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THE FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 253

PERMANENT EDITION

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND DISTRICT COURTS OF THE UNITED STATES

WITH TABLE OF CASES IN WHICH REHEARINGS HAVE BEEN GRANTED OR DENIED

DECEMBER, 1918—JANUARY, 1919

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AMENDMENTS TO RULES

UNITED STATES CIRCUIT COURT OF APPEALS

Seventh Circuit [1]

[The United States Circuit Court of Appeals for the Seventh Circuit entered an order on February 6, 1919, amending rule 3 of the rules of this court to read as follows:]

3.

TERMS.

A term of this court shall be held annually at the city of Chicago on the first Tuesday in October, and continue until the first Tuesday in October of the succeeding year. Every term shall be adjourned to such time and places as the court may from time to time designate. Unless otherwise specially ordered, the court will hold at Chicago three sessions for the hearing of causes during each term, beginning on the first Tuesdays in October and January, respectively, and the last Tuesday in April.

[1] For other rules, see 150 Fed. xxv, 79 C. C. A. xxv, 235 Fed. xii, 148 C. C. A. xii.

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[1] Appointed October 24, 1918.

[2] Died January 20, 1919.

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[4] Confirmed January 7, 1919.

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Okmulgee Window Glass Co. v. Frink. Rehearing granted Feb. 5, 1919.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

UNITED STATES v. BEAN, County Treasurer.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1918.)

No. 5078.

1. INDIANS ⟸15(2)—INDIAN LANDS—ALIENATION.
After Act April 26, 1906, c. 1876, § 22, and Act May 27, 1908, c. 199, § 9, lands of all full-blood Seminole Indian heirs were inalienable, save on approval of the court, etc.

2. TAXATION ⟸6—STATE TAXES—GOVERNMENT INSTRUMENTALITIES.
It is the universal rule that every instrumentality lawfully employed by the United States to execute its constitutional laws and exercise its lawful governmental authority is necessarily exempt from state taxation or interference.

3. TAXATION ⟸181—INDIAN LANDS.
Lands of full-blood Seminole Indian heirs, inalienable under Act April 26, 1906, c. 1876, § 22, and Act May 27, 1908, c. 199, § 9, are not subject to state taxation, notwithstanding provisions in each of the acts that all lands upon which restrictions are removed shall be subject to taxation.

4. TAXATION ⟸611(8) — RESTRAINING COLLECTION — JUDGMENT — INCONSISTENCY.
In a suit by the United States to enjoin the county treasurer of an Oklahoma county from selling or conveying allotted lands formerly owned by the Seminole Nation on account of taxes levied, a decree that all lands belonging to enrolled citizens of the Seminole Tribe, except homesteads then owned by the original allottees, which were alienable at the times of the assessments, were taxable, and that upon conveyance of all such lands, including homesteads, the same were taxable, *held* not erroneous, in that the two clauses were inconsistent.

5. TAXATION ⟸181—INDIAN LANDS.
While homesteads of Seminole allottees were not subject to taxation, both because inalienable and by reason of the direct terms of the Seminole Agreement, yet when the restrictions on alienation were removed, and the homesteads became alienable, they were subject to taxation whenever the allottees disposed of them.

6. EQUITY ⟸364—PROPRIETY OF DISMISSAL—DEFECT OF PARTIES.
A court of equity will on its own motion dismiss a bill, if to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties.

7. JUDGMENT ⟸17(1)—JURISDICTION—AUTHORITY OF COURTS.
A court may not directly adjudicate a person's claim of right, unless he is actually or constructively before it.

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8. PARTIES ⊂=32—"INDISPENSABLE PARTIES"—WHO ARE.
An "indispensable party" is one who has such an interest in the subject-matter of the controversy that a final decree cannot be made, without affecting his interests or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Indispensable Party.]

9. TAXATION ⊂=611(4)—COLLECTION—INJUNCTION—PARTIES.
Where purchasers of lands formerly belonging to the Seminole Nation, which had been sold for taxes, were not made parties to a suit by the United States against the treasurer of the Oklahoma county in which the lands lay to enjoin him from collecting the taxes and from selling or conveying the lands, the suit must be dismissed for the want of such parties, for they are indispensable.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by the United States against G. E. Bean, County Treasurer of Seminole County, Okl. From the decree, the United States appeals. Reversed and remanded, with directions.

W. P. McGinnis, U. S. Atty., of Muskogee, Okl. (C. W. Miller, Sp. Asst. U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

T. S. Cobb, J. H. Cobb, and A. M. Fowler, all of Wewoka, Okl., for appellee.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

SANBORN, Circuit Judge. The United States brought this suit to prevent the county treasurer of Seminole county, Okl., from selling or conveying certain allotted lands formerly owned by the Seminole Nation or Tribe of Indians, on account of taxes levied thereon by the officers of those counties for the fiscal years ending June 30, 1910, June 30, 1911, June 30, 1912, June 30, 1913, and June 30, 1914. The court below rendered a decree, by which it classified the lands, enjoined the county treasurer from selling or conveying on account of those taxes the lands it adjudged not legally subject thereto, and dismissed the bill as to those lands which it found to be lawfully subject to such taxes. The United States has appealed, and specified several alleged errors.

The agreement between the United States and the Seminole Nation or Tribe of Indians, ratified by Act July 1, 1898, c. 542, 30 Stat. 567, 568, provides for the division, allotment, and conveyance of the lands of that nation to the enrolled members thereof in severalty, so that each member shall receive land of the same value as near as may be as the value of that which every other member receives.

It declares that each shall receive a deed of his allotment and that:

"Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity."

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For convenience the tract thus selected by an allottee is called his homestead, and the remainder of his allotment his surplus land. Section 8 of the act of March 3, 1903 (32 Stat. 1008, c. 994), provides:

"That the homestead referred to in said act [the act of July 1, 1898, just cited] shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the deed for the allotment."

Act May 27, 1908, c. 199, 35 Stat. 312, 313, is a comprehensive declaration of the status as to restrictions upon alienation of the numerous classes of allotted lands formerly held by the Five Civilized Tribes, and section 4 of that act provides:

"That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."

[1] Counsel for the United States assign the third and fifth paragraphs of the decree as error. Those paragraphs read in this way:

"(3) That all inherited homestead allotments, where the allottees died prior to April 26, 1906, which were owned by said heirs during said fiscal years, were alienable and taxable during said years, regardless of whether said heirs were enrolled as full-blood Indians, or of less Indian blood."

"(5) That all allotments, both surplus and homestead, made after the death of the enrolled Seminole citizens, whether owned by full-blood heirs, or by heirs of less Indian blood, were alienable and taxable during said fiscal years, whether the death of the enrolled citizens or the selections of allotments were made before or after April 26, 1906."

The court below made these findings and rendered this decree before the decisions of the Supreme Court in Brader v. James, 246 U. S. 88, 38 Sup. Ct. 285, 286, 287, 62 L. Ed. 591, and Talley v. Burgess, 246 U. S. 104, 38 Sup. Ct. 287, 288, 289, 62 L. Ed. 600, were handed down. Conceding that prior to the passage of the act of April 26, 1906 (34 Stat. 137, c. 1876), the land described in these findings were alienable, it must now be held, in deference to the opinions in these cases, that section 22 of the act of April 26, 1906, which subjected all conveyances of adult full-blood Indian heirs to the approval of the Secretary of the Interior, and all conveyances of minor full-blood Indian heirs to the approval of the court, and section 9 of the act of May 27, 1908 (35 Stat. 312, 315), which subjected all conveyances of full-blood Indian heirs to the approval of the court having jurisdiction of the estate of the deceased allottee, rendered the lands of all full-blood Seminole Indian heirs inalienable during the fiscal years for which the taxes here in controversy were levied. David v. Youngken, 250 Fed. 208, — C. C. A. —, C. C. A. 8th Circuit, filed April 3, 1918; Harris v. Bell, 250 Fed. 209, — C. C. A. —, C. C. A. 8th Circuit, filed April 30, 1918.

[2, 3] Were these inalienable lands of the full-blood Indian heirs taxable for the fiscal years 1910, 1911, 1912, 1913, and 1914? Counsel for the treasurer of the county argue that they were because Congress provided in section 19 of the act of April 26, 1906 (34 Stat. 137), that "all lands upon which restrictions are removed shall be subject to taxation," and by the act of May 27, 1908 (35 Stat. 312),

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that "all lands from which restrictions have been or shall have been removed shall be subject to taxation and all other civil burdens." But this contention is overborne by the fact that by these very acts of Congress restrictions upon the alienation of these lands while held by full-blood Indian heirs were imposed, and these lands were held in trust by the United States for these heirs, and made one of the instrumentalities of the government of the United States by which it pursues its wise policy of protecting Indians from the unrestrained greed, rapacity, and cunning of the members of the white race, and of seeking to induce them to cultivate the soil, to practice the arts of civilized life, and become provident and useful citizens. The lands of the full-blood Indian heirs were not lands from which restrictions had then been removed. They were lands upon which restrictions were imposed by these very acts, and it is not probable that the legislators intended to impose taxes upon lands of Indians which the United States was holding for them, while it withheld from them the power of disposition, for such a course runs counter to its public policy and practice from the foundation of the government.

Counsel call attention to the fact that there is no provision in the agreement with the Seminole Nation that any of the lands to be allotted to the members of the tribe, except the homesteads, should be free from taxation while they remained inalienable. But when that agreement was made they were free from taxation, and those who made the agreement knew that the settled policy and practice of the United States was to protect the members of the tribe and all the property which it held the control and disposition of for them free from taxation until it granted them full power of disposition thereof. And it was doubtless for that reason that no stipulation was inserted in the treaty on the subject, except that the 40 acres to be selected by each member of the tribe for a homestead should be "nontaxable as a homestead in perpetuity." 30 Stat. 567, 568. So it was that the imposition of the restrictions upon alienation by these acts of 1906 and 1908 upon the lands of the full-blood Indian heirs brought these lands under the universal rule that every instrumentality lawfully employed by the United States to execute its constitutional laws and to exercise its lawful governmental authority is necessarily exempt from state taxation or interference. United States v. Rickert, 188 U. S. 432, 437, 438, 439, 23 Sup. Ct. 478, 47 L. Ed. 532; United States v. Thurston County, 143 Fed. 287, 289, 290, 74 C. C. A. 425. The provisions of the acts of 1906 and 1908, cited by counsel for the treasurer, are therefore so inconsistent with the imposition of the restrictions by these acts upon the alienation of the lands of full-blood Indian heirs and the legal effect of that imposition, that Congress could not have intended that they should apply to those lands, and the true construction of the acts which contain them undoubtedly limits their application and effect to other land. The result is that the allotments of Seminole lands owned and held during the fiscal years 1910, 1911, 1912, 1913, and 1914 by full-blood Indian heirs were instrumentalities of the United States re-

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served and used by it to execute its laws and to exercise its governmental powers, and they were exempt from taxation by the state of Oklahoma, or any of its counties, cities or other governmental subdivisions.

[4, 5] It is assigned as error that the court below also adjudged:

"That all lands belonging to enrolled citizens of the Seminole Tribe of Indians, except homesteads then owned by the original allottees, which were alienable by such enrolled citizens at the times of the assessments for taxation for the fiscal years ending June 30, 1910, June 30, 1911, June 30, 1912, June 30, 1913, and June 30, 1914, were taxable and that upon conveyance of all such lands, including homesteads by said enrolled citizens the same were taxable thereafter."

The objection to this declaration is that the last clause thereof is inconsistent with the first. But a careful reading and consideration of the paragraph has satisfied that there is no real inconsistency in it. The first clause declares that all alienable surplus lands owned by the original allottees during the fiscal years 1910, 1911, 1912, 1913, and 1914 were taxable, and the second clause declares that these surplus lands, and also the homesteads of such enrolled citizens which were actually lawfully alienated, were taxable after such alienation. No error is perceived in this conclusion. The only exemption from taxation of the surplus lands arose from the restrictions upon their alienation. Wherever, therefore, those lands were or became alienable, they were or became taxable. The exemption of the homestead of an allottee arose from two sources: (1) The restrictions on its alienation; and (2) the provision of the Seminole Agreement that it "shall, by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity." But when the restrictions on alienation were removed by act of Congress, and the homestead became alienable, the allottee then had the option to retain it as a homestead exempt from taxation, or to surrender his right to it as a homestead and its exemption from taxation, to convey it and receive the consideration for its sale. If he chose the latter alternative, then the land which had been his homestead was no longer such, and it was thereafter taxable. Sweet v. Schock, County Treasurer, 245 U. S. 192, 38 Sup. Ct. 101, 102, 103, 62 L. Ed. 237.

[6-9] The questions presented by counsel for the parties to this suit have been considered, and the opinion of the court regarding them has now been expressed. But the record presents a case which deprives both that expression and the opinion of the court below of the conclusiveness of an adjudication. That record consists of a complaint, a motion to dismiss the complaint on the ground that it does not contain allegations sufficient to entitle the plaintiff to the relief prayed for, or to any other relief, a stipulation between the United States and the county treasurer, by their respective attorneys, that the case may be submitted to the court upon certain stipulated facts, which are immaterial to the subject now to be considered.

The only parties to the suit are the United States and the county treasurer of Seminole county. The plaintiff alleges in its complaint, among other things, that the county treasurer has sold all the tracts

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of land which are the subject of this suit, for the taxes levied thereon for the years 1910, 1911, 1912, 1913, and 1914, and has executed and delivered certificates of sale to the purchasers thereof who have paid therefor; that when no one bid the amount of the tax on any tract it was bid in for and a certificate of sale was executed by him to the county; that many of the latter certificates have been purchased from the county by various persons and have been transferred to such purchasers and are now held by them. The decree enjoins the county treasurer from collecting any of the taxes levied on the lands inherited and owned by the enrolled citizens of the Seminole Nation which the court found to be inalienable and nontaxable for the fiscal years 1910, 1911, 1912, 1913, and 1914, and it adjudges that the taxes levied and assessed, and each, every, and all tax sale certificates and certificates of purchase upon or concerning the aforesaid nontaxable and inalienable lands be, and they are annulled; that whatever liens, charges, or incumbrances the assessments, tax levies, and tax sale certificates might constitute against said land be, and the same are, annulled; and that all incumbrances upon the title to the lands created thereby are removed.

From the complaint and the decree the facts conclusively appear that this suit has been commenced, prosecuted, and a decree has been rendered against the party who has no real interest in the property in litigation, and that none of the real parties in interest adverse to the claim of the complainant have been made parties to the suit, or have appeared or been heard therein. The taxes of which complaint is made have been levied, the lands upon which they were levied have been sold to pay them, certificates of the sales thereof have been executed and delivered, the certificates and any liens they evidence are held either by the county, or by other purchasers at the sales, or from the county, or by their successors in interest; but neither the county (Revised Laws Oklahoma, § 1501), nor any of the purchasers at the sales, nor any of the holders of the certificates of sales, are parties to this suit, and as they have not been made parties, and have not been heard, or had any opportunity to be heard in this suit, nothing that the court below has adjudged and nothing that this court has decided herein is or can be binding upon them, or upon any parties claiming under them, or even upon the court below, or upon this court, when, if ever, the claims, rights, and interests of these parties who are not present in either of the courts are presented by them for adjudication.

But the decree, by its terms, annuls their certificates, destroys the liens they claim, removes all these as clouds upon the titles, without any notice to or hearing by them, and this decree doubtless has been, or, if permitted to stand, will be, spread upon the records of the titles to these lands. It cannot fail injuriously to affect—nay, practically to destroy—the value of the claims and rights of these holders of certificates, because it bears on its face no adequate notice that they are not bound by it. "The established practice of courts of equity to dismiss the plaintiff's bill," says the Supreme Court, in Minnesota v. Northern Securities Co., 184 U. S. 199, 235, 22 Sup. Ct.

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308, 322 (46 L. Ed. 499), "if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court sua sponte, though not raised by the pleadings or suggested by the counsel. Shields v. Barrow, 17 How. 130 [15 L. Ed. 158]; Hipp v. Babin, 19 How. 271, 278 [15 L. Ed. 633]; Parker v. Winnipiseogee Lake Cotton & Woolen Co., 2 Black, 545 [17 L. Ed. 333]." To the same effect is the opinion of this court in Hawes v. First Nat. Bank, 229 Fed. 51, 57, 59, 143 C. C. A. 645, 651, 653.

It is a familiar and just rule that no court may directly adjudicate a person's claim of right, unless he is actually or constructively before it. It is an established rule of practice in the conduct of suits in equity in the federal courts that every indispensable party must be brought into the court or the suit must be dismissed. And an indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree cannot be made without affecting his interests, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Seminole County and each of the other holders of certificates of sale or of liens which they claim upon any of the lands described in the complaint which the plaintiff seeks to affect by this decree, was an indispensable party to this or any suit to avoid or injuriously affect his certificate or claimed lien. And as Justice Curtis said in Shields v. Barrow, 58 U. S. (17 How.) 130, 138, at 141 (15 L. Ed. 158):

> "It being clear that the Circuit Court could make no decree, as between the parties originally before it, so as to do complete and final justice between them without affecting the rights of absent persons," the original bill ought to have been dismissed.

See Ribon v. Railroad Companies, 83 U. S. (16 Wall.) 446, 450, 451, 21 L. Ed. 367; Bank v. Carrollton Railroad, 78 U. S. (11 Wall.) 624, 630, 631, 20 L. Ed. 82; Bogart v. Southern Pacific Co., 228 U. S. 137, 146, 147, 33 Sup. Ct. 497, 57 L. Ed. 768; Chadbourne v. Coe, 51 Fed. 479, 481, 2 C. C. A. 327, 329; Howe v. Howe & Owen Ball Bearing Co., 154 Fed. 820, 828, 83 C. C. A. 536, 544; United States v. United Shoe Machinery Co. (D. C.) 222 Fed. 349, 408.

Let the decree below be reversed, and let the case be remanded to the court below, with directions to dismiss the suit for want of indispensable parties, unless within a short time, to be fixed by the court below, some of the indispensable parties are made parties to the suit, and in case the latter course is pursued, and the plaintiff should then be found entitled to any relief, to specifically limit the terms and effect of the decree to the interests of those indispensable parties, who are later made parties to the suit.

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LUDWIG et al. v. BRESSLER.

(Circuit Court of Appeals, Eighth Circuit. July 25, 1918. Rehearing Denied September 30, 1918.)

No. 5054.

1. APPEAL AND ERROR ⟸733—ASSIGNMENTS OF ERROR—SUFFICIENCY.
In a suit to set aside deeds because the grantors were incompetent and the grantees exerted undue influence, where the court sustained exceptions to a master's report in favor of defendants and entered a decree for plaintiff reciting that exceptions were sustained and the deeds set aside, etc., defendants' general assignment of error that the court found upon the issues for plaintiff, that it found the deeds were procured by undue influence, and that the grantors were incompetent, *held* sufficient under Rule 11 of the Circuit Court of Appeals (188 Fed. ix, 109 C. C. A. ix).

2. APPEAL AND ERROR ⟸766—BRIEFS—SUFFICIENCY.
Where appellant's brief complied with Rule 24 for the Circuit Court of Appeals (188 Fed. xvi, 109 C. C. A. xvi) save in so far as it failed to set forth the pages of the record where the evidence in support of the argument could be found, the appeal will not be dismissed or the judgment affirmed, as it was necessary for the appellate court to read all of the evidence on the important issues raised in order to decide them.

3. DEEDS ⟸68(1½)—VALIDITY—MENTAL CAPACITY.
The question of the mental capacity of an aged or feeble-minded person to dispose of his property depends, not on whether the powers of his mind were impaired or whether he had ordinary capacity to do business, but whether he had the smallest capacity to understand what he was doing and to determine intelligently whether or not he would do it.

4. DEEDS ⟸196(3)—VALIDITY—PRESUMPTIONS.
Notwithstanding the fiduciary relation of parent and child, a deed of gift from one to the other, in the absence of fraud, is presumed valid, and the burden of proof of its invalidity on account of undue influence is on him who asserts it.

5. DEEDS ⟸72(1)—VALIDITY—UNDUE INFLUENCE.
Influence gained by kindness, affection, care, and service will not be regarded as undue in the absence of fraud or imposition, although it induces the grantor to make an unequal distribution of his property in favor of those who have contributed or are to contribute to his wants, provided such distribution is voluntary.

6. DEEDS ⟸72(1)—VALIDITY—UNDUE INFLUENCE.
The undue influence for which a deed or will may be avoided must be such as effectually deprives the grantor or testator of the exercise of his free will and coerces him to substitute another's will for his own.

7. DEEDS ⟸211(4)—VALIDITY—EVIDENCE—SUFFICIENCY.
In a suit to set aside deeds on the ground that the grantors lacked capacity and that the deeds were procured through the grantee's undue influence, evidence *held* insufficient to show the grantors' want of capacity or establish the undue influence.

Carland, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Suit by Sarah A. Bressler against Mary C. Ludwig and another. From a decree for complainant, defendants appeal. Reversed and remanded, with directions.

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H. C. Brome, of Worland, Wyo. (Clinton Brome, of Omaha, Neb., on the brief), for appellants.

Frederick S. Berry, of Wayne, Neb. (A. R. Davis, of Wayne, Neb., and Vinton Pike, of St. Joseph, Mo., on the briefs), for appellee.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

SANBORN, Circuit Judge. This is a suit in equity brought on July 28, 1916, by Mrs. Sarah A. Bressler, to avoid two deeds of a farm in Nebraska made by her father and mother, Jacob D. Fenstermacher and Caroline Fenstermacher, on October 18, 1906, and April 25, 1910, respectively, to Mrs. Mary C. Ludwig, the sister of Mrs. Bressler, and a third deed of the same land to the same grantee made by Mrs. Fenstermacher on April 17, 1914, after the death of her husband. The grounds of the suit are that at the times the respective deeds were made Mrs. Fenstermacher, who held the title to the farm from 1882 until 1906, had not sufficient mental capacity to execute a valid deed, and that she was induced to make each of these deeds by the undue influence of Mr. and Mrs. Ludwig. The case was referred to Honorable Charles F. McLaughlin, the special master, who heard the evidence and made an exhaustive report of the facts and the law as he found them to be, and concluded that the plaintiff was entitled to no relief. Exceptions to this report were filed, and, after hearing them, the court below rendered a decree in favor of the plaintiff. The appeal questions this decree.

[1] Counsel for the appellee has made a motion to dismiss the appeal or to affirm the decree on account of the failure of the appellants to comply with rules 11 and 24 of this court (188 Fed. ix, xvi, 109 C. C. A. ix, xvi). Rule 11 requires the appellant to file an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. The court below made no order sustaining or overruling any of the specific exceptions to the master's report and filed no opinion or finding, but simply rendered a decree which recited that it sustained "the exceptions to the report of the master filed by the complainant herein as to the general conclusion of the master upon the law and the facts," and decreed that the three deeds be avoided and the plaintiff have an undivided half of the land. The appellants assign as errors: (1) That the court found upon the issues generally for the plaintiff and against the defendants; (2) that it found that the deeds were procured by them by undue influence; (3) that it found that Mr. and Mrs. Fenstermacher were, on October 18, 1906, and thereafter continually mentally incompetent and incapable of making valid conveyances of real estate, and that it awarded an undivided half of the land to the plaintiff. In the absence of any opinion or finding of the court below, except that which appears in the decree, this assignment of errors is clearly sufficient. The court below could not have rendered the decree without first finding either mental incompetency of the Fenstermachers or undue influence by the defendants, and the plaintiff assigned each of these findings and the general finding for the plaintiff as errors. What the court may have thought

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regarding the minor issues did not appear, and the appellants should not be deprived of their right to a review of the findings on the crucial questions at issue because they did not guess what the court thought regarding others and charge it with error in that thought.

[2] Rule 24 requires the appellants to file a brief which shall contain: (1) A statement of the case exhibiting the questions involved and the manner in which they were raised; (2) a specification of the errors relied upon and a statement as particularly as may be in what the decree is alleged to be erroneous; (3) a brief of the argument presenting a clear statement of the points of law or fact to be discussed with a reference to the pages of the record and the authorities relied upon in support of each point. The brief of the appellants contains: (1) A fair statement of the case which discloses two controlling questions, the alleged incompetency of the Fenstermachers to make the deeds and the alleged undue influence that induced them to do so; (2) the assignment of errors; (3) an argument which presents the points of law which they discuss, and a citation of the authorities on which they rely. This argument also states decisive facts which appellants maintain were established by the evidence, but the brief does not set forth the pages of the record where the evidence in support of some of these facts may be found. However, as the master's report sets forth the facts which he found, and his conclusion was in favor of the appellants, and, as all the evidence on the two important issues must be read and considered in order to decide them, the court is unwilling to deprive the appellants of the review of the decision below on account of their failure to specify the pages of the record where some of the evidence in their favor may be found, especially in view of the fact that the opinions of the special master and the court below are in conflict. The motion to dismiss or affirm is therefore denied.

The real issue in this case is the validity of the deed of Mr. and Mrs. Fenstermacher to Mary C. Ludwig, dated October 18, 1906, for this deed conveyed the farm consisting of about 350 acres of land. The deed of April 25, 1910, covered the same land and 40 acres more that seems to have been omitted from the earlier deed by mistake, and the deed of April 17, 1914, was a quitclaim deed of the same property made by Mrs. Fenstermacher after the death of her husband. If the deed of October, 1906, was not invalid, the subsequent confirmatory deeds are of little account. It follows that in the examination and consideration of the evidence the date, October 18, 1906, has been kept constantly in mind, for it is the competency of Mrs. Fenstermacher on that day and the undue influence upon her of the defendants on that day, and not at later dates, that condition the validity of the deed of that date and the decision of this case.

The evidence as to the mental capacity of Mrs. Fenstermacher to understand what she was doing when she made them and intelligently to determine whether or not she would do it is conflicting, but the preponderance of it is that she had ample capacity to understand the effect of her deeds and to decide intelligently whether or not she should make them. On the question of undue influence the evidence is more evenly balanced. All the evidence on these issues has been thoughtfully

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considered, but it is too voluminous for recital in this opinion. The rules of law by which the evidence upon this case must be measured, and by which the issues it presents must be decided, are established beyond controversy by the decisions of the federal courts.

[3] The question of the mental capacity of an aged or feeble person to dispose of her property is not whether or not the powers of her mind were impaired, or whether or not she had ordinary capacity to do business, but it is whether or not she had any—the smallest—capacity to understand what she was doing, and to determine intelligently whether or not she would do it. Sawyer v. White, 122 Fed. 223, 224, 58 C. C. A. 587, 588; Mann v. Keene Guaranty Sav. Bank, 29 C. C. A. 547, 548, 86 Fed. 51, 52; Rugan v. Sabin, 3 C. C. A. 578, 584, 53 Fed. 415, 421; Stewart's Ex'r v. Lispenard (N. Y.) 26 Wend. 303; Ex parte Barnsley, 3 Atk. 168; Hill v. Nash, 41 Me. 586, 66 Am. Dec. 266; Jackson v. King (N. Y.) 4 Cow. 216, 15 Am. Dec. 354; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; President, etc., v. Merritt (C. C.) 75 Fed. 480, 492. Any other test would wrest from the feeble and the aged that power over their earnings and savings which is their best safeguard against misfortune, and would produce endless uncertainty, difficulty, and litigation.

[4] Counsel for the complainant contend that the intimate and affectionate relation between Mr. and Mrs. Fenstermacher and Mr. and Mrs. Ludwig which existed while they were living together from 1903 until the death of the former in 1914 and 1915, respectively, raise the legal presumption that the deeds in question were voidable. There are cases in which fraud has been charged, and some others in which the facts have established a practical surrender of the will of the grantor to the grantee where such a presumption has been indulged. Gibson v. Hammang, 63 Neb. 349, 352, 353, 88 N. W. 500; Bennett v. Bennett, 65 Neb. 432, 440, 91 N. W. 409, 96 N. W. 994; Allore v. Jewell, 94 U. S. 506, 510, 24 L. Ed. 260. But the established rule in the courts of the United States is that, notwithstanding the fiduciary relation of parent and child, a deed of gift from one to the other in the absence of fraud is presumed to be valid, and the burden of proof of its invalidity on account of undue influence is on him who assails it. Towson v. Moore, 173 U. S. 17, 19, 20, 24, 19 Sup. Ct. 332, 43 L. Ed. 597; Jenkins v. Pye, 12 Pet. 241, 253, 254, 9 L. Ed. 1070.

[5] Influence gained by kindness, affection, care, and service will not be regarded as undue, in the absence of fraud or imposition, although it induces the grantor to make an unequal distribution of his property in favor of those who have contributed, or are to contribute, to his wants, if such distribution is voluntarily made. As was said in Mackall v. Mackall, 135 U. S. 167, 172, 10 Sup. Ct. 705, 707 (34 L. Ed. 84):

"It would be a great reproach to the law if, in its jealous watchfulness over the freedom of testamentary disposition, it should deprive age and infirmity of the kindly ministrations of affection, or of the power of rewarding those who bestow them." Sawyer v. White, 122 Fed. 223, 225, 58 C. C. A. 587, 589; McElroy v. Masterson, 156 Fed. 36, 40, 41, 84 C. C. A. 202, 206, 207; Alcorn v. Alcorn (C. C.) 194 Fed. 275, 280; Meyer v. Jacobs (C. C.) 123 Fed. 900, 912.

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[6, 7] The undue influence for which a deed or will may be avoided must be such as effectually deprives the grantor or testator of the exercise of his free will and coerces him to substitute another's will for his own. Conley v. Nailor, 118 U. S. 127, 133, 135, 6 Sup. Ct. 1001, 30 L. Ed. 112. "If it does not appear," says the Supreme Court in Ralston v. Turpin, 129 U. S. 663, 670, 9 Sup. Ct. 420, 423 (32 L. Ed. 747), "that he was incapable, by reason of physical or mental debility, of exercising a discriminating judgment in respect to the disposition of his property, or was driven to make the gifts in question against his own wishes, and under some influence that he was unable, no matter from what cause, to resist, the relief asked must be denied. 'The undue influence for which a will or deed will be annulled,' this court said in Conley v. Nailor, 118 U. S. 127, 134 [6 Sup. Ct. 1001, 1005 (30 L. Ed. 112)], 'must be such as that the party making it has no free will, but stands in vinculis.' "

Guided by these rules of law, the evidence, arguments, and briefs have been considered. They have convinced that the deeds in question in this case were not carelessly or hastily made, but that they were the means of the accomplishment of a preconceived plan thoughtfully adopted and steadily pursued by the Fenstermachers from 1883 until their respective deaths. In the rural districts of the eastern part of this country for more than 150 years it has been a practice, so common that it is not beyond judicial notice, for persons who owned farms and had several children to give the home farm to one or two of the children in consideration that he or they would carry it on and care for the parents in the later years of their lives, and to let and expect the other children to seek their fortunes elsewhere, free from the duty to care for their parents. The evidence in this case has convinced that the key to the conveyances of Mr. and Mrs. Fenstermacher that are here challenged is that as early as 1882, when they bought this land, they conceived the plan to follow this practice, and in that way to insure their support and comfort and a home for themselves and those of their children who should care for and support them. To this end they caused the land to be conveyed to their son Peter and their married daughter Mrs. Ludwig, whose husband and Peter at first undertook to operate it. To the same end in 1881 they caused the land to be conveyed to Mrs. Fenstermacher, and subsequently arranged that the two daughters and their husbands should live upon and carry on the farm free of rent while the parents moved to town. Mr. and Mrs. Bressler were offered the opportunity and the option of operating the farm on the same terms that were offered to Mr. and Mrs. Ludwig. They first chose to accept it, but shortly chose to reject the opportunity and the offer and to seek their fortunes elsewhere, while Mr. and Mrs. Ludwig accepted the offer, lived upon and carried on the farm from 1883 until 1908, and from 1893 to 1908 boarded and cared for their parents at the farm, and from 1908 until their respective deaths in 1914 and 1915 at their home in West Point. To the same end in 1906, after Mr. and Mrs. Ludwig had remained with them and carried on the farm for 23 years, they conveyed it to Mrs. Ludwig, for one dollar and a recited annual consideration of $600 during the life of the sur-

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vivor of them, a consideration evidently inserted to insure the suitable board, clothing, care, and comfort of the grantors during their lives. To carry out this plan, they made the second deed to convey the omitted 40 acres in 1910, and to the same end, after Mr. Fenstermacher's death, Mrs. Fenstermacher made the quitclaim deed to Mrs. Ludwig. Regarding this deed, Mr. Steuffer, who drew it, testified: That he had been connected with the West Point National Bank since 1885, and had been acquainted with Mr. and Mrs. Fenstermacher for many years; that Mr. Ludwig told him Mrs. Fenstermacher wished to see him, and he went to see her, and she gave him the data with which to prepare the deed; that he went back to his office to prepare it and then returned to her house, and she executed it on the 17th of April, 1914; that he talked with her in the German language; that he thought there was no impairment of her mental powers; that she was pretty good for her age; that no one said anything to him about the way in which the deed should be drawn except Mrs. Fenstermacher; that after he drew the deed he read it and translated it to her in German so that she would understand what it was, and she signed it on April 17, 1914.

In the light of this evident plan and the fact that the deeds of 1906 and 1910 were made when Mr. Fenstermacher was in good health and unimpaired mental powers, the evidence not only fails to convince that either Mr. or Mrs. Fenstermacher were, when they made their deeds, without mental capacity to understand what they were doing, or to determine intelligently whether or not they should make the deeds, but it leaves no doubt that each of them did understand what they were doing, and that they did intelligently determine to make the deeds to carry out the preconceived intent and purpose to which they had devoted this land from the time they bought it.

Nor has the complainant established by a fair preponderance of the evidence that Mrs. Fenstermacher was driven to make any of the deeds in question against her own wishes, or under any influence which she was unable to resist that deprived her of the exercise of her free will. The only evidence to that effect is the testimony of Mr. and Mrs. Bressler, interested witnesses, to what they testify that Mrs. Fenstermacher said about the deeds of 1906 and 1910 in 1914, on the day after her husband's funeral when she was in the depths of her grief, and this testimony is met by the denial of much of its substance by Mrs. Ludwig and by the patent and persuasive fact that never after the deed of 1906 was made until that day, so far as the evidence discloses, did either she or her husband complain or object to or question the validity of the deed of 1906, or that of 1910, that four years after they made the first deed they made a second deed of the land described in the first deed, and that after the death of her husband she quitclaimed all the property to Mrs. Ludwig. If the deed of 1906 had been made against the will of either Mr. or Mrs. Fenstermacher, they would undoubtedly have challenged it, or complained of it to Mr. and Mrs. Bressler while they were both in life, and if they desired would have had it revoked.

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The conclusion is that the decree below should be reversed, with costs against the complainant, and the case must be remanded to the court below, with directions to overrule the exceptions to the master's report and to render a decree for the defendants.

It is so ordered.

CARLAND, Circuit Judge (dissenting). The errors assigned were substantially as follows:

(1) That the court erred in finding that the deeds were obtained by undue influence.

(2) That the court erred in finding that the Fenstermachers were mentally incompetent and incapable of making the deeds. There was no assignment that the court erred in finding that the deeds were obtained by fraud.

These assignments of error accompanied 330 printed pages of testimony and were simply reprinted in the brief as assignments of error. I do not think this was a compliance with Rule 24.

Coming to the merits, the majority opinion says:

"And the grounds of the suit are that at the time the respective deeds were made, Mrs. Fenstermacher, who held the title to the farm from 1882 to 1906, had not sufficient mental capacity to execute a valid deed, and that she was induced to make each of these deeds by the undue influence of Mrs. Ludwig."

Of course, want of mental capacity and undue influence have, in cases of this kind, a well-known meaning. The complaint, however, alleged:

"But the same were obtained and procured through the manipulation, fraud, and deceit of the defendants and each of them, and by means of the influence and control which said Mary C. Ludwig had over her said mother and unduly exercised."

The prayer of the complaint asked that the several deeds be declared not to be the acts and deeds of Caroline Fenstermacher, but that they were "procured by the fraud and undue influence of the defendant."

A careful reading of the evidence has convinced me that a clear case of fraud in the procurement of the deeds was made out by the plaintiff. The decision of the majority is, in my opinion, not only wrong on the facts, but convicts a mother, who the evidence shows loved her daughters wth equal affection, of conveying without consideration property of the reputed value of $75,000 to one daughter without giving the other anything. The mere statement of what was accomplished suggests something wrong.

I must dissent.

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BROWN et al. v. FLETCHER et al. (two cases).

(Circuit Court of Appeals, Second Circuit. May 10, 1918.)

No. 191.

1. TRUSTS ⟸331—ACCOUNTING—CONCLUSIVENESS.
In a suit to establish a claim against a testamentary trustee by one not a bona fide purchaser from an assignee of the beneficiary, a decree of the Surrogate's Court, settling the trustee's accounts and directing the payment of the fund to the beneficiary was a good defense.

2. JUDGMENT ⟸683—BAR—JUDGMENT OF STATE COURT.
In a suit by one not a bona fide purchaser from an assignee of the beneficiary under a testamentary trust to establish a claim against the testamentary trustee and the beneficiary, a judgment of the Supreme Court of New York in a suit by the beneficiary against the trustee and the original assignee, holding that the assignment was usurious and void, was a good defense.

3. USURY ⟸72—CONTRACT OF SALE—EXPECTANT ESTATE—INQUIRY.
A contract by the beneficiary under a testamentary trust containing no words of loan or intimation of a borrowing, and which was in terms a contract of sale or assignment of his beneficial interest, did not prevent investigation of circumstances to test transaction for usury, as the purchaser of an expectant estate takes a risk which explains the small consideration, and the value on vesting is no criterion of the value when the bargain is made.

4. TRUSTS ⟸147(1)—TESTAMENTARY TRUST—ASSIGNMENT BY BENEFICIARY.
If the beneficiary under a testamentary trust, by a contract purporting to sell or convey his beneficial interest, surrendered no more than his chance of living long enough to reduce the fund to possession, he should be held to his bargain, though ill-advised.

5. USURY ⟸41—TRANSACTION—ASSIGNMENT OF BENEFICIAL INTEREST.
An absolute assignment of a beneficial interest under a testamentary trust in consideration of a loan of $5,000 or $6,000, which, less commissions, etc., netted about $3,500, and under which the lenders might receive $17,500, and were to pay the premiums on the beneficiary's life insurance assigned to them, whereby the lenders avoided any legal contingencies or dangers, and would receive the capital at all events, with unlawful additions, was usurious.

Ward, Circuit Judge, dissenting.

Appeals from the District Court of the United States for the Southern District of New York.

Bills by John A. S. Brown and Frank E. Schermerhorn, as trustees for Clara Schermerhorn under the will of Thomas Cunningham, deceased, against Austin B. Fletcher, as testamentary trustee of Conrad Morris Braker, under the will of Conrad Braker, Jr., deceased, and Conrad Morris Braker. From decrees (244 Fed. 854) dismissing the bills, plaintiffs in each suit appeal. Affirmed.

Plaintiffs appeal from decrees dismissing bills, with costs. The father of defendant Braker left a will under which defendant Fletcher ultimately became trustee, inter alia, to retain the principal of certain portions of his estate (meantime paying his son, said defendant, the income) until in the case of one fund of $10,000 20 years had passed from testator's death, and as to another fund of $17,500 and upwards said son should reach the age of 55, at which dates the son defendant should receive the funds absolutely, if then living.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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In 1901, 11 years after testator's decease, defendant Braker being then 43 years old and in receipt of a considerable income from his father's estate, sought to borrow money on these interests in expectancy. He got about $6,000 (less "commissions") in consideration of executing to one Rabe what purport to be absolute assignments or conveyances of all his "estate, right, title, and interest of, in and to" the funds aforesaid. Rabe was a "dummy" for one Burr, who shortly after organized the New York Finance Company, to which Rabe transferred what he had gotten from Braker. These plaintiffs, by divers conveyances not thought necessary to enumerate, assert the title Rabe obtained, and claim the additional protection of being bona fide purchasers without notice or knowledge of any equities of Braker's or defects in Rabe's or Burr's title. In 1910 defendant Braker was 52 years old, when the 20 years after his father's death expired, and the $10,000 fund fell in; and when he was 55, in 1913, the $17,500 fund likewise vested.

The suit to recover the $10,000 fund (Equity 7-231) was begun against Fletcher, trustee, alone in 1911, was dismissed on the merits in the District Court (203 Fed. 70), reversed and dismissed for lack of jurisdiction by this court (206 Fed. 461, 124 C. C. A. 367), but jurisdiction established by the Supreme Court (237 U. S. 583, 35 Sup. Ct. 750, 59 L. Ed. 1128), after which this court (231 Fed. 92, 145 C. C. A. 280) held (1) that a judgment of the Supreme Court of New York, dated February 5, 1912, in suit of Braker v. New York Finance Co. et al. (sufficiently described in above reported opinions) was not a defense, because the present plaintiffs "obtained their lien before suit was brought"; (2) that a surrogate's decree of August 2, 1912 (sufficiently described in 203 Fed. 70, supra), denying the fund to these plaintiffs, was also not a defense, because the proceeding in that court was not begun until after this action in equity was instituted; and (3) that Braker was a party to this action, so necessary that in his absence "the court cannot adjudicate the case." Thereupon an amended bill was filed, and subpœna served on Braker April 20, 1916. So far as he is concerned, this action is no older than that service, and in his answer he sets up both judgment and decree as bars to suit.

The action to recover the $17,500 fund (Equity 10/112) was begun in 1913, and the proceedings in the Supreme and Surrogate's Courts do not affect it. The bill was dismissed in the District Court for lack of jurisdiction, which was, however, established on appeal (235 U. S. 589, 35 Sup. Ct. 154, 59 L. Ed. 374), and the cause returned for trial. The two actions were then tried together, and both transactions held to be usurious loans; the testimony showing circumstances both as to relation of parties and documents executed similar to that considered in a long line of decisions in the courts of this state (enumerated in Provident Life & Trust Co. v. Fletcher [D. C.] 237 Fed. 108), some of which relate to dealings under this Braker will, and by this defendant.

On this appeal, the contentions requiring consideration are, on appellee defendant's part, that it was fully shown and properly held below that as matter of fact these pretended sales of expectancies were in truth mere covers for usurious loans, that the doctrine of "catching bargains" invalidates both transactions, and that both the judgment and decree above mentioned are complete defenses as to the action first brought.

Fredric W. Frost, of New York City (Herbert C. Smyth, of New York City, and Monroe Buckley, of Philadelphia, Pa., of counsel), for appellants.

Selden Bacon, of New York City, for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). That the defendant Braker is an incompetent spendthrift, of no judgment whatever, may be quite true. His father's opinion of his wisdom is

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plainly inferable from the will giving rise to this (and much other) litigation. But when in 1901 he either borrowed from or sold to the dummy Rabe, at rates which gave Rabe's principals the chance or certainty of profits at the rate of five to one, he was of mature years, not impoverished, except temporarily and by his own extravagances; he was no raw and needy youth. To such a man we are agreed that the doctrine of catching bargains has no application. A majority of the court do not find it necessary to express, as to the New York decisions above referred to and relied on below, either general assent or dissent. It is preferred to dispose of these appeals on narrower grounds.

[1, 2] In the suit for the $10,000 fund we hold that both the judgment of the Supreme Court of this state and the Surrogate's decree are good defenses in bar of any such claim as is here advanced against Braker, and unless plaintiffs can have decree against Braker they can never recover, if for no other reason than that their title flows from him alone. The trustee, Fletcher, is a stakeholder only.

In 231 Fed. 92, 145 C. C. A. 280, this court had not Braker before it; he was not then served. When he was brought in the Surrogate's decree was years old, and upon the trial of this case he proved a chain of connections between Burr, who was to all intents the New York Finance Company, and these plaintiffs, which convince us that Brown et al. are not bona fide pruchasers of or lienors upon anything the New York Finance Company had from or through Braker; on the other hand, they are but the cloak or cover for Burr, who from the beginning has been and still is in control of this litigation. There were not even purchasers "pendente lite," as was supposed; they are not purchasers at all, but tools of Burr. This is a finding of fact on the evidence now before us.

[3] As to the suit for the $17,500 fund, it is undoubtedly true that the paper title given to Rabe, and lying at the foundation of plaintiff's claim, contains no words of loan, nor any intimation of a borrowing by Braker. It is in terms a contract of sale and in the present tense. But this fact does not prevent investigation of the circumstances attending its execution and delivery, in order to test the transaction for usury. One who really buys an expectant estate, by the very nature of his purchase takes a risk, which explains and justifies the small price he pays. The value on vesting, the worth when danger of loss is past, is no criterion of value when bargain made.

[4] If Braker gave up or forewent no more than his chance of living long enough to reduce to possession his father's bounty, he should be held to his bargain, ill-advised and foolish as it may have been.

[5] In this instance, however, two things occurred which in the judgment of a majority of this court gave a different aspect to the transaction. Braker wanted $5,000, he got $3,500 (out of which he paid a broker $500 for introducing him to Rabe et al.), and it was substantially agreed that the difference between request and receipt was so great that the Rabe-Burr party agreed to pay the premiums on such life insurance as they wanted and for which Braker agreed to

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apply. This was a part of the agreement, and as much a part as was the document of sale on which plaintiffs must and do rely. Policies were accordingly obtained, and assigned to Rabe, "creditor" of Braker. He certainly was no creditor, if there was a bona fide present sale made.

The second matter deemed important is that the assignment or document of transfer, after vesting in Rabe as fully as words could do it Braker's rights in and to the fund in question, continues thus:

"I do by these presents, for myself, my heirs and executors and administrators, covenant, grant, and agree to and with the said Frank L. Rabe, his heirs, executors, administrators, and assigns, that he, the said Frank L. Rabe, his heirs, executors, administrators, and assigns, shall and will as hereinbefore declared and set forth receive the net sum of [$17,500] when and as soon as [the fund of which the amount in suit is a part] shall become due and payable under and by virtue of the provisions [of Braker, Sr.'s, will], to have and to hold the same unto the said Frank L. Rabe, his heirs," etc.

Thus (first) by insurance at Braker's expense (the difference between his paying direct and having his price or advance abated in consideration of Rabe's paying being nil) covering the period of suspense when Braker might by dying prevent vesting, and (second) by Braker's covenant to pay out of whatever he had whencesoever procured, if the estate of Braker, Sr., proved valueless, the $3,500 principal of plaintiff's assignors was placed beyond the hazard of every contingency, except inability to collect out of Braker or his insurers, as the case might be. This avoidance of legal (as distinguished from natural) contingencies or dangers is one of the oldest marks of usury, when such elimination of genuine hazard secures gains above lawful usance. Chesterfield v. Janssen, 2 Vesey, 125; Colton v. Dunham, 2 Paige (N. Y.) 272. And as to the effect of such superadded personal liability as that of Braker's, see Leavitt v. Enos, 155 App. Div. 584, 140 N. Y. Supp. 862.

It is said that Braker's covenant is no more than the guaranty considered in Orvis v. Curtiss, 157 N. Y. 657, 52 N. E. 690, 68 Am. St. Rep. 810. We cannot think so, for there was in that case no advance or transfer of money from plaintiff to defendant, but (as definitely found) a joint venture or "contract of partnership," with a guaranty against positive loss by one partner to the other. Here any personal responsibility is utterly inconsistent with that present sale of a real contingency on which alone plaintiffs can securely rest.

It follows that, without considering the wholly contradictory and irreconcilable tale told by Braker on one side and Burr et al. on the other, as to what was contemporaneously said, we find the written or admitted words evidencing the contract made, such as to show something more than and different from the purchase of a contingency, viz. an avoidance of all hazard except that of being paid by Braker or his insurers, whose obligation was held by Braker's "creditor"—i. e., Rabe or his assignees. From this apparatus of papers plaintiff cannot escape. The "treaty was for a loan." Every effort was made to avoid that word by those furnishing the money, but when it was furnished the would-be borrower had in substance and

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effect agreed to "return the capital at all events" with unlawful additions. This is usury. Dowdall v. Lenox, 2 Edw. Ch. [N. Y.] 274.

Decrees affirmed, with one bill of costs.

WARD, Circuit Judge (dissenting). Unless we are to hold that there can be no such thing as an improvident sale of an expectancy in a decedent's estate, on the ground that an attempted sale must be regarded as a cover for a loan of money on usury, the assignments by Braker to Rabe of his legacies under the fourteenth and fifteenth articles of his father's will were sales. The instruments he executed expressly so stated, and the testimony of the witnesses to the same effect is overwhelming. There was in neither assignment any promise by Braker to repay the money he received. It is true that in the assignment of seven-tenths of his legacy of $50,000 under the fifteenth article of the will he guaranteed that it should produce $35,000 to the purchaser. In the case of Orvis v. Curtiss, 157 N. Y. 657, 52 N. E. 690, 68 Am. St. Rep. 810, the defendant not only guaranteed plaintiff against loss of the money he put into a joint adventure in stocks, but also guaranteed him a profit of $5,000. The similarity between that case and this is that the court below held in it that the contract made was really a loan upon usury (12 Misc. Rep. 434, 33 N. Y. Supp. 589), whereas the Court of Appeals refuse to treat the contract as anything else than what it professed to be. In that respect the decision is an authority for our treating the transactions in this case as sales.

The policies of insurance on Braker's life were assigned to Rabe and his assigns, and the premiums were paid by him and them. It was natural and proper for the purchaser to take out insurance against the contingency of Braker's death before anything should vest in him under his father's will. I do not suppose that a loan upon bottomry would become usurious if the lender protected himself against loss by insuring the arrival of the vessel. That would be a perfectly independent contract.

The policies were not assigned to Rabe "as creditor," as stated in the opinion of the court. On the contrary, the form of assignment used was absolute, and not the form of assignment of the policy as collateral.

The complainants sued as owners of one-half the legacy under the fifteenth article and of the last installment of $10,000 under the fourteenth article of the will, by virtue of a sale of the same to them under a collateral note securing an advance of $10,000. The court holds that a decree of the surrogate in August, 1912, made after this suit had been instituted in the District Court, is res adjudicata as to the legacy under the fourteenth article of the will. It is quite clear, however, under Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, and Waterman v. Bank, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80, that the federal courts may determine the rights of citizens of other states in a decedent's estate, and that the state court must recognize that determination in making distribution. The complainants in this case, citizens of Pennsylvania, submitted their

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claim to the legacy under the fourteenth article of the will to the District Court of the United States, and that court obtained jurisdiction of them and of the trustee and of the claim, which jurisdiction continued unless or until the bill should be dismissed. The fact that Braker was subsequently brought in as an indispensable party did not create jurisdiction in the court for the first time. The joinder related and enabled the court to render a decree with the same effect as if he had originally been a party.

Of course, if the complainants were mere tools of Burr et al., as the court finds, they are bound by the judgment in the state court action; but I think the proofs show that they were bona fide lenders of $10,000 four years before the action in the state court was brought. The proofs leave much to be desired in respect to straightforwardness of all the parties concerned, but for these reasons I think both judgments should be reversed.

THE WALTER ADAMS.

SEABOARD FISHERIES CO. v. PIEDMONT & GEORGES CREEK COAL CO.

(Circuit Court of Appeals, First Circuit. June 21, 1918.)

Nos. 1327–1332.

1. MARITIME LIENS ⊂=26—CONTRACT BASIS OF LIEN.
A contract cannot afford the necessary basis for a maritime lien, unless it is maritime in its nature as to all its provisions, so as to be cognizable in admiralty.

2. ADMIRALTY ⊂=14—JURISDICTION—"MARITIME CONTRACT."
Admiralty has no jurisdiction over breach of a contract to furnish owners of 19 fishing steamers such coal as the 19 vessels might require during the season; such contract not being maritime in character, in that it did not begin and end in the necessities of a particular vessel for her own voyage.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maritime Contract.]

3. MARITIME LIENS ⊂=27—COAL—CONSTRUCTION OF STATUTE—"SUPPLIES FURNISHED TO VESSELS."
Under Act June 23, 1910, giving a maritime lien for "supplies furnished to vessels," a lien does not attach to a vessel because of coal used by such vessel, where the coal, instead of being delivered to the vessel, was part of large quantity of coal delivered to the owner, to be used by any of its 19 fishing steamers; the owner determining the vessels to use the coal, the amount to be used by each vessel, and time of putting it on board—the coal, under such circumstances, not having been supplies furnished to a vessel.

4. MARITIME LIENS ⊂=27—SUPPLIES FOR DESIGNATED VESSEL.
Where specific supplies have been furnished to owner upon distinct understanding that they were for specified vessel, and owner, after delivery to him, has appropriated them to designated vessel, supplies have been furnished to vessel, within Act June 23, 1910, giving maritime lien for supplies furnished to vessels.

Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Libels by the Piedmont & Georges Creek Coal Company to enforce maritime liens against the fishing steamer Walter Adams and certain other fishing steamers; the Seaboard Fisheries Company, claimant. Decrees for libelant, and claimant appeals. Reversed, and cases remanded, with instructions to dismiss libels.

See, also, 240 Fed. 147.

Rathbone Gardner, of Providence, R. I., and Philip L. Miller, of New York City (Charles R. Haslam and Gardner, Pirce & Thornley, all of Providence, R. I., and Sullivan & Cromwell, of New York City, on the brief), for appellant.

John M. Woolsey, of New York City, and Frank Healy, of Providence, R. I. (Harry D. Thirkield, of New York City, on the brief), for appellee.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

DODGE, Circuit Judge. Maritime liens, asserted by the libelant company upon each of the vessels proceeded against in these cases, for amounts of coal alleged to have been furnished to them respectively during the fishing season of 1914, have been sustained as valid by the District Court. The claimant appeals from the decrees, contending that upon the facts proved the libelant acquired no maritime lien upon either of said vessels.

There is little or no dispute as to the material facts. They are for the most part sufficiently set forth in the opinion below. The William B. Murray et al., 240 Fed. 147.

The libelant had no dealings regarding the furnishing of coal with either of the vessels libeled, through their officers in command; nor did any of its dealings with their owner regarding the coal it claims to have furnished relate to coal required at the time for use by either of said vessels, or to either of said vessels as distinguished from the other vessels included with them in a "fleet" of nineteen fishing steamers in all. Its dealings were only with the then owner of the entire fleet, referred to in the opinion below as the "Oil Corporation," which corporation was employing the fleet, in connection with lands and fishing factories belonging to it at Promised Land, on Long Island, in New York, and at Tiverton, R. I., in a manufacturing business. At the two above-named places the vessels of the fleet delivered fish taken on their successive trips, and also coaled for further trips.

The libelant did not deliver any of the coal it claims to have furnished directly to the vessels libeled, or either of them; nor does it appear to have delivered any of said coal to the Oil Corporation directly, either at Promised Land or at Tiverton. The coal for which it claims liens came to those places in five different shipments, on various dates in May, June and July, 1914. Four of said shipments were delivered, as the opinion below states, at Promised Land, and one at Tiverton. But all the shipments came to those places on barges which had taken the coal on board at the libelant's loading piers near New York City, where the libelant had agreed to deliver it under a previous general agreement with the Oil Corporation so to deliver such coal

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as said corporation might require for its needs at Promised Land and at Tiverton, during said season, at agreed prices per ton; the delivery of all the coal being f. o. b. at said pier. The above facts regarding said shipments from the libelant's piers, not referred to in the opinion below, but appearing from the invoices and bills of lading relating to the shipments, indicate that delivery of all the coal so shipped to the Oil Corporation took place at the libelant's loading piers. In view of them, we do not think it can be taken as proved that the libelant delivered any of said coal to the Oil Corporation, under the above agreement for delivery, either at Promised Land or at Tiverton. But, even if such delivery can be taken as proved, there is no question that the coal included in the five cargoes was put on board the barges by the libelant at its New York piers without any understanding that it, or any definite part of it, was for either of the vessels libeled, or for any particular vessel of the fleet, or that all of it was for the vessels then composing the fleet. The first shipment, indeed, was expressly identified on the invoice as "coal for factory." . There can be no doubt that, according to the understanding between the parties, some at least of the coal to be furnished would be needed in the factories, and the Oil Corporation was left, so far as any understanding with the libelant was concerned, to use the coal either in the factories or on the vessels of its fleet, as it might subsequently desire.

If the libelant can be said to have delivered any of the coal comprised in these five shipments to the Oil Corporation, at Promised Land or at Tiverton, there was still no understanding as to the coal so delivered, or any definite part of it, that it was for either of the vessels libeled, or for all of them, or even for all the vessels in the fleet, as distinguished from the factories; and, except that the coal was understood to be for use in its business as carried on at those places, its ultimate disposition was left as above for determination by the Oil Corporation subsequently to the making of the agreement regarding coal for the season, and subsequently to both its shipments and its delivery.

The five shipments were all charged by the libelant on its books to the Oil Corporation, without any entries charging any of it either to a specific vessel, or to specific vessels, or to the fleet; and they were billed to the Oil Corporation only, without any reference to vessels or fleet. When the first shipment to Promised Land arrived there, it was put into the Oil Corporation's bins, which already contained 1,068 tons previously received and paid for by the Oil Corporation in full, under the same general agreement. The remaining three shipments received at Promised Land were dumped on the same pile, and from the entire pile the Oil Corporation used coal as needed, for all the vessels in its fleet of nineteen, and also for running its boiler plant on shore at that place. The shipment received at Tiverton went upon the Oil Corporation's pier there, and was used by it in part for ten of the vessels belonging to its fleet as they needed it, and in part by its boiler plant on shore at that place. Among the vessels which took on board and used some part of the coal included in the five shipments were the vessels proceeded against in this case.

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There was evidence tending to show how much coal each of said vessels took on board at Promised Land out of the entire stock at that place, and how much at Tiverton out of the entire stock there, after the five shipments had been received as above. The District Court determined the quantity of coal subsequently received and used by each vessel libeled, out of the coal included in said shipments, as follows: The respective quantities found to have been taken on board at Promised Land by each of said vessels respectively were reduced by an estimated proportion, being the proportion which the 1,068 tons in the pile at Promised Land, before the first of the above shipments to that place had been added thereto, bore to the whole quantity in said pile, after the coal included in said shipments had been added. To the quantities so ascertained were then added the quantities found to have been taken on board by each vessel libeled at Tiverton.

Whether the libelant has shown itself entitled to maritime liens upon these vessels respectively for the respective amounts of coal thus ascertained is a question to be determined, not between it and the owner at the time of said vessels, but between the libelant and the present claimant, who had nothing to do with the libelant's agreement with the Oil Corporation, nor with ordering, receiving, or using the coal shipped under it as above, and who did not become owner of said vessels until after they had received and used the coal. The Oil Corporation mortgaged its property in 1913, including these vessels, to secure its bonds. A bill to foreclose the mortgage so given had been filed in the same District Court wherein the decree now appealed from was rendered. There was a decree of foreclosure upon said bill, ordering the sale of the mortgaged property, and under it these and the other vessels of the fleet were sold April 24, 1915, before this suit was begun. The claimant was the purchaser of these vessels at the sale. The present libels were afterwards filed against them on June 16, 1915. While the sale did not divest valid maritime liens to which the vessels were subject when sold, the question of the validity of the liens asserted in this suit is, so far as the present claim is concerned, a question as to the validity of secret or unrecorded incumbrances.

As to the libelant's original agreement with the Oil Corporation to furnish it with coal for the season, it was never completely embodied in any written document. It appeared that when this agreement was made there was a balance due for coal from the previous year, and that the Oil Corporation was known to be largely indebted, in view whereof there was an understanding between the parties to the effect that the latter should have a maritime lien for the coal it was to furnish, not for the above five shipments specifically, and upon the Oil Corporation's entire fleet, or such vessels belonging to it as might thereafter use any of the coal, not upon any specific vessels included in it. The District Court found it to have been understood by the parties "that the law would afford a lien upon the vessels for the coal and that the Coal Company would thus have security," and also understood that "a large part of the coal furnished was to be used by vessels of the fleet."

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[1] A contract cannot afford the necessary basis for a maritime lien, unless it is maritime in its nature, so as to be cognizable in admiralty; and it is not enough that the contract is maritime as to some of its provisions—it must be maritime in its entirety. It was long ago said by high authority:

"In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime." Story, J., in Plummer v. Webb, 4 Mason, 380, Fed. Cas. No. 11,233.

The principle stated has since been repeatedly recognized and acted on. The following District Court decisions may be cited: Diefenthal v. Hamburg, etc., 46 Fed. 397, 399; Richard v. Hogarth, 94 Fed. 684; The James T. Furber, 129 Fed. 811; Id., 157 Fed. 128; Berton v. Tietjen, etc., Co., 219 Fed. 763—also the following decisions on appeal: The Harvey and Henry, 86 Fed. 657, 30 C. C. A. 330; Pacific, etc., Co. v. Leatham, etc., Co., 151 Fed. 440, 80 C. C. A. 670; The Pennsylvania, 154 Fed. 9, 83 C. C. A. 139.

[2] Nor, even if the libelant's agreement with the Oil Corporation had covered no coal for factory use, and had been an agreement only for the furnishing of such coal as the nineteen vessels of its fleet might thereafter require during the season, could it be regarded as maritime in character. It did not "begin and end in the necessities of a particular vessel for a particular vessel for her own voyage," as a contract for supplies must, in order to be within admiralty jurisdiction. "Where owners group together a large number of vessels, and make annual contracts for their supplies, the admiralty jurisdiction does not include them because the reason for it does not." The Oil Corporation could not, therefore, have sued the libelant in admiralty for failure to supply coal according to the agreement, nor could it have been sued in admiralty for a refusal to take and pay for coal offered under the agreement. Diefenthal v. Hamburg, etc. (D. C.) 46 Fed. 397, already cited; S. S. Overdale Co. v. Turner (D. C.) 206 Fed. 339.

Part of the agreement is said to have been that the libelant should have the security of a maritime lien for such coal as it should furnish thereunder. It may well be doubted whether, in a contract nonmaritime in character as above, a maritime lien for supplies later to be furnished could ever be created by express stipulation therein on the part of the vessel owner. It is at any rate clear, as pointed out in the opinion of the District Court, that no such security could be created upon the entire fleet, irrespective of what use should be made of the coal, nor upon particular vessels of the fleet for coal furnished to the other vessels. Astor, etc., Co. v. E. V. White, etc., Co., 241 Fed. 57, 154 C. C. A. 57, L. R. A. 1917E, 526. Whenever maritime liens created by express contract with the owner have been sustained, the agreed liens have been upon vessels or freights specified at the time of the agreement, and for supplies or advances then agreed to be furnished to them specifically upon such specific credit, and afterward so furnished. The evidence as to the precise agreement made in this case as to liens upon the Oil Corporation vessels is far from definite, and by no means such as would be sufficient in any event for the

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establishment of a maritime lien by express consent of the owner. The general manager of the Oil Corporation testified that, as he understood, a maritime lien on the entire fleet should be security upon which the libelant was to furnish coal; but to such an agreement no effect can be allowed, as has been stated. We regard the evidence as establishing, at most, such an understanding as the District Court found to have existed—that "the law would afford a lien upon the vessels for the coal"; that is, according to the libelant's present contention, upon each vessel afterwards supplied, for the coal supplied to her.

Under the circumstances of this case, the libelant has a lien upon any one of these vessels, if it has proved that it "furnished" the coal received by her as above "to the vessel," upon the order of her owner, within the meaning of Act June 23, 1910, c. 373, 36 Stats. 604 (Comp. St. 1916, §§ 7783–7787), but not in the absence of such proof. This, under the circumstances shown, we consider the only lien which the law afforded it.

Assuming that the libelant can be said, in the case of any one of the vessels, to have "furnished to" her the coal she received, in the statutory sense, the furnishing may be said to have been "upon the order of her owner." But the question is whether any such assumption can be made, in view of the facts that, after turning over to the owner of the fleet the entire quantity of coal shipped as above, the libelant left it wholly to the owner to select, out of the fleet, the particular vessels by which the coal was to be received and used, and to determine the particular part of said quantity to be put on board each such vessel, as well as the particular time for putting it on board.

The federal statute enlarged the maritime law as it had previously stood, by permitting the acquirement of maritime liens upon vessels, for supplies furnished to them, as well in their home ports as in foreign ports. This it accomplished by providing that proof of furnishing such supplies to a vessel should be sufficient proof of credit given to the vessel therefor; definite proof of credit so given having always previously been held necessary, whenever what had been furnished had been furnished at the port of the owner's residence. We see no reason to believe that the statute intends the same result to be accomplished without proof that the supplies for which a lien is claimed have been furnished directly to the vessel, and not merely furnished to the owner without definite and distinct reference to her.

When the statute was passed in 1910, no principles of the maritime law of the United States were more fully recognized or more firmly adhered to than those set forth in the familiar statements by the Supreme Court in Vandewater v. Mills (The Yankee Blade) 19 How. 82, 89, 15 L. Ed. 554, to the effect that maritime liens are stricti juris, because they may operate to the prejudice of general creditors and purchasers without notice, and that they cannot be extended by construction, analogy, or inference.

It was also well settled, prior to the statute, that credit given by a materialman to a vessel was not proved unless supplies or materials intended for her were shown to have been furnished directly to her. While actual delivery by him on board, or (in the case of materials)

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actual incorporation in the vessel, was not necessary under all circumstances to constitute such direct furnishing by him, mere delivery to the owner without special reference to the particular vessel, was not accepted as sufficient proof; there must have been at least such delivery to the vessel sought to be charged with a maritime lien as would have bound her under a contract of affreightment for transportation of the goods by her. See The James H. Prentice (D. C.) 36 Fed. 777, 781, and cases cited; The Vigilancia (D. C.) 58 Fed. 698, 700, and cases cited; The Cimbria (D. C.) 156 Fed. 378.

In like manner, it had been held necessary, in order to establish an admiralty lien upon a vessel for maritime services rendered to her, that the services should appear to have been rendered to the particular vessel sought to be charged. Proof that they had been rendered under a contract with her owner for future services to a number of his vessels indiscriminately, at an agreed price per day or for the season, though including the particular vessel, was not accepted as sufficient for the purpose. The Newport, 114 Fed. 713, 52 C. C. A. 415; The Alligator, 161 Fed. 37, 88 C. C. A. 201. In the latter case it was said by the Court of Appeals for the Third Circuit:

"A lien does not and should not attach for a supposed credit given to a vessel unless the services or supplies are clearly shown to have been rendered or furnished to the particular vessel to which the credit is given."

The statute of 1910 has not, in our opinion, made proof that the supplies for which a maritime lien is claimed were furnished directly to the particular vessel by the materialman any less necessary than before, nor does it afford any ground for attaching any meaning other than that previously recognized to the expression "furnished to a vessel." The decisions made since the statute was passed have insisted upon the same necessity and have given the same effect to the words quoted. See The Geisha, The Bethulia (D. C.) 200 Fed. 865, 876; Astor, etc., Co. v. White, etc., Co., 241 Fed. 57, 154 C. C. A. 57, L. R. A. 1917E, 526; The Cora P. White (D. C.) 243 Fed. 246.

The statute with which we are here concerned must thus be regarded as differing materially in its terms from state statutes purporting to give liens—which may or may not be maritime liens—for supplies or materials furnished "for" or "on account of" a vessel, or for materials furnished "in, or about, or during, her construction," like the Maine statute considered in The Kiersage, 2 Curtis, 421, Fed. Cas. No. 7,762, or the Massachusetts, Michigan, and Virginia statutes referred to in The Geisha (D. C.) 200 Fed. 865, 867, 868. In Berwind-White, etc., Co. v. Metropolitan, etc., Co. (C. C.) 166 Fed. 784, affirmed American Trust Co. v. W. & A. Fletcher Co., 173 Fed. 471, 97 C. C. A. 477, referred to in the opinion below, the Court of Appeals for this Circuit sustained liens claimed for machinery which had gone into each of two vessels respectively while being constructed, under a single contract to furnish machinery for both, but which did not appropriate any of it specifically to either. The liens so sustained, however, relating as they did to construction, were not maritime liens; nor were they asserted in an admiralty court. See 173 Fed. 480, 97

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C. C. A. 477. The decision sustaining them, made in an equity suit, gave effect to a New Jersey statute with reference to which the machinery had been contracted for, which statute purported to secure by a lien any debt contracted by the owner of a vessel "on account of" any materials furnished "for or towards the building, repairing, furnishing or equipping such vessel." 166 Fed. 785. But the agreement here relied on must be taken to have had reference to the terms of the above federal statute, and the parties to have understood that "the law would afford a lien" upon any one vessel of the Oil Corporation fleet for such coal only as might be "furnished to" her according to the accepted meaning of that expression. The question here is whether compliance with the terms of that statute is proved, not whether any underlying equity can be found which might support a lien in the libelant's favor.

[3] We are unable to believe, in view of all the above, that the provisions of the statute can properly be understood in the less restricted sense accepted by the District Court, according to which, although the libelant had obtained no lien upon any vessel in the Oil Corporation's fleet when it parted with its coal by delivery to said corporation, liens in its favor might afterward be created by the Oil Corporation's subsequent acts in selecting particular vessels out of said fleet to receive portions of the coal which had been so delivered.

[4] Where specific supplies or materials have been furnished to the owner upon a distinct understanding that they were for a specified vessel, and the owner has, after delivery to him, appropriated them to the vessel so designated between the parties, they have been held to have been furnished to her in the sense of the statute; and maritime liens for them under it have been sustained. Ely v. Murray, etc., Co., 200 Fed. 368, 118 C. C. A. 520; The Yankee, 233 Fed. 919, 147 C. C. A. 593.

The Court of Appeals for the Third Circuit was careful, in the case last cited, to limit its decision as follows:

"We hold that a materialman may make actual delivery of supplies to a vessel in the maritime sense, by causing them to be transported by rail and water carriers by interrupted stages from their point of origin to the vessel side, when the transaction is begun by a valid order indicating that the supplies are for the vessel and are to be delivered to her, and is completed by an actual delivery to the vessel consistent with the instructions of the order and the intentions of the parties giving and accepting it."

Further than this no court had gone, in interpreting the provisions of the statute here in question, prior to the decision here appealed from. We are obliged to regard the construction adopted by the court below as one not intended by the statute.

We therefore hold that the District Court erred in sustaining the liens asserted, upon the evidence before it. This conclusion renders it unnecessary to consider certain other errors assigned.

The decree of the District Court is reversed, and the cases are remanded to that court, with instructions to dismiss the libels. The appellant in each case recovers its costs of appeal.

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In re WEIDHORN.

Petition of LEVY.

(Circuit Court of Appeals, First Circuit. May 28, 1918.)

No. 1302.

1. BANKRUPTCY ⟸440—JURISDICTION OF REFEREE—REVIEW—"QUESTION OF PROCEDURE."

The question raised in the District Court by denial of a referee's jurisdiction to investigate the merits of a controversy under the forms of a plenary suit by the trustee is a question of procedure, which, under Bankr. Act, § 24b (Comp. St. 1916, § 9608), may be raised before the appellate court by petition to revise, though a decision on the merits, had there been jurisdiction, could have been reviewed only on appeal.

2. BANKRUPTCY ⟸224—JURISDICTION OF REFEREE—SUIT TO AVOID TRANSFERS.

In a case referred generally, after adjudication, under Bankr. Act, § 22 (Comp. St. 1916, § 9606), and according to General Order XII, whereby all proceedings, except such as are required to be had before the judge, were thereafter to be had before the referee, who was to perform duties he was empowered by the act to perform, the referee had jurisdiction of a bill in equity, filed by the trustee under section 70e (Comp. St. 1916, § 9654), to avoid transfers in fraud of creditors; nothing in the act or general orders expressly requiring such proceedings to be had before the judge, and sections 1(7), 38(4), 42a, 42c (Comp. St. 1916, §§ 9585, 9622, 9626), and General Order III, permitting an inference in favor of the referee exercising jurisdiction.

Petition to Revise in the Matter of Law the Proceedings of the District Court of Massachusetts.

In the matter of J. Herbert Weidhorn, bankrupt. On petition of Benjamin A. Levy, trustee, to revise a decree directing the vacation of a decree made by the referee on a bill in equity. Reversed.

For opinion below, see 243 Fed. 756.

Lee M. Friedman, of Boston, Mass., and Albert S. Woodman, of Portland, Me. (Swift, Friedman & Atherton, of Boston, Mass., on the brief), for petitioner.

William M. Blatt, of Boston, Mass., for respondent.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

DODGE, Circuit Judge. The order or decree of the District Court, which this petition seeks to revise, directed the vacation of a decree made by the referee upon a bill in equity, filed and answered before him, and sustained by him after hearing the merits of the case as in plenary proceedings before the court, and it directed the dismissal of the bill on the ground that the referee had been without jurisdiction so to entertain or hear it.

[1] 1. We are asked to dismiss the petition to revise on the ground that it is not a petition within section 24b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. 1916, § 9608]). It is contended that the question raised as to the referee's jurisdiction can be brought before us only by appeal under section 24a.

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The bill in equity, filed by the trustee in bankruptcy of the estate under administration, sought to avoid two conveyances by the bankrupt to his brother, on the alleged ground that they had been made with intent to hinder, delay, or defraud his creditors. The referee held the conveyances void, and ordered the defendant to account for or restore the property transferred.

The defendant's petition for review of the referee's decree by the District Court alleged only that the above findings and conclusions were not justified by the evidence. It did not allege that the referee had acted without jurisdiction. The referee's certificate to the District Judge, however, recited that the defendant had contended "that the referee, sitting as a court of bankruptcy, has no jurisdiction," and that he had ruled to the contrary. The District Judge dealt only with the question of jurisdiction, undertaking no consideration of the merits of the controversy passed upon by the referee.

The trustee's present petition to this court, while it asks reversal of the decree of dismissal, and for affirmance of the decree entered by the referee, raises before us only the question of the referee's jurisdiction. If he had jurisdiction, his result on the merits remains to be reviewed by the District Court.

Since the petition before us thus presents only the preliminary question of the referee's jurisdiction to proceed on the bill before him, we think it raises rather a question of procedure, under section 24b, than a "controversy arising in bankruptcy proceedings," within the meaning of section 24a. Such "controversies" arise over steps in bankruptcy proceedings which the court or referee has jurisdiction to take or refuse to take. When the referee's jurisdiction to investigate the merits of a controversy like this in summary proceedings is attacked, the question is properly raised before the Appellate Court by petition to revise an order of the District Court sustaining such jurisdiction. Schweer v. Brown, 195 U. S. 171, 25 Sup. Ct. 15, 49 L. Ed. 144; Shea v. Lewis, 206 Fed. 877, 124 C. C. A. 537; Gibbon v. Goldsmith, 222 Fed. 826, 138 C. C. A. 252. We see no sufficient reason to doubt that the question raised by a denial of the referee's jurisdiction to investigate the merits of such a controversy under the forms of a plenary suit may be equally well raised by petition to revise. The question is one of law only. That a result on the merits, had there been jurisdiction, could have been reviewed here only on appeal, does not prove that we are without power to determine the question of jurisdiction under such a petition as this.

[2] 2. The case had been referred generally, under section 22 of the Bankruptcy Act (Comp. St. 1916, § 9606), and according to General Order XII. The reference was not for any special or limited purpose. According to clause 1 of said general order, "all the proceedings except such as are required by the act or by these general orders to be had before the judge," were thereafter to be had before the referee, and according to clause 2 of said order the referee was thereafter to perform the duties which he was "empowered by this act to perform" in the matters arising in the case referred to him. We are unable to agree with the learned District Judge that "all the pro-

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ceedings," in clause 1, must be taken to mean only such proceedings of the bankruptcy courts as have been distinguished from controversies arising in bankruptcy proceedings for the purposes of section 24. We think the order requires a broader construction, in view of all its provisions, and of other provisions applicable, found in the act.

Nothing either in the act or in the general orders expressly requires the proceedings upon a bill filed by a trustee like this, whereof "any court of bankruptcy" has jurisdiction under section 70e (Comp. St. 1916, § 9654), to be had before the judge. On the contrary, section 38 (4), being Comp. St. 1916, § 9622, invests the referee with jurisdiction, "subject always to a review by the judge," "to perform such part of the duties (with express exceptions not here applicable) as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders * * * except as herein otherwise provided."

Neither in the act nor the rules nor the orders referred to are any provisions found which exclude such cases from the general operation of this section. The jurisdiction given by section 70e, over such a proceeding, is in equity, as affording a remedy more adequate and complete than can be had at law. Wall v. Cox, 101 Fed. 403, 41 C. C. A. 408; Pond v. New York, etc., Bank (D. C.) 124 Fed. 992; Davis v. Gates (D. C.) 235 Fed. 192, 195. There are certain injunctions which only the judge can order (Gen. Order XII, 3); but no such injunction was sought by the bill which the trustee filed.

Section 42a of the act (Comp. St. 1916, § 9626) provides for the keeping of records of proceedings in cases before the referee corresponding to those kept in equity cases before the federal courts. Section 42c makes the records so kept part of the records of the court, when certified and transmitted by the referee as there required. By General Order III, process, summons, and subpœnas, under the court's seal and signed by the clerk, are to be furnished referees upon application therefor. In view of these provisions, we are not prepared to agree with the District Judge that to affirm the referee's jurisdiction in cases like this would amount to creating a new court having concurrent equity jurisdiction with the state courts and with the District Court. The jurisdiction so exercised would be that of the District Court as a court of bankruptcy, though exercised by an officer of that court given for defined purposes, the powers of the court, with the right to issue its process, always, of course, subject to review by the judge.

Section 1 (7) of the act (Comp. St. 1916, § 9585) provides that "courts," as used in the act, may include the referee; and for the purposes here material we think section 38 (4) must be taken as intending to make that word as there used include the referee.

From the sections of the act above referred to an intent on the part of Congress may reasonably be inferred to permit the exercise of all functions of the bankruptcy courts not specifically excepted, by a number of local officers of the court, easily accessible throughout each district, instead of empowering the District Judge alone to exercise them, at the statutory places for holding his court. The provisions

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have been recognized as manifesting such an intention. Remington, Bankruptcy (2d Ed.) §§ 496, 501; In re Steuer (D. C.) 104 Fed. 976, 980.

We find no decisive objection to the above view in the fact that matters involving considerable amounts will be thereby often left to the referee's determination in the first instance. The same is true regarding matters as to which the referee's jurisdiction under the act is unquestioned. It is true that the referee cannot punish for the contempts referred to in section 41, but must certify the facts to the judge for his action. This, however, is only matter of procedure, and is also applicable to proceedings whereof the referee's jurisdiction is unquestioned. That the referee has jurisdiction to act upon such a bill is the view which seems to us most in accordance with the general scheme contemplated by the act for the primary hearing and determination of such controversies as are likely to arise between trustees of estates and adverse claimants. If the property in controversy here had been in the trustee's possession and claimed from him, or a lien upon it asserted, by the defendant, the referee's jurisdiction would have been undeniable, though the above objections to its exercise would have been no less applicable.

Such a construction of the above provisions of the act involves no substantial prejudice to any right of a defendant against whom such a bill is brought. If it were addressed to the judge, instead of the referee, filed, not with the referee, but in the clerk's office, and heard by the referee under directions from the court to ascertain the facts and report thereon, no one would doubt that the "duties conferred upon the bankruptcy court" in the case had been so far properly performed. The referee's report, with the evidence before him, if necessary, would then come before the District Judge for confirmation or disaffirmance, and the final decree of the court accordingly would follow. If heard and decided by the referee, as in this case, a petition for review would also bring the whole matter, with the evidence heard, before the judge, whose order affirming or disaffirming that made by the referee would also amount to a final decree by the District Court. We see no difference between the two methods of reaching a final result in the District Court sufficiently important to require the conclusion that the latter method cannot be one contemplated by the act. It will always be in the judge's power to prevent its adoption, as was not done here, by limiting the powers given the referee, in the order of reference.

No court of appeals has yet passed upon the question here raised. Conflicting decisions regarding it may be found, made in other District Courts either by the judge or a referee. In this district the decisions prior to that here appealed from have tended to sustain the referee's jurisdiction. In re Steuer, 104 Fed. 976, and In re Scherber, 131 Fed. 121, are the earliest in date which refer to the question. Neither decides it, but the suggestions regarding it in Re Steuer show much disinclination on the part of the court to hold the referee wholly without jurisdiction. Jurisdiction has been exercised by the referee in similar cases, and its exercise, apparent from the record, and there-

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fore subject to disapproval by the court at any stage of the proceedings, has met with no objection either from the parties or from the courts either on review or appeal, in not a few reported cases in this and other circuits. See particularly Clarke v. Rogers, 183 Fed. 518, 106 C. C. A. 64, and 228 U. S. 534, 33 Sup. Ct. 587, 57 L. Ed. 953; Studley v. Bank, 200 Fed. 249, 118 C. C. A. 435, and 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313. We find no reason sufficient to require a decision involving the conclusion that the referee's jurisdiction was exercised in all such cases without statutory warrant, and must regard the decision that it was unlawfully exercised in this case as erroneous. We reach this conclusion without reference to the question whether or not there was seasonable objection to the jurisdiction by the defendant. It is not contended that his consent could have given a jurisdiction not given by the act.

Let there be a decree reversing the decree of the District Court, and remanding the case to that court for further proceedings in accordance with this opinion. The trustee in bankruptcy recovers his costs in this court.

GRAHAM v. FAITH.

In re W. P. B. BROOKS & CO., Inc.

(Circuit Court of Appeals, First Circuit. May 28, 1918.)

No. 1347.

1. BANKRUPTCY ⊂=224—JURISDICTION OF REFEREE—SUIT TO AVOID TRANSFER.
A referee has jurisdiction of a bill by the trustee to avoid a transfer in fraud of creditors.

2. BANKRUPTCY ⊂=461—JURISDICTION OF REFEREE—REVIEW.
An appeal not taken in time required by Bankr. Act, § 25a (Comp. St. 1916, § 9609), from the affirmance by the District Court of the dismissal of a bill by a referee for want of jurisdiction may be treated as a petition to revise, which would be in time; the question raised being a question of law only reviewable on such petition.

Appeal from the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Judge.

In the matter of W. P. B. Brooks & Co., Incorporated, bankrupt. A bill in equity by the trustee, John L. Graham, against Lillian M. Faith, before the referee, was dismissed for want of jurisdiction, and from an order of the District Court, affirming the dismissal, the trustee appeals. Reversed.

Harvey H. Pratt and John Comerford, both of Boston, Mass., for appellant.

Harlan H. Ballard, Jr., of Boston, Mass. (Ballard & Little, of Boston, Mass., on the brief), for appellee.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

DODGE, Circuit Judge. The trustee in bankruptcy of W. P. B. Brooks & Co., Incorporated, adjudged bankrupt in the District Court

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on January 17, 1916, filed a bill in equity before the referee, to whom there had been a general reference of the case, to recover property alleged to have been preferentially transferred by the bankrupt to the defendant named therein, here the appellee. In her answer the defendant denied jurisdiction in the referee to hear and determine the merits of the bill. The referee sustained this objection and dismissed the bill for want of jurisdiction, on the authority of the decision previously made by the District Court in Re Weidhorn, 243 Fed. 756. From an order of the District Court, affirming the dismissal by the referee, the trustee appeals.

[1] A petition to revise the decree of the District Court in Re Weidhorn has been heard by us at the present sitting. No. 1302, Levy, Trustee, Petitioner, 253 Fed. 28, — C. C. A. —. The District Court had held in that case that the referee was without jurisdiction of a bill by the trustee to avoid a transfer by the bankrupt alleged to have been in fraud of creditors. We have reversed the District Court, and sustained the referee's jurisdiction, by a decree entered also on the date hereof. This requires a similar result in the present case.

[2] We have held in No. 1302 that the question of the referee's jurisdiction was properly before us upon a petition to revise under section 24b. We do not think, however, that we are required to dismiss the present appeal on the sole ground that the question presented should have been brought here by such a petition. The decree below in this case was entered February 25, 1918. The trustee was obliged by section 25a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. 1916, § 9609]) to take his appeal within ten days, if it was to be taken at all. A petition to revise, however, he may bring, according to the decisions in this circuit, at any time within six months after the decree complained of. In re Worcester County, 102 Fed. 808, 42 C. C. A. 637. We see no reason why, under the circumstances, the appeal now before us may not be treated as a petition to revise. The question it raises is a question of law only. In re Williams' Estate, 156 Fed. 934, 84 C. C. A. 434; In re Blanchard Shingle Co., 164 Fed. 311, 90 C. C. A. 243.

Let there be a decree reversing the decree of the District Court and remanding the case to that court for further proceedings in accordance with our opinions in this case and in No. 1302 above referred to. The trustee in bankruptcy recovers his costs in this court.

PUGET SOUND ELECTRIC RY. v. MATSON.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1918.)

No. 3092.

1. APPEAL AND ERROR ⟸1002—REVIEW—VERDICT.
A verdict on conflicting evidence will not be reviewed on appeal.

2. APPEAL AND ERROR ⟸1060(4)—HARMLESS ERROR—MISCONDUCT OF COUNSEL.
Though plaintiff's counsel was guilty of misconduct in telling defendant's witness that he would have him punished for perjury, if he testi-

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fied as he had on a previous trial, yet, where the witness did not change his testimony, and the jury disregarded its finding for plaintiff, the verdict need not be set aside because of the improper conduct of plaintiff's counsel.

3. TRIAL ⟸295(10)—INJURIES TO PASSENGERS—INSTRUCTION ASSUMING FACTS.
Where defendant asserted that plaintiff was not a passenger at the time of his injuries, a charge on the respective degrees of care to be exercised by passenger and carrier *held*, in view of the remainder of the charge, not to take that contention from the jury by assuming that plaintiff was a passenger.

4. CARRIERS ⟸321(6)—INJURIES TO PASSENGERS—ACTIONS—INSTRUCTIONS.
In an action for injuries received when plaintiff attempted to board defendant's car, where it was defendant's contention that plaintiff was not accepted as a passenger, and that car was moving at the time, instruction charging that if defendant did not encourage plaintiff to board the car, and he "flew" at the side of the car, defendant only owed him the duty to refrain from willfully injuring him, *held* not improper by reason of the use of the word "flew."

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by Alexander Matson against the Puget Sound Electric Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank D. Oakley, of Tacoma, Wash., for plaintiff in error.

Ralph Woods and Charles L. Wescott, both of Tacoma, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Plaintiff below, Matson, was injured by an electric train operated by the defendant below. Matson recovered a verdict. He testified: That at about 11 o'clock at night, when the train came into Pacific City bound for Tacoma, it stopped an instant at the depot and let one man off; that he was standing at the lower end of the depot when the train came in and stopped; that he started to go up to board the car, grabbed the handhold with his right hand and was going to step on the car, when the train started with a jerk, pulled him, overbalanced him, threw him around, and the wheel went sideways across his foot; that he saw no conductor; that when the train stopped before the accident he was standing close to a turnstile, which was at the end of the platform in front of the station house; that he did not run to catch the car; that the vestibule was open; that he saw a man when he came from the car, but he could not say what step the man got off of; that he passed the man near the turnstile; that when he boarded the car the door was opposite the door of the depot.

[1] There was evidence by the defendant to the effect that Matson was seen running on the road toward the depot about the middle of the street at the time that the train was standing at the depot. But, at most, there was a conflict of evidence, and the verdict upon the facts will not be disturbed by this court.

[2] The defendant asks reversal because of the misconduct of counsel for plaintiff during the trial. The defendant called a witness named

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Shull, who testified to the effect that just before the accident he saw Matson running in the road, about the middle of the street, toward the depot. We quote from the redirect examination carried on by counsel for defendant:

"Q. Now, did you have a conversation this morning with Mr. Woods in reference to what would happen to you if you testified this morning? A. Mr. Woods spoke to me in the hall out there this morning. Q. What did he say with reference to your appearing here as a witness? A. He said, if I lied like I did the other time, he would send me to the penitentiary. Q. When did he tell you that? A. About an hour ago. Q. He told you, if you lied like you did the other time, he would have you arrested for perjury, didn't he? A. Yes, and have me sent to the penitentiary."

The witness was then excused, and the following colloquy was had:

"The Court (addressing Mr. Woods): If he lied the other time, why have you not had him arrested before this time?

"Mr. Woods: Your honor will remember that in the other trial (interrupted)—

"Mr. Oakley: I do not think it is necessary to have any explanation.

"The Court: If you made that remark in good faith (interrupted)—

"Mr. Woods: I made that remark in good faith.

"The Court: Why didn't you have him arrested when this trial came off? Why were you holding it over him when he was a witness in this case?

"Mr. Woods: The testimony is practically the same now as it was before, that he stood there 50 or 75 feet away; he testified that he recognized the witness; I understood the witness to testify in the other trial that he recognized this man (interrupted)—

"The Court: I did not ask you to rehash this testimony, but if you thought he had perjured himself, and if you were able to prove it, it would seem to be your duty to start that prosecution, and not try to influence his testimony in this trial by talking to him about it.

"Mr. Woods: Well, all I want is the truth, and I cannot see where he is telling the truth.

"Mr. Oakley: It is an attempt to intimidate a witness.

"(Defendant rests.)"

We are of one mind in condemning the conduct of counsel for Matson. It was highly discreditable, and the authority of the court might with all fitness have been invoked to punish in appropriate manner. Savin, Petitioner, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150. But there is nothing to warrant the belief that the witness was affected by the threat of counsel. His testimony as to the material points in the case was positive, and directly in support of the theory advanced by defendant. The jury weighed the credibility of the witness, and evidently did not believe his statements. As no direct prejudice to the rights of the defendant appears, we are not prepared to say that as a matter of public policy the District Court erred in not setting aside the verdict of the jury.

[3] Error is assigned because the court, in the course of an instruction explaining that it was the duty of a passenger to exercise ordinary care for his own safety when he attempts to board a train, said:

"* * * But the passenger, and the plaintiff in this case, by the same rule is not held to that high degree of care which the carrier was bound to use."

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It is argued that by the instruction the plaintiff was to be considered a passenger, whereas defendant denied that he was in such relationship to it. But the force of such a contention is lost when the whole instruction is examined, for by its terms the court expressly told the jury that before applying the rules of degree of care it was necessary for them to find that the plaintiff had become a passenger, and that before he could be considered a passenger he must have either mounted upon the train, or been in such a position that by his conduct it was shown that he desired to board the train, and that he was either seen by the agents of the carrier operating the train, or that his actions were such that, if they were vigilant, they should realize that he desired to take the train. Furthermore, after the court concluded its main charge, and defendant had excepted to the possible assumption by the court that the plaintiff was a passenger, the court said to the jury that he "did not mean in any way to intimate that the plaintiff was a passenger; whether the plaintiff was a passenger or not, he was bound to exercise ordinary care for his own safety." We think this removed all chance of misunderstanding.

[4] The court also charged that if the train were moving, and the vestibule were closed, and there was no invitation on the part of the defendant company to encourage the plaintiff in any way to board the car, and he "flew" at the side of the car, defendant did not owe him the exercise of ordinary degree of care, and only owed him the duty of refraining from willfully and purposely injuring him. The defendant criticized the statement of the court that, if the plaintiff "flew" at the side of the car, defendant owed him no duty, except as explained. We cannot think, however, that there could have been any prejudice to the defendant by the use of the word "flew." The meaning of the court was evidently that, if the plaintiff ran for the car after the vestibule was closed and the train was moving, the defendant carrier was relieved of the obligation to exercise that degree of care which was imposed upon it, if he had been a passenger seeking to board the train when it was standing still.

When the whole charge of the court is considered, we believe it fairly stated the law, and that none of the assignments of error is well founded. The judgment is therefore affirmed.

Affirmed.

FIRTH et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. May 3, 1918.)

No. 1606.

1. INDICTMENT AND INFORMATION ⊂⊃87(8)—AVERMENT OF TIME.
An averment in an indictment that the conspiracy charged was formed "on the ——— day of May, 1917," *held* sufficiently definite, where the statute charged to have been violated was enacted on May 18, 1917.

2. CONSPIRACY ⊂⊃43(1)—SUFFICIENCY OF INDICTMENT.
An indictment for conspiracy is not bad for indefiniteness, where it alleges the purpose of the conspiracy, and describes the precise methods taken for carrying it out.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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3. CONSPIRACY ⟸33—TO DEFRAUD UNITED STATES—OBSTRUCTING REGISTRATION FOR MILITARY SERVICE—"FUNCTION OF GOVERNMENT."
A conspiracy to prevent persons of draft age from registering as required by law is one to defraud the United States by obstructing a "function of the government."
[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Governmental Function.]

4. CONSPIRACY ⟸48—TO PREVENT DRAFT REGISTRATIONS—INSTRUCTIONS.
Instructions, in a prosecution for conspiracy to defraud the United States by preventing registration of persons for military service, approved.

In Error to the District Court of the United States for the Southern District of West Virginia, at Huntington; Benjamin F. Keller, Judge.

Criminal prosecution by the United States against Edwin Firth, Hilton Bias, Raymond Green, and Henry Howes. Judgment of conviction, and defendants bring error. Affirmed.

Seymour Stedman, of Chicago, Ill., for plaintiffs in error.
Lon H. Kelly, U. S. Atty., of Gassaway, W. Va.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

WOODS, Circuit Judge. [1] The defendants were convicted under an indictment charging conspiracy "on ——— day of May, 1917, * * * to defraud the said United States, by impairing, obstructing, and defeating a lawful function of the government of the said United States, to wit, the registration for military service of all male persons between the ages of twenty-one and thirty, both inclusive, as provided by the act of Congress passed May 18, 1917." The overt act charged was the circulation of a printed circular in these words:

"Are we facing a militarized America? War has been declared without a referendum vote of the people. Conscription has been thrust on an unwilling people without a referendum. Will compulsory military service be the next questionable innovation? We have newspaper talk about 'Democracy'; let us have it in reality, in our political, social and industrial relations. Demand the referendum on all vital public questions. Demand the repeal of the Conscript Act. West Virginia Legislature is planning to penalize strikes during war time. Oppose it.—Workmen's Council of Defense."

On the circular was a cartoon, representing a German soldier and a member of Congress in grotesque attitudes, and a citizen speaking to the congressman. Under the cartoon were the words:

"American Father: Come now, Mr. Congressman—none of that for my sons."

A demurrer to the indictment was overruled. The statute providing for registration for military service was enacted on May 18, 1917. 40 Stat. 76, c. 15. Obviously the defendants were informed that they were charged with formation of conspiracy in the month of May after the enactment of the statute, for the indictment spe-

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cifically alleges that the conspiracy was formed in violation of the statute. Ledbetter v. United States, 170 U. S. 606–612, 18 Sup. Ct. 774, 42 L. Ed. 1162; Day v. United States, 229 Fed. 534, 143 C. C. A. 602.

[2] The indictment is not subject to the objection of indefiniteness, for it not only alleges conspiracy to obstruct registration for military service, but sets forth the precise methods the defendants intended to use to effect that purpose. Crawford v. United States, 212 U. S. 183–192, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392.

[3] Counsel earnestly argued that, since the citizens who were called to register for military service had not commenced any service to the government, exhortation or persuasion to them not to register was not an obstruction of a function of the government. It is too plain for argument that preparation for war by registration for military service is as much a function of the government as the actual waging of war.

[4] There was sufficient evidence of conspiracy to go to the jury, and hence no error was committed in refusing to direct an acquittal of any of the defendants. Detailed statement of the analysis of the evidence would be of no value. The defendants worked together in the same shop, and all were opposed to registration and draft for military service. Printed circulars were placed by the defendant Firth, in the shop, tending to obstruct registration by inducing others to oppose it. The common understanding among the defendants was that these circulars should be distributed by all of them for the purpose for which they were prepared, and there was evidence that each of the defendants did distribute some of these circulars. It was the province of the jury to determine the credibility of the evidence and the inference to be drawn from it. It was not necessary to prove an expressly formulated agreement to obstruct the registration. An unlawful combination may be inferred from conduct, and the conduct of these defendants taken in connection with their admissions was sufficient to warrant the inference of guilt.

Since the evidence on behalf of the government consisted, not only of circumstances, but admissions of the defendants, the instruction based on the assumption that the evidence was entirely circumstantial was properly refused.

We are unable to find any language in the charge expressing the opinion that the distribution of the circulars set out in the indictment did obstruct the registration. On the contrary, the inference of purpose and effect to be drawn from the evidence was in explicit language left to the jury.

Error is assigned in the refusal of this instruction:

"It is your duty to presume the defendants and each of them innocent, and this presumption you should carry with you into the jury room; it is an essential principle of the law of the land and is imposed upon you during your deliberation as a jury."

The District Judge properly charged that the presumption of innocence continues only until it is overcome by evidence which satisfies the jury of the guilt of the accused beyond a reasonable doubt.

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Coffin v. United States, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481; Wilson v. United States, 232 U. S. 563, 34 Sup. Ct. 347, 58 L. Ed. 728.

A careful examination of the whole record discloses no error.

Affirmed.

WELCH v. DANIELS et al.

(Circuit Court of Appeals, Eighth Circuit. July 29, 1918.)

No. 5088.

JUDGMENT ⟸828(4)—CONCLUSIVENESS—BILL—SUFFICIENCY.

A bill in federal court to quiet title to land in Oklahoma, which alleged a prior decree of the Oklahoma circuit court, quieting title in defendant and determining the invalidity of the marriage under which plaintiff asserted title, was void by reason of statutes of Arkansas, in which state the marriage was celebrated, *held* defective, and properly dismissed; there being no showing that such statutes were not put in issue by the pleadings, or that the decree of the Oklahoma court was not based on its interpretation thereof.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by Helen Welch against John A. Daniels, guardian, and others. From a decree dismissing the suit, complainant appeals. Affirmed.

Eugene S. Quinton, of Topeka, Kan., and George D. Rodgers, of Muskogee, Okl. (A. H. Vance, of counsel), for appellant.

A. C. Towne, of Miami, Okl., W. H. Kornegay, of Vinita, Okl., and A. C. Wallace, of Miami, Okl., for appellees.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. Appellant brought suit to quiet her title to lands in Oklahoma and for an accounting, claiming to have an interest in property as the widow of James Welch. The defendants were the daughter of James Welch, his administrators, and the receivers who had had possession of some of the property. The court sustained a motion to dismiss the bill, and this appeal is prosecuted from that order.

Appellant's bill alleged that she was married to James Welch in Arkansas on May 5, 1913, and that he died intestate in Oklahoma on July 26, 1913. She also alleged that the defendant daughter of James Welch had brought suit against appellant about three years before, in the district court of Ottawa county, Okl., seeking to annul appellant's marriage to James Welch and to quiet her title to these lands as against appellant, and had procured a decree by that court finding that James Welch did not have sufficient mental capacity to make a marriage contract, nor to ratify and confirm it thereafter, and finding that appellant

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never was the wife of James Welch, and that the marriage was void, and the title to the lands was quieted in the daughter.

The bill charged that this decree was void because the court was without jurisdiction to annul the marriage by reason of certain statutes of Arkansas (Kirby's Digest 1904), quoted as follows:

"Sec. 5172. Every male who shall have arrived at the full age of seventeen years, and every female who shall have arrived at the full age of fourteen years, shall be capable in law of contracting marriage; if under those ages, their marriages are void."

Also:

"Sec. 5175. When either of the parties to a marriage shall be incapable, from want of age or understanding, of consenting to any marriage, or shall be incapable from physical causes of entering into the marriage state, or where the consent of either party shall have been obtained by force or fraud, the marriage shall be void from the time its nullity shall be declared by a court of competent jurisdiction."

The chief question in the case is whether appellant was entitled to relief against the daughter of James Welch, as appellant was not otherwise entitled to relief against the other defendants. The argument of appellant concedes that the decree of the Oklahoma district court conclusively determines this case against her, if that court had jurisdiction to enter such a decree. The District Court of Oklahoma is a court of general jurisdiction (section 10, art. 7, Const. Okl.), and appellant makes no complaint of its power to hear and determine that suit, but complains because the court did not apply the laws of Arkansas, relating to annulment of marriages, in deciding the case, and asserts that it had no jurisdiction if it did not apply those statutes.

Appellant claims that a proper construction of the Arkansas statutes prevents the annulment of a marriage except from and after the date of the decree. Without conceding that the Oklahoma court was bound to apply the Arkansas statute, we do not find it necessary to decide this, the only question presented by appellant, because it does not arise on the record. The bill alleged that the suit in the Ottawa county district court was one to annul the marriage and to quiet title to these lands, and it set forth the findings of fact and conclusions of law and the decree entered by that court, but it does not appear from anything alleged in the bill, that the Arkansas statutes were not made an issue by the pleadings, nor that the decree of the court was not based upon its interpretation and application of those statutes to the facts in the case.

As the claim of appellant that the decree was beyond the court's jurisdiction rests upon a basis of fact that has no foundation in the record, the decree will be affirmed.

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BRIDGETON NAT. BANK v. WAY.

In re SEELEY.

(Circuit Court of Appeals, Fourth Circuit. May 8, 1918.)

No. 1631.

BANKRUPTCY ⟸440—REVIEW—PROCEDURE.

A "petition for review," filed in a District Court in a bankruptcy proceeding, is ineffectual to remove the case for any purpose into the Circuit Court of Appeals.

Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Norfolk, in Bankruptcy; Edmund Waddill, Jr., Judge.

In the matter of August Scriber Seeley, bankrupt. Petition by the Bridgeton National Bank for review of order. On motion by Luther B. Way, trustee, to strike cause from docket and to dismiss petition. Motion granted.

J. D. Hank, Jr., Asst. Atty. Gen., of Richmond, Va., for the motion.

G. R. Swink, of Norfolk, Va., opposed.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. Within four months prior to his adjudication in a voluntary proceeding, the bankrupt executed a deed of trust on certain personal property to secure two notes, amounting to $1,500, given by him to one of his creditors for a debt long overdue, and on which suit had been brought in a state court. The petitioning bank claims to have discounted these notes before maturity, in good faith, and in the ordinary course of business. After hearing the parties in interest, the referee held that the deed of trust was a voidable preference, directed the trustee to administer the proceeds of the property, which had been sold in the meantime, "as unincumbered assets of the bankrupt," and allowed the bank to prove the notes only as an unsecured claim. On March 7, 1918, the decision of the referee was "approved and affirmed" by the District Court. Nine days later, March 16, the bank filed in that court a "petition for review," as it is styled, which recites the proceedings, quotes the conclusion of the court respecting the deed of trust, alleges that it is erroneous in matter of law, and asks that it may be reviewed "by the Circuit Court of Appeals of the Fourth Circuit of the United States." Thereupon the District Court ordered a review by this court of its order of March 7th, and directed the record to be filed with the clerk of this court within 30 days. No petition to superintend and revise has been filed in this court as provided by rule 36 (233 Fed. xx, 146 C. C. A. xx), nor has any appeal to this court been taken. The trustee here moves to strike the cause from the docket and to dismiss the petition.

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There is no need of discussion. It is enough to say that the so-called "petition for review," filed in the court below, was wholly ineffectual to bring the case into this court for any purpose, and consequently there is nothing before us for review. The motion to strike from the docket must therefore be granted, and it will be so ordered. Inasmuch, however, as the time within which an appeal might be taken appears not to have expired, the order will be without prejudice to the right of appeal by the bank, if it be so advised. Whether the question sought to be reviewed can be brought up by appeal we do not decide.

Motion to strike cause from the docket granted.

EASTERN TRANSP. CO. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. April 2, 1918.)

No. 1598.

COLLISION ⊂=153—SUIT FOR DAMAGES—REVIEW ON APPEAL.

Where the decree in a suit for collision has ample support in conflicting evidence, it cannot be reversed by the appellate court.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in admiralty for collision by the Eastern Transportation Company against the United States. From a decree for half damages, libelant appeals. Affirmed.

John Henry Skeen, of Baltimore, Md., for appellant.
Samuel K. Dennis, U. S. Atty., of Baltimore, Md.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. Under statutory permission the Eastern Transportation Company filed a libel against the United States for damages to the barge John T. Donohue caused by collision with the United States steamer C-2 off Smith's Point, Chesapeake Bay. After hearing very conflicting evidence, the District Court found as a conclusion of fact that both vessels were at fault, and charged the United States with one-half of the damages to the John T. Donohue. Discussion of the evidence would be of no value. The conclusion of the District Court, having ample support in the evidence, cannot be reversed by this court.

Affirmed.

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BAY STATE ST. RY. CO. v. RUST.

(Circuit Court of Appeals, First Circuit. June 21, 1918.)

No. 1349.

MASTER AND SERVANT ⟸356—MASTER'S LIABILITY FOR INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT.

Under Rhode Island Workmen's Compensation Act, § 1, providing that it shall not be a defense "that the employé has assumed the risk of the injury," it is immaterial whether the risk was assumed by acts of the employé or by his contract of employment.

In Error to the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Action at law by Cecelia Rust against the Bay State Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William R. Harvey, of Newport, R. I. (Sheffield & Harvey, of Newport, R. I., on the brief), for plaintiff in error.

Everett L. Walling, of Providence, R. I., for defendant in error.

Before BINGHAM and JOHNSON, Circuit Judges, and HALE, District Judge.

HALE, District Judge. The plaintiff below recovered judgment against the defendant, under the Rhode Island Employers' Liability Act (section 14, c. 283, of the General Laws of Rhode Island 1909), as supplemented by the Rhode Island Workmen's Compensation Act (chapter 831 of the Public Laws of 1912), for the death of her husband, Harold H. Rust, on December 11, 1916, alleged to have been caused by the negligence of the defendant, while in its employ as a lineman, engaged in renewing wires on one of its poles in Newport, R. I.

The railroad had not accepted the Workmen's Compensation Act. Section 1 of that act provides as follows:

"In an action to recover damages for personal injury sustained by accident by an employé arising out of and in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense: (a) That the employé was negligent; (b) that the injury was caused by the negligence of a fellow employé; (c) that the employé has assumed the risk of the injury."

The railroad contends that, although the above statute applied, and deprived it of the defense that Rust "had assumed the risk of the injury," still, under its general denial, it is entitled to rely upon a contractual assumption of the risk by him, as opposed to a voluntary assumption of the risk; that, upon the evidence, it appears that he contractually assumed the risk of the dangers which caused his death; and that, at the end of the testimony, the District Court should have directed a verdict for the defendant. This question is raised by the assignments of error.

The issue brought before the court below was the question of the defendant's negligence. The plaintiff stated a case of negligence. In

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the several counts, which we need not recite in detail, it was alleged by the plaintiff in substance: That on December 11, 1916, Rust was a lineman on the defendant's electric railway in Newport, engaged in renewing wires; that the defendant failed to meet its duty of providing him with a reasonably safe place to work; that it set him to work in close proximity with electrical appliances and instrumentalities which were not reasonably safe and suitable; or, if safe and suitable under some circumstances, on the morning in question they were not safely and suitably insulated so as to protect the lineman from dangers of which he was ignorant and of which he was not warned; that the defendant was negligent, in that it failed to insulate dangerous terminals while Rust was working on the top of the pole near such terminals, and in failing to warn him of the dangerous condition of the various terminals. The issue of fact at the trial was the question of defendant's negligence. The plaintiff offered testimony tending to show that Rust was ordered upon a pole by the defendant's foreman, to renew certain wires; that there was on the pole a pothead which was the direct cause of his death; that this pothead was attached by a bracket projecting outward from the second cross-arm; that the pothead was a device for attaching overhead wires to certain other wires which came up the side of the pole inside a lead cable; that these latter wires were not attached to the overhead wires, but were connected in a manhole in the sidewalk to an underground cable which carried a high voltage and was dangerous to human life; that, when not so arranged, these wires did not indicate electrical dangers. There was testimony tending to show that Rust did not have knowledge of certain dangerous conditions to which he was exposed and was not warned. There was also testimony that the potheads were not of a reasonably safe and suitable construction; that they were not properly insulated; and that it was not proper construction to allow exposed contacts to remain with high voltage current running through them, without some means, in the nature of a warning sign, to indicate that they were alive.

The defendant offered testimony to show that the potheads were of the best kind known to the art, that they were properly insulated, that they were kept in a reasonably safe and suitable condition, and that there was some warning given. On the question of negligence there was conflicting evidence. The railroad contends that there was conclusive evidence that its electrical system was of approved construction; that the conditions confronting Rust at the time of the injury presented obvious dangers, which should have become apparent to the lineman by the reasonable exercise of his faculties; that, by his agreement, he contractually assumed the risks from which he suffered injury and death; that the provisions of the Workmen's Compensation Act do not apply, so far as they relate to the taking away of this assumption of risk as a defense, inasmuch as his contract of employment necessarily required him to work around obviously dangerous apparatus; and that defendant is entitled to rely upon this fact under its general denial.

The courts undoubtedly recognize two ways by which an employé may assume the risk of the dangers arising in the course of his em-

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ployment. He may assume a risk by his own acts. He may also assume a risk which is well stated in Tuttle v. Milwaukee Railway, 122 U. S. 189, 195, 7 Sup. Ct. 1166, 30 L. Ed. 1114, in which case Judge Cooley is referred to as saying that, when an employé engages in his employment, he does so in view of all the incidental hazards of the business when reasonably conducted, and that he and his employer, when fixing the terms and agreeing upon the compensation, must have contemplated these hazards as having an immediate bearing upon their agreement; that the employé well knows that he will be exposed to an incidental risk; and that he must be supposed to have contracted that, as between himself and the master, he would run this risk.

In passing the Workmen's Compensation Act, the Rhode Island Legislature was dealing with a matter of public interest, for the protection of a great class of our citizens. Its legislation should not receive a narrow construction. The Legislature used the plain, broad language that in an action to recover damages for personal injuries sustained by accident by an employé, in the course of his employment, it shall not be a defense "that the employé assumed the risk of the injury." The Legislature had before it the well-known condition that there are the two ways which we have mentioned by which an employé may assume the risk of injury; namely, by his acts and by his agreements. Nothing is brought to our attention which tends to the conclusion that the Legislature intended to exclude one way of assuming risk, and to permit another. Nothing before us leads to the inference that the Legislature did not intend to exclude the entire matter of assumed risk, regardless of classifications as to the different ways by which a risk may be assumed. The Legislature may well have had in mind, also, that the master's liability depends upon negligence; and that evidence of negligence is often directed to what an employé is doing under his agreement of service. And it is sometimes of little practical importance whether it be found that a certain risk is assumed, or that, under the contractual relations existing between the master and the servant, no negligence is found on the part of the master. This is illustrated in Ashton v. Boston & Maine Railroad, 222 Mass. 65, 109 N. E. 820, L. R. A. 1916B, 1281, which case is relied on by the defendant. In that case, the Massachusetts court had before it a condition in which the plaintiff's intestate was a foreman in the defendant's employ; he was skilled in electrical matters; he was under the duty of seeing whether the electric wires and appliances within the electric zone were in repair, and to maintain and keep them in repair. When injured, Ashton was in the performance of this duty. In doing it he was killed. The court found that the record did not disclose any evidence of negligence on the part of the defendant. That was the decision of the case. What the court said further, beyond deciding the case, it is not necessary for us to consider. It is clear that if dangers ordinarily incident to a business, when properly conducted, are contractually assumed or, standing alone, are not evidence upon which a finding of negligence on the part of an employer could be predicated, we are not concerned with such a case.

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In the case at bar nothing happened like the facts in the Ashton Case. Rust was a lineman; he was not a hunter for electrical trouble; he was under no duty to discover whether electrical appliances and instrumentalities were out of repair, and, if so, to repair them; he did not go upon the pole to see whether the pothead needed to be repaired or needed any further insulation; he was there to do his duty as a lineman in renewing wires on defendant's poles; and his injury was not due to a danger incident to the business in which he was engaged, when such business was reasonably conducted. There was evidence tending to show that he met his death by reason of the failure of the railroad to exercise the care of a reasonably prudent man in providing suitable electrical appliances and instrumentalities, in keeping them properly insulated, and in sufficiently warning its employé. There was evidence, also, to the contrary. All this evidence was given to the jury under proper instructions by the court below. We find no error in the action of the District Court in such submission of the case to the jury, and in refusing to direct a verdict for the defendant.

The judgment of the District Court is affirmed, with interest; the defendant in error recovers her costs in this court.

LA CROSSE PLOW CO. v. PAGENSTECHER.

(Circuit Court of Appeals, Eighth Circuit. April 11, 1918. Rehearing Denied July 8, 1918.)

No. 4797.

1. APPEAL AND ERROR ⟸866(3)—REVIEW—QUESTIONS PRESENTED.
Where the court directed a verdict for plaintiff, and defendant's motion for directed verdict was unaccompanied by any other request, and neither party requested that any fact in issue be submitted to the jury, the only question for review by the appellate court is whether there is any evidence to support the verdict.

2. TRIAL ⟸177—DIRECTION OF VERDICT—ARGUMENT.
Where each party moved for a directed verdict in its favor, the court had power to direct a verdict, notwithstanding the case had been partially argued to the jury.

3. APPEAL AND ERROR ⟸883—DIRECTION OF VERDICT—PROPRIETY.
Where defendant requested a directed verdict at the close of plaintiff's evidence, and again at the close of all of the evidence, it cannot be heard to say that the case ought to have gone to the jury; plaintiff's motion for directed verdict having been granted.

4. PRINCIPAL AND AGENT ⟸89(8)—COMMISSIONS—SALES AGENT.
In an action for commissions claimed as a sales agent, evidence *held* to warrant a finding that the plaintiff did not agree to wait for commissions until purchase-money notes received by defendants should be paid.

Stone, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action by Louis Pagenstecher against the La Crosse Plow Company, a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

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Charles H. Schweizer, of La Crosse, Wis. (M. A. Hall, of Omaha, Neb., on the brief), for plaintiff in error.

David A. Fitch, of Omaha, Neb. (Raymond T. Coffey and Gurley & Fitch, both of Omaha, Neb., on the brief), for defendant in error.

Before CARLAND and STONE, Circuit Judges, and RINER, District Judge.

CARLAND, Circuit Judge. Defendant in error, plaintiff below, sued the Plow Company to recover commissions claimed to be due him under a written contract as sales agent. The commissions sued for were claimed on sales made to one Howard. They consisted of two items. The first item, of $6,621.09, was for sales for which notes were given by Howard. The second item, of $2,105, was for implements sold to Howard, but taken back by the Plow Company. The contract provided that one-half of the commission should be payable "on receipt of and acceptance of order, balance when accounts are paid or settled by note." The sales were made prior to November, 1912, under a contract dated November 9, 1910, and extended until November, 1912. That the first item and one-half of the second had been earned and were due by November, 1912, is not disputed. The whole contention at the trial was over the question as to whether the plaintiff had agreed to waive the payment of the commissions until the Plow Company had received payment from Howard, there being no evidence that such payment had been received by the Plow Company.

At the close of all the evidence, counsel for both parties moved the court for a directed verdict. The court denied the motion of counsel for the Plow Company, and directed a verdict in favor of plaintiff for the sum of the first item and one-half of the second, with interest, less $876.95, the amount of a counterclaim pleaded by the Plow Company, which was undisputed. The Plow Company has removed the case here assigning the following errors: (a) The refusal to direct a verdict in its favor; (b) the granting of the motion of the plaintiff for a directed verdict; (c) the allowance by the court of interest on plaintiff's demands thereof from December 12, 1912.

[1] The motion for a directed verdict on the part of counsel for the Plow Company was unaccompanied by any other request, and neither party requested that any fact in issue be submitted to the jury. In this condition of the record the only question now open is as to whether there is any evidence to support the verdict. Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; Empire State Cattle Co. et al., v. Atchison, Topeka & S. F. Ry. Co., 147 Fed. 457, 77 C. C. A. 601; Id., 210 U. S. 1, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70; Minahan v. Grand Trunk Western R. Co., 138 Fed. 37, 70 C. C. A. 463; Melton et al. v. Pensacola Bank & Trust Co., 190 Fed. 126, 111 C. C. A. 166; Farmers' & Merchants' Bank v. Maines, 183 Fed. 37, 105 C. C. A. 329; American National Bank v. Miller, 185 Fed. 338, 107 C. C. A. 456; United States v. Two Baskets, 205 Fed. 37, 123 C. C. A. 310; In re Iron Clad Manufacturing Co., 197 Fed. 280, 116 C. C. A. 642; Southern Pac. R. Co. v. United States, 222 Fed. 46, 137 C. C. A. 584; Breakwater Co. v. Donovan, 218 Fed. 340, 134 C. C. A. 148;

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Allegheny Valley Brick Co. v. C. W. Raymond Co., 219 Fed. 477, 135 C. C. A. 189; Anderson v. Messinger, 158 Fed. 251, 85 C. C. A. 468; Western Express Co. v. United States, 141 Fed. 28, 72 C. C. A. 516.

[2, 3] The fact that the case had been partially argued to the jury when the court directed the verdict for the plaintiff does not alter the legal relations of the parties to the record. The power to direct a verdict existed at the time the direction was made. Counsel for the Plow Company, having requested the court to direct a verdict at the close of the plaintiff's evidence and again at the close of all the evidence, cannot be heard to say that the case ought to have gone to the jury. That the plaintiff was entitled under the contract to what the court gave him is undisputed, unless the evidence introduced by the Plow Company, tending to show that the plaintiff had agreed to wait for the amount due him until the Plow Company had received payment for the implements sold, was so clear and undisputed that no verdict in opposition thereto would be allowed to stand.

[4] We proceed, then, to consider whether the evidence upon the subject mentioned was undisputed. In this connection we quote the following from the brief of counsel for the Plow Company:

"The principal issue of fact relied upon by plaintiff in error, and resting in part upon oral testimony which was disputed by the defendant in error, was whether the latter had made an agreement in respect to the Howard commissions to the effect that he would wait for the payment of the same until the Howard notes were paid."

We agree with counsel for the Plow Company that there was a disputed question of fact, and a careful consideration of the evidence convinces that there was evidence to sustain the verdict. We do not think the court erred in regard to the question of interest. The debt on which the interest was allowed was the debt which both parties agreed had been earned December 12, 1912.

The judgment below is therefore affirmed.

STONE, Circuit Judge (dissenting). I am compelled to dissent from the conclusion reached by the majority of the court. To my mind the evidence is conclusive that defendant in error waived the present payment of the sums in suit.

WILLARD et al. v. UNION TOOL CO.

(Circuit Court of Appeals, Ninth Circuit. August 5, 1918. Rehearing Denied October 30, 1918.) No. 3131.

1. PATENTS ⟸90(1)—ANTICIPATION—PRIOR ART.
Where two bona fide applications for patents are pending at the same time, neither is prior in art to the other.

2. PATENTS ⟸90(1)—PRIORITY BETWEEN PATENTS.
When two patents for the same invention have been issued to independent inventors, the rule is that the dates of their inventions are (1) the dates of the patents, (2) the dates of the applications, provided they sufficiently describe the invention, and (3) the dates of actual reduction to practice.

3. PATENTS ⟸90(5)—DATE OF INVENTION—REDUCTION TO PRACTICE.
In the absence of other proof, the filing of application for a patent is taken to be a reduction to practice of the invention.

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4. PATENTS ⊂⇒91(1)—PRIORITY BETWEEN PATENTS—BURDEN AND MEASURE OF PROOF.

As between rival inventors whose applications are pending at the same time, the burden is on him whose application is second to show that he was first to reduce the invention to practice.

5. PATENTS ⊂⇒91(3)—PRIORITY BETWEEN PATENTS—MEASURE OF PROOF.

In a contest between rival inventors for priority of invention, their applications being pending at the same time and both inventors having reduced their conceptions to practice, the one whose application is second, in sustaining the burden of proving that he was the first to reduce the invention to practice, is required to establish his priority only by fair preponderance of evidence and not by proof conclusive in character or beyond a reasonable doubt.

6. PATENTS ⊂⇒26(1)—VALIDITY—COMBINATIONS.

The mere fact that human agency intervenes in an operation does not render a combination unpatentable, nor is it necessary that the action of the elements be simultaneous, nor that one of the elements shall so enter into the combination as to change the action of the others; but it is sufficient if there be some joint operation of the elements producing a result due to their co-operative action.

7. PATENTS ⊂⇒26(2)—"COMBINATION"—NEW RESULT.

To constitute a patentable "combination," the result itself need not be new, but it is sufficient if an old result be produced in a more facile, economical, or efficient way.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Combination.]

8. PATENTS ⊂⇒328—VALIDITY AND INFRINGEMENT—WELL-BORING APPARATUS.

The Willard and Wilcox patent, No. 1,064,270, for a well-boring apparatus, claims 6, 7, 8, and 9, *held* not anticipated, valid, and infringed. Claims 1, 2, 3, 4, and 5 for combinations *held* invalid as not for true combinations in a unitary structure.

9. PATENTS ⊂⇒25—AGGREGATION—DETACHED PARTS.

A well-boring apparatus patent, for combination of a drive bushing device for rotating the string, with "slips" for holding the string in position while removing or restoring it, the slips being removable by hand when not in use, *held* a mere aggregation, and not a combination, since the manual use of a tool or an unattached movable device cannot be made an element of a combination claim.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Edward E. Cushman, Judge.

Suit in equity by Arthur G. Willard and William W. Wilson against the Union Tool Company. Decree for defendant, and complainants appeal. Reversed in part and affirmed in part.

Raymond Ives Blakeslee, of Los Angeles, Cal., for appellants.

Frederick S. Lyon, of Los Angeles, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appeal in this case involves the decrees of the court below in two suits for infringements of patents, namely, Willard and Wilson against the Union Tool Company, and the same plaintiffs against the Oil Well Supply Company and R. H. Herron. Both suits are upon patent No. 1,064,270 issued to Willard and Wilcox on June 10, 1913, on an application filed March 11, 1912. Submitted with these cases in the court below was the case of Griffin et al. v. Wilson et al., upon patent No. 1,067,330, issued

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July 15, 1913, to T. J. Griffin, on his application which was filed October 5, 1911. From the decree in the latter case which held the Griffin patent void as anticipated by the prior art, no appeal has been taken.

The appellants' patent is for a well-boring apparatus, and relates to well borers which are provided with rotary tops whereby the rotation of the boring tool and the string of pipe sections extending from the same is caused; the rig being employed in raising and lowering the boring tool and string in performing the operations incident to drilling. The patent contains two general groups of claims. The second group, which embraces claims 6, 7, 8, and 9, will be first considered. The nature of those claims is fairly represented by claim 6, which is as follows:

"In improvements of the character disclosed, the combination with a rotary table and a well-boring string; of a bushing fitting within the table and formed to surround and grip the string and impart rotation from the table thereto; and a member upon the string formed and disposed in a position to engage with said bushing and withdraw the same from the table upon the elevation of of the string."

The court below found that all of this combination was covered by the patent to Griffin of July 15, 1913, except the last element, the "member upon the string formed and disposed in position to engage with said bushing and withdraw the same from the table upon the elevation of the string," and held that, although that element was not mentioned or claimed in the Griffin patent, it was plainly disclosed therein, and that Griffin had the conception of all the claims involved in the patent in suit at the time of the filing of his application which was prior to the application for the appellants' patent, and that the presumption arose therefrom that Griffin had then reduced the same to practice, and held that where the contest is between a patentee or his successors in interest and another person, or his successors in interest, and such other person has been shown to have reduced to practice the combination claimed prior to the filing date of the application of the patentee, the burden rests upon those suing under the patent to show a reduction to practice prior to that of the alleged infringer, and that, since such reduction to practice was not shown by the high degree of proof required, it followed that the claims of the Willard and Wilcox patent were void. In brief, the position of the trial court was, not that the combination described in the appellants' patent did not involve invention and was not patentable, but that Willard and Wilcox were not the first inventors thereof, and that, since Griffin made no claim for that element of the combination which would have rendered his invention patentable, he thereby relinquished the combination to the public, and all were free thereafter to use it.

The contest here does not arise between two rival patentees. It is not between the owners of the patent to Willard and Wilcox, and a manufacturer under the Griffin patent. It is between the owners of the former patent and persons who are admittedly infringers if the claims of that patent are sustainable. It is not claimed that Willard and Wilcox got from Griffin the idea of their combination, or that they were not original inventors of the same.

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[1] The contention is that inasmuch as Griffin's application for patent was prior in time and therein the combination was described, although one of its elements was not claimed as part of the invention, it follows that Willard and Wilcox were not the inventors of the combination. If it be assumed that the Griffin invention covers the combination here in question, we have the situation of two independent inventors whose applications were pending at the same time, both of whom, in the absence of proof to the contrary, will be presumed to be original inventors. Where two bona fide applications are pending at the same time, neither is prior in art to the other, for neither can know of the contents of the other's confidential communication on file in the Patent Office. Mergenthaler Linotype Co. v. International Typesetting Mach. Co. (D. C.) 229 Fed. 168.

[2, 3] When two patents for the same invention have been issued to independent inventors, the rule is that the dates of their inventions are: (1) The date of the patents; (2) the dates of the applications, provided the application sufficiently describes the invention; and (3) the dates of actual reduction to practice. In the absence of other proof, the filing of the application is taken to be a constructive reduction to practice. In Kearney v. Lehigh Valley R. Co. (C. C.) 32 Fed. 321, 322, Mr. Justice Bradley said:

"The date of the application, if it describes the invention sufficiently, is conclusive evidence that the invention was made prior to such date."

[4, 5] The date of the Willard and Wilcox patent was prior to that of Griffin, but the latter's application was first in time. There was no evidence that the Griffin invention was ever reduced to practice otherwise than by the filing of his application. There was evidence that the Willard and Wilcox invention was reduced to practice prior to the date of Griffin's application; but the court below held that the evidence was not of that high degree which was required, and applied the rule which the appellee herein contends for, that the evidence must be of that conclusive character which is required to establish the defense of anticipation or of prior public use, to which contention the appellee cites authorities which hold that in suits for infringement of patents the defense of anticipation or prior use must be established by proof, clear, positive, and unequivocal, and that nothing must be left to speculation or conjecture. We cannot agree that the rule is applicable here. We think the rule to be applied is that which governs contests between rival inventors for priority of invention whose applications are pending at the same time, which is that, where both inventors have reduced their conceptions to practice, the burden of proof is on him whose application is second to show that he was the first to reduce the invention to practice, and that in sustaining such burden he is controlled by the ordinary rules of courts of law with respect to the burden of proof, and is required to establish his priority only by a fair preponderance of the evidence, and not by proof conclusive in character, or beyond a reasonable doubt. Wurts v. Harrington, 79 O. G. 337, 10 App. D. C. 149; Sundh Electric Co. v. Interborough Rapid Transit Co., 198 Fed. 94, 117 C. C. A. 280; Evans v. Associated Automatic Sprinkler Co., 241 Fed.

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252, 154 C. C. A. 172; Automatic Sprinkler Co. v. Walworth Mfg. Co. (C. C.) 60 Fed. 605.

On behalf of the appellants, testimony was introduced to show that in the summer of 1911 the Wilson & Willard Manufacturing Company, for the appellants, had manufactured and sold devices which embodied all the features of the second group of the claims of their patent. The witness Madsen, owner of the Madsen Iron Works, made the castings for those devices, and he testified that they were made of such diameter that the collar on the pipe would lift the bushing when the stem was raised into the derrick. He produced copies of invoices of castings which he made at different periods between May and September of that year. He testified that the first devices made were not so constructed that the bushing would be lifted when the stem was raised, but that during the summer the change was made, and he was positive that it occurred before September, because on the 1st of September he changed his place of business, and in his memory he associated the making of the devices with his former place of business. E. C. Wilson, the president of the Wilson & Willard Manufacturing Company, testified that one of the devices was so made in the summer of 1911, and that early in the summer it was installed and in operation by the Pacific Light & Power Company in the Salt Lake oil field west of Los Angeles, under the superintendence of M. L. Thorn, and that he saw it there in use. It was in evidence that, at the time of taking the testimony in the case, Thorn was snowbound and inaccessible in the mountains of Nevada, and that, while the case was under submission, the appellants made application for leave to take his testimony, presenting his affidavit in which he deposed that in the summer of 1911, and prior to September he as such superintendent purchased from the appellants and used the rotary well-drilling outfit, with a drive bushing, and that the drive bushing of that outfit was directly engaged and withdrawn by the collar upon the elevation of the drive stem. The application was denied for want of diligence, and because the offered testimony was cumulative. W. W. Wilson, vice president of the Wilson & Willard Manufacturing Company, testified that in August, 1911, he saw in use, under the superintendence of M. L. Thorn, a rotary rig containing the appellants' combination. Charles E. Wilcox, salesman for the Wilson & Willard Manufacturing Company, and one of the patentees, testified that he saw the device in operation by the Pacific Light & Power Company in the spring or summer of 1911, and that it was furnished by the Wilson & Willard Manufacturing Company. Arthur G. Willard, the other patentee, testified that the change in the diameter of the bushing so as to permit it to engage the collar on the stem was made at his direction at the instance of Wilcox from drawings produced by him, and that the first device so made was constructed by the Madsen Iron Works in July, 1911. There was no contradiction of any of this testimony, and it was sufficient we think to sustain the burden of proof and to show that the Willard and Wilcox invention was reduced to practice two or three months before the date of the Griffin application for patent.

Turning to the other group of claims, we find that they are founded on a combination of the drive bushing device with certain devices called

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"slips," which are employed for temporarily gripping the string and holding it suspended at any particular point of elevation. The slips are used in the operation of removing the string from the well and in the operation of restoring it thereto. The purpose is to hold the string firmly in place in order to permit its disjunction piece by piece, or the reconstruction of the same in a similar manner. In that operation the bushing device suspended on a collar of the stem is raised into the derrick, leaving in the rotating table an inverted conical space, in which space the slips are placed by hand around the suspended string. The slips are adapted when in position to form a cylindrical opening slightly less than the outside surface of the pipe. The inner faces of the slips are cut with transverse serrations adapted to grip the outer surface of the pipe and thereby support the weight of the suspended string. The combination claims are fairly presented in claim 2, which is as follows:

"Improvements of the character disclosed comprising in combination with a rotary table, a plurality of means of operative connection between the same and a string and each formed for separate application to the table in substitution for the other, there being interlocking means effective between one of said means of operative connection and the table whereby the string may be rotated upon rotation of the table; the other of said means of operative connection being formed and adapted to coact through the table and with slips to sustain the weight of the string."

The combination claims were held void by the court below on the ground that they present an aggregation and not a patentable combination. Said the court:

"When the slips or wedges are removed from the opening to allow the substitution of the drive bushing or nut, they are removed by hand and laid aside, here or there; far or near, as chance and the inclination of the operator may determine, leaving them, for the time, to be a part neither of this or any other machine, becoming a separate tool to be gone in search of when again needed, recovered, returned, and again placed by hand in the opening before assuming any relation to the rest of the machine."

And the court held that the mere fact that the opening in the table may be formed to accommodate in succession both the drive bushing for rotating the string, and the slips for hauling it up, does not render the table, the stem, the drive bushing, or the slips any part of one combination.

[6, 7] As we read the letters patent, the invention claimed is a combination of elements to be used in connection with a rotary well-drilling apparatus, to facilitate changing from the operation of drilling to the operation of removing the drill string from the well, and vice versa, and its function is fulfilled in the accomplishment of those results. The actual drilling of a well is only incidental, and is a function aside from that of the combination. It is not therefore a combination of a rotary boring device with a device for holding the boring pipe in position for disintegration or reconstruction, but it is a combination of certain features only of a boring device with a device for holding the same in position for a designated purpose. The mere fact that human agency intervenes in an operation does not render a combination unpatentable. Nor is it necessary that the action of the elements be simultaneous. Pelton Waterwheel Co. v. Doble, 190 Fed. 760, 111 C. C. A. 488; Burdett-Rowntree Mfg. Co. v. Standard Plung-

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er E. Co. (C. C.) 196 Fed. 43; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 C. C. A. 516; Krell Auto Grand Piano Co. v. Story & Clark Co., 207 Fed. 946, 125 C. C. A. 394. Nor is it necessary that one of the constituent elements shall so enter into the combination as to change the action of the others. International Mausoleum Co. v. Sievert, 213 Fed. 225, 129 C. C. A. 569. It is sufficient if there be some joint operation performed by the elements producing a result due to their co-operative action. National Cash Register Co. v. American Cash Register Co., 53 Fed. 367, 3 C. C. A. 559; Toledo Computing Scale Co. v. Moneyweight Scale Co. (C. C.) 178 Fed. 557; New York Scaffolding Co. v. Whitney, 224 Fed. 452, 140 C. C. A. 138; Ohmer Fare Register Co. v. Ohmer, 238 Fed. 182, 151 C. C. A. 258. And the result itself need not be new. It is sufficient if an old result be produced in a more "facile, economical, or efficient way." New York Scaffolding Co. v. Whitney, supra; Pelton Waterwheel Co. v. Doble, supra.

[8, 9] But the difficulty in the way of sustaining the appellants' claims is that they do not exhibit a true combination. Under the patent laws protection is afforded to an invention or improvement of an art, machine, manufacture, or composition of matter. In Yale & Greenleaf Manufacturing Co. v. North, 5 Blatchf. 455, Fed. Cas. No. 18,123, Judge Shipman said:

"A combination in mechanism must consist of distinct mechanical parts, having some relation to each other, and each having some function in the organism."

Says Robinson, section 153:

"A combination is an instrument or operation formed by uniting two or more subordinate instruments or operations in a new idea of means."

Here the elements are not contained in a unitary structure, and the instrument is not formed by uniting two or more subordinate instruments. The device for holding the pipe string in position is a detached instrument which is no part of a machine or manufacture. The manual use of a tool or an unattached movable device cannot, we think, be made an element of a combination claim.

The decree as to claims 1, 2, 3, 4, and 5 is affirmed. As to the other claims, the decree is reversed, and the cause is remanded for further proceedings.

LIQUID CARBONIC CO. et al. v. GILCHRIST CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1918. Rehearing Denied March 11, 1918. On Petition for Modification, May 1, 1918.)

No. 2504.

1. PATENTS ⟸26(2)—VALIDITY—"INVENTION."

While one who, by enlarging the size of a patented article, makes it suitable for a new use, is not entitled to a patent, yet, where the inventor combines a new element with the old device, whereby a new and useful result is obtained, there is "invention," which is patentable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Invention.]

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2. PATENTS ⊂⇒328—VALIDITY—INFRINGEMENT.

The Berman patent, No. 962,300, for a dispensing apparatus for use at bars and soda fountains, to contain straws for drinking purposes, *held* valid and infringed as to claim 2, though invalid as to claim 1.

On Petition for Modification.

3. PATENTS ⊂⇒325—EXCESSIVE CLAIM—DISCLAIMER—COSTS.

Where, through inadvertence, etc., a patentee has claimed that of which he was not the first inventor, he cannot, under Rev. St. § 4922 (Comp. St. 1916, § 9468), recover costs for infringement of the valid portion of the patent, where his disclaimer was not filed prior to the beginning of suit.

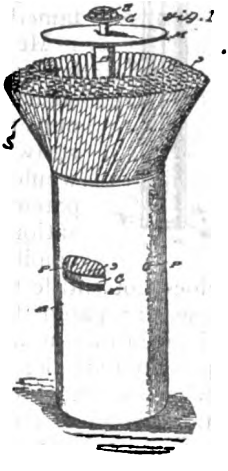
4. PATENTS ⊂⇒156—EXCESSIVE CLAIMS—INFRINGEMENT—DISCLAIMER.

Under Rev. St. §§ 4917, 4922 (Comp. St. 1916, §§ 9462, 9468), where a patentee through inadvertence, etc., claimed that of which he was not the original discoverer, but a disclaimer was not filed before suit, no recovery by the patentee for infringement of the valid portion of the patent can be allowed, unless disclaimer be filed within a reasonable time.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Gilchrist Company against the Liquid Carbonic Company and William J. Eisenhardt. From a decree for complainant, defendants appeal. Reversed, with directions.

The patent involved is for a straw dispensing device for use at bars, soda fountains, and the like, to contain straws used for drinking purposes, so that customers may take some therefrom, leaving the rest covered and protected. A patent therefor, No. 962,300, was issued to Berman June 21, 1910. The device is shown in patent Fig. 1.



C is the plate or straw holder, attached in its center to rod *B*, which, by grasping the handle *H*, is moved up or down within the outer cylinder *A*. Cover *M* is attached to the upper part of the rod just below the handle, so that, when the holder *C* is lowered to the bottom of the cylinder, the cover engages the top of the cylinder, closing it to air, dust, flies, etc. Indentations *P* in the cylinder arrest at the proper point the upward movement of the plate or holder. When the handle is raised, the straws *SS* are placed in the cylinder, resting on the plate or holder. They naturally spread out at the top and arrange themselves in spiral form, as shown in Fig. 1. Releasing the handle, the holder drops, and with it the straws, which in descending contract together in the cylinder, and when they reach the bottom are wholly contained within it; the cover closing over the top. When it is desired to use a straw, the customer or the attendant at the bar lifts the handle, and when high enough the straws spread out as shown, one or more are withdrawn, and the handle released, whereupon the straws again drop into the cylinder as before.

The two claims of the patent are alleged to be infringed. They are:

"1. In a dispensing apparatus, an outer cylinder having a perforation in its bottom, a carrier comprising a central rod, a lower plate arranged to fit within said outer cylinder, an upper plate secured to said rod and constituting a cover for said outer cylinder, and an integral handle projecting upwardly from said cover.

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"2. In a straw dispensing device, an outer cylinder, a carrier comprising a central rod, a lower plate arranged to fit within said cylinder secured to said rod and constituting a support for the straws, an upper plate secured to said rod and constituting a cover for said cylinder, an upwardly projecting handle for said cover, and means carried by said outer cylinder for limiting the movement of the carrier."

The defense is invalidity of the patent, on the prior art, and noninfringement. The District Court found both claims valid and infringed, and decreed accordingly.

George P. Fisher, of Chicago, Ill., for appellants.
Fred Gerlach, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1, 2] The nearest citation in the prior art, and the one mainly relied on for reversal, is McIntyre, No. 629,586, 1899. It assumes to be in the "box or case" art, and to relate more particularly to boxes "adapted to receive and hold pencils, penholders, rules," etc. Fig. 2 of that patent shows the device.



The rod *B* is connected with the top *G*, which serves also the purpose of a handle to grasp it, and to the lower disk *C*. When *G* is grasped and raised it also raises disk *C*, bringing up and exposing pencils, etc., which have been placed within the cylinder *A*, and when *C* is lowered the contents are retained wholly within the then covered cylinder.

McIntyre's device, used as a "scholar's companion" for holding pencils, etc., clearly presents in reduced form the structure of Berman's claim 1. If McIntyre's device had only to be made on a larger scale, in order to use it as a straw dispenser, as described in Berman's claim 1, the latter would not be patentable over McIntyre. The fact that a patented article, without addition, subtraction, or reorganization, except to change its size, may be suited to a use wholly different from that contemplated by its inventor, does not entitle the one who so enlarges it, and subjects it to the new use, to a patent for the enlarged device. But if, to adapt the patented device to the new use, an element must be brought in, not found in the patented article, the combining of the new element with the old device, whereby a new and useful result is obtained, generally involves invention, which is patentable.

Unlike McIntyre's device, which was evidently designed for the individual use of its possessor, Berman's contrivance is intended to be placed on bars and counters where the public may operate it, helping themselves to straws as may be required for use in drinking. If just the enlarged McIntyre box were devoted to this use, it would find serious handicap in the fact that, in lifting the straws, they would frequently be raised too high, thereby causing them to fall out of the cylinder onto the bar or floor, exposing them to unsanitary conditions, subjecting them to breakage, and involving the annoyance and labor of gathering them up and replacing them in the cylinder, perhaps only to be thrown out again by the next user. If Berman may be said to

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have had the McIntyre device in mind, he not only conceived its possible adaptability to the new use, but realized that to make practical and successful the intended new use would require a limitation on the upward movement of the straws to avoid the danger of spilling them out of the cylinder. This result he achieved by the very simple expedient of making indentations in the cylinder at places where the straws would be prevented from going higher than just high enough to spread them so the customer may withdraw such as he desires, retaining the others in the cylinder, without danger of their being thrown out through being lifted too high.

Appellant maintains that the expedient of an indentation for such a purpose is so old and so simple that its employment would not involve invention. Considered merely as an element in a device this is undoubtedly true. But, simple as it is, it remained for Berman to conceive, not only the possibility of the McIntyre device in this new use, but also the additional element essential to make the new structure practical and desirable for that use. In this we find Berman exercised invention which was patentable, and which is covered by his claim 2. Claim 1 omits this added element. Respecting the validity of the patent, we therefore conclude that claim 2 is valid, and that claim 1 is invalid on McIntyre.

To escape the charge of infringement, it is claimed appellant's device does not show that the lower plate or holder "fits" in the cylinder, as stated in claim 2, and does not have "an upper plate secured to said rod." We do not think that the word "fit," as employed in claim 2, is to be considered as indicating such a fitting of parts as might be implied between a steam cylinder and its piston, but must be considered with reference to the object of the patent and the function of the plate or holder in such structures. There is no reason why the fit of the plate or holder in the cylinder should be exact, and difference shown in this regard between appellant's and appellee's device is not at all functional or essential. Appellant does not avoid infringement by fitting his plate within the cylinder more loosely than the patentee seems to have done. Appellant's upper plate or lid does not appear to be rigidly secured to the rod, but it is slidably secured to it. The lid could not be removed from the rod without removing screws or cutting the metal. The construction of appellant's device is such that the user must lift a handle at the upper part of the lid. But in lifting this handle he must at the same time lift the rod thus slidably secured to it, and in lifting the rod he lifts the lower plate on which the straws repose, and he thus lifts and exposes the straws in the precise manner of Berman's claim 2. Therefore to all intents and purposes appellant's lid is secured to the rod the same as is Berman's. It accomplishes the same result and in the same manner, and does not escape infringement merely because, after his lid is raised, there is the possibility of an additional movement by sliding the lid down the rod. This slidability in appellant's device is protected by a junior patent grant to Eisenhardt, No. 1,195,451, 1916; and, while this may show improvement of decided merit, which is not necessary here to be considered, yet, in so far as appellant's device incorporates the Berman conception of a rod to be

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lifted at its upper end whether by grasping a handle integral with the rod proper, or a handle on the upper end of the lid, which engages the rod, it infringes in this respect. The alleged infringing device incorporating as it does, also, the indentations in the outer cylinder for arresting at the proper place the upward movement of the plate or strawholder, we find claim 2 is infringed.

The decree of the District Court should be modified, by finding claim 1 invalid, and, as so modified, it is affirmed.

On Petition for Modification.

[3, 4] Petition for modification of the order of this court directs attention to sections 4917 and 4922, Rev. Stat. U. S. (Comp. St. 1916, §§ 9462, 9468) (see margin[1]) and it is urged there should be no decree in appellee's favor under valid and infringed claim 2 of the patent, unless claim 1, which we found to be void, was disclaimed as in these statutes provided, and that in no event is appellee entitled to recover any costs.

That under the circumstances indicated in these statutes, benefit of any recovery by the patentee is denied unless or until disclaimer is filed, and that he is entitled to recover no costs where disclaimer is not filed prior to the beginning of the suit, appears to be too well settled by the statutes and the decisions applying them, to require further elucidation. Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; Gage v. Herring, 107 U. S. 640, 2 Sup. Ct. 819, 27 L. Ed. 601; Seymour v. McCormick, 19 How. 96, 15 L. Ed. 557; O'Reilly v. Morse, 15 How. 62, 14 L. Ed. 601; Westinghouse v. Cooper, 245 Fed. 463, 157 C. C. A. 625; Cummer & Son v. Atlas Dryer Co., 193 Fed. 993, 113 C. C. A. 611; Herman v. Youngstown Car Co., 191 Fed. 579, 112 C.

[1] Sec. 4917. Whenever, through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, a patentee has claimed more than that of which he was the original or first inventor or discoverer, his patent shall be valid for all that part which is truly and justly his own, provided the same is a material or substantial part of the thing patented; and any such patentee, his heirs or assigns, whether of the whole or any sectional interest therein, may, on payment of the fee required by law, make disclaimer of such parts of the thing patented as he shall not choose to claim or to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent.

Sec. 4922. Whenever, through inadvertence, accident, or mistake, and without any wilful default or intent to defraud or mislead the public, a patentee has, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor or discoverer, every such patentee, his executors, administrators, and assigns, whether of the whole or any sectional interest in the patent, may maintain a suit at law or in equity, for the infringement of any part thereof, which was bona fide his own, if it is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right, notwithstanding the specifications may embrace more than that of which the patentee was the first inventor or discoverer. But in every such case in which a judgment or decree shall be rendered for the plaintiff no costs shall be recovered unless the proper disclaimer has been entered at the Patent Office before the commencement of the suit. But no patentee shall be entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer.

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C. A. 185; Novelty Glass Co. v. Brookfield, 172 Fed. 221, 97 C. C. A. 25; Fairbanks, Morse & Co. v. Stickney, 123 Fed. 79, 59 C. C. A. 209; Metallic Extraction Co. v. Brown, 110 Fed. 665, 49 C. C. A. 147.

Claim 1, which we found void, is material and substantial, though it does not appear that the claim was made through "any willful default or intent to defraud or mislead the public," but rather "through an inadvertence, accident or mistake." No disclaimer of it appearing to have been entered as in the statutes provided, but no unreasonable delay or neglect therein appearing, the order we heretofore made must be and is set aside, and in lieu thereof we make the following order:

The decree of the District Court is reversed, and appellee shall have 60 days after mandate herein is filed in the district court, in which to file there a certified copy of disclaimer of claim 1 of the patent which disclaimer is to be entered in the United States Patent Office; and on the filing of such certified copy of disclaimer the District Court shall enter the usual decree for injunction and accounting under claim 2 of said patent, without costs to appellee. Failing to enter and to file such disclaimer as prescribed, the bill shall be dismissed at appellee's costs. Neither party shall recover costs of this appeal.

WATERBURY FARRELL FOUNDRY & MACHINE CO. v. E. J. MANVILLE MACH. CO.

(Circuit Court of Appeals, Second Circuit. April 25, 1918.)

No. 235.

Appeal from the District Court of the United States for the District of Connecticut.

Bill by the Waterbury Farrell Foundry & Machine Company against the E. J. Manville Machine Company. From a decree for defendant, complainant appeals. Affirmed.

For opinion below, see 253 Fed. 59.

P. Farnsworth, of New York City (J. Edgar Bull, of New York City, of counsel), for appellant.

Wetmore & Jenner and Oscar W. Jeffery, all of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

WATERBURY FARRELL FOUNDRY & MACHINE CO. v. E. J. MANVILLE MACH. CO.

(District Court, D. Connecticut. September 13, 1917.)

No. 1464.

1. PATENTS ⟸174—MINOR IMPROVEMENTS—CONSTRUCTION.
Claims in patents for minor improvements in an art already well understood should be strictly construed.

2. PATENTS ⟸246—INFRINGEMENT—OMISSION OF ELEMENTS.
The omission of one element of a claim to a patent averts infringement.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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3. PATENTS ⊂=328—INFRINGEMENT—MACHINES.

Patent No. 1,108,958, for an improvement in die blocks used in metal heading machines, *held* not infringed by patent No. 1,166,668, for an improvement in swinging die caps for heading machines.

In Equity. Bill by the Waterbury Farrell Foundry & Machine Company against the E. J. Manville Machine Company to enjoin infringement of a patent and for accounting. Bill dismissed.

Decree affirmed 253 Fed. 59, — C. C. A. —.

Philip Farnsworth, of New York City, for plaintiff.

Oscar W. Jeffery, of New York City, for defendant.

THOMAS, District Judge. This case arises on final hearing on pleadings and proofs on a bill of complaint charging infringement of letters patent of the United States No. 1,108,958, issued September 1, 1914, to Richard Lester Wilcox, assignor to the Waterbury Farrell Foundry & Machine Company, for new and useful "improvement in die blocks" used in metal heading machines. The bill asks for an injunction and an accounting. The answer denies the material allegations of the bill, and the defense is that the patent in suit, if construed so broadly as to include the defendant's structure, lacks patentable novelty, and, if strictly construed, as the defendant insists it should be, by reason of the prior art, the proceedings in the Patent Office, and the self-imposed limitations in the specification and the claims, it is not infringed.

The invention, as stated in the specification—

"relates to a die block of the type used in a heading machine for holding the dies, and has for its object, among other things, to so design and construct the several parts of the block that the body member thereof may be attached to the header, and not require removal therefrom to adjust the dies, or for any similar reason, and to connect therewith a cap or cover that may be readily moved into and out of its closed position, without separation from the body member, and with the minimum labor and inconvenience."

The patentee, in the specification, continues and says:

"My invention consists in the die block, having certain details of construction and combinations of parts, as will be hereinafter described and more particularly pointed out in the claims."

The claims alleged to be infringed are the first, third, and fourth, which are as follows:

"1. In a die block, the combination, with a body member, of a cap pivotally connected therewith, and means for securing said cap to said body member in its closed position."

"3. In a die block, the combination with a body member, having two walls at an angular relation to each other, of a cap, means for pivotally securing said cap to said body member, and threaded means for securing said cap to said body member when in its closed position.

"4. In a die block, the combination with a body member of a cap, means for inseparably and movably securing said cap to said body member, whereby it may occupy at different points of its movement a closed or an open position in relation to said body member, and means for securing said cap to said body member when in its closed position."

Thus it will be seen that the invention of the patent in suit is limited to a die block. The title of the invention is "die block." In the

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specification, the patentee says he has invented "new and useful improvements in die blocks"; that the "invention * * * relates to a die block"; that "my invention consists in the die block." And further on in the specification, in speaking of the prior art, he says:

"The prior art discloses generally two types of header die blocks, one type requiring removal of the block with its connecting parts, as a unit, from the header to have access to the dies, an operation requiring much labor and strength, and involving serious difficulties in the fine relative adjustment of the several parts; another type, differing only in that the body of the die block is held within the header while the cover or cap is removed therefrom."

The patent in suit is for an improvement on the latter type of block. That type of die block was patented to the patentee herein on August 13, 1912, by patent No. 1,035,400, which, according to the specification, related—

"to new and useful improvements in die blocks * * * and has for its object * * * to construct such a block, with readily detachable parts, so as to allow convenient and quick access to the dies without removal of the entire block from the machine."

The evidence in this case shows that the art of upsetting the ends of metal pieces by heading machines is very old. All headers have punches and dies, and blocks or other means for supporting and holding the dies while the punches are acting. The Wilcox patent, No. 1,035,400, was for one particular means for supporting and holding header dies, to wit, a die block with a removable cover, and the Wilcox patent in suit is for an improvement on the die block, with the cover hinged thereto, instead of removable therefrom. In both patents, Wilcox pointed out a number of times that he had made an improvement in die blocks. This is the only thing he emphasized, and he obtained his patents based on claims for improvements in die blocks.

At the time the Wilcox patents were issued, the defendant was manufacturing and selling a heading machine, under the Campbell patent, No. 926,170, which had as one of its characteristics an integral die recess; that is, a recess for holding the dies formed directly in the walls of the frame. In this recess was a cover which was movable, so as to permit easy access to the dies without lifting the cover from the recess. No such thing as a die block was used in the Campbell machine. In 1914 the defendant adopted, and has ever since used, a cover for the dies which is hinged directly to the frame of the machine. This cover is turned up and out of contact with the dies, and down and fastened over them as desired; and it was for this structure, on the application of A. H. Gaess, that patent No. 1,166,668 was issued on January 4, 1916, to the defendant. This patent is for a "improvement in swinging die caps for heading machines." It is stated in the specification of this patent that the invention relates to a metal heading machine of the class shown in the Campbell patent, No. 926,170. In referring to this old type of machine, Gaess stated that the dies are "set into a pocket in the end of the frame, which pocket has end, side, and bottom walls integral with the frame, and a cap is placed in the pocket and bolted down on the top of the dies." The improvement which Gaess conceived was to hinge the cap directly to the frame, so the die recess could be opened without removing the cap from the machine, instead of, as in the Camp-

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bell patent, having the cap slide on the frame, so the die recess could be opened without removing the cap from the machine.

When the Wilcox patent in suit was cited against the application of Gaess, the Patent Office properly allowed the patent to Gaess, for all the claims made by Wilcox were based on a die block having a body member and a cap hinged to said body member, whereas all of Gaess' claims were based on the combination with the frame, of the cap hinged to the frame, as will clearly appear from a reading of the first claim of the Gaess patent, which is as follows:

"1. The combination with the frame of a heading machine having a die pocket in one end, of the dies located in said pocket, and a cap hinged to the frame and adapted to be swung down and fastened in said pocket over the dies, or to be unfastened and swung back out of the pocket, so as to free the dies."

This claim described defendant's structure. It therefore appears that the complainant's and defendant's structures are not the same, and that the patent to Gaess was issued, not as an improvement over Wilcox's structures, but as an improvement on an entirely different structure, viz. a machine which has no die block, but has the die pocket in the machine frame. In other words, the Gaess patent was for an improvement on the structure shown in the early Campbell patent, whereas the Wilcox patent in suit is for an improvement on the die block of the Wilcox first patent.

In Thacher v. Transit Construction Co. (D. C.) 228 Fed. 905, this court said:

"Furthermore, the patentee must be presumed to have meant what he said. He has described a particular construction, and in his claim he has stated that it is this particular construction upon which he desired to secure a monopoly. Such self-imposed limitations are always recognized as precluding a patentee from showing that the invention is broader than his claims, and, if broader, he must be deemed to have surrendered the surplus to the public. Railroad Company v. Mellon, 104 U. S. 112, 119, 26 L. Ed. 639; White v. Dunbar, 119 U. S. 47, 51, 52 [7 Sup. Ct. 72, 30 L. Ed. 303]; McClain v. Ortmayer, 141 U. S. 419 [12 Sup. Ct. 76, 35 L. Ed. 800]."

[1] I cannot escape the conclusion that the defendant does not use a die block, and, not using a die block, it does not use the invention described in the specification and clearly defined by the patentee in the claims of the patent in suit. Claims in patents for minor improvements in an art already well understood should be strictly construed. American Graphophone Co. v. American Parlorgraph Co., 235 Fed. 137, 148 C. C. A. 631; Murray v. Greeno, 234 Fed. 91, 148 C. C. A. 107.

[2] The omission of one element of a claim averts infringement. Walker on Patents, § 349; Cimiotti v. American Fur Refining Co., 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100; Hall Mammoth Incubator Co. v. Teabout, 215 Fed. 109, 131 C. C. A. 417; Underwood Typewriter Co. v. Royal Typewriter Co., 224 Fed. 477, 140 C. C. A. 163; Evans et al. v. Hall Printing Press Co., 223 Fed. 539, 139 C. C. A. 129.

[3] I am of the opinion that defendant does not infringe the claims of the patent in suit, and in view of this conclusion it is unnecessary to discuss the other claims made by counsel.

Let the bill of complaint be dismissed. Ordered accordingly.

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I. T. S. RUBBER CO. v. PANTHER RUBBER MFG. CO.

(District Court, D. Massachusetts. May 20, 1918.

No. 740.

PATENTS ⇐328—VALIDITY—INFRINGEMENT.

The Tufford patent, No. 1,177,833, for a mold for making rubber heels, claim 11 of which specified a mold chamber having one wall convex and the other concave, *held* invalid, and further *held* not infringed, if deemed limited to the particular structure shown and described in the patent.

In Equity. Suit by the I. T. S. Rubber Company against the Panther Rubber Manufacturing Company. On hearing on pleadings and proof. Bill dismissed.

Nathan Heard and Frederick A. Tennant, both of Boston, Mass., F. O. Richey, of Elyria, Ohio, Maurice M. Moore, of Boston, Mass., and Charles A. Brown, of Chicago, Ill., for plaintiff.

Horace Van Everen and Van Everen, Fish & Hildreth, all of Boston, Mass., for defendant.

DODGE, Circuit Judge. The plaintiff in this bill, filed July 20, 1916, owns United States patent No. 1,177,833, issued April 4, 1916, to John G. Tufford, assignor to the plaintiff company, for mold for making rubber heels. As the case was presented at the hearing, the plaintiff contended that only one of the twelve claims of the patent had been infringed by the defendant, viz. claim 11, which is as follows:

"11. A mold for forming heel lifts, including assembled parts, one of which is provided with a molding chamber having the general outlines of a heel lift, one wall of the molding chamber being concave, and the opposed wall of said chamber having a convex surface coacting with said concave wall, one of said walls being provided with washer supporting devices."

September 18, 1916, in compliance with an order of court, the plaintiff specified, as the structure which it would "contend at the hearing constitutes an infringement," the mold structure illustrated in certain annexed drawings, marked "Plaintiff's Exhibit 1, Sheets 1 and 2."

December 4, 1916, in answer to interrogatories filed by the plaintiff, the defendant produced a three-part rubber heel mold, marked for identification "Defendant's Mold," and admitted that said mold, or others identical therewith, were used by it since April 4, 1916, and prior to the filing of the bill.

Assuming the validity of the above-quoted claim in suit, according to its broad terms, there seems to me no doubt that molds like the one marked "Defendant's Mold," which are, for all essential purposes, such molds as the above drawings marked "Plaintiff's Exhibit 1" show are within the terms of the claim, so that their use by the defendant would have to be regarded as an infringing use.

A question of more difficulty, however, arises as to the validity of the claim in issue, which is denied by the defendant.

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In the plaintiff's patent a mold said to embody the patented invention is described, with references to drawings which show both a "mold unit" and an "assembled multiple or gang mold." The mold so shown and described has certain features to which no reference is made in the above claim in suit, although they appear as elements of other claims of the patent not here in suit. The mold shown and described is a three-part mold, consisting of a base plate, an intermediate plate, and a top plate. Claim 11 purports to cover any mold for forming heel lifts, without regard to the number of parts composing it, in one part whereof there is a molding chamber having the general outline of a heel lift, one wall of which chamber is concave, the opposed wall convex and coacting with the concave wall, and one of the two walls provided with washer supporting devices.

The first inquiry is as to the substantial difference between a mold having the above-claimed features and heel lift molds previously known and used.

Heel lift molds for forming rubber heels, whose molding chamber had the general outline of a heel lift, were and long had been familiar. In most of them, one or both the opposed walls of the molding chamber were flat. In some, one of the walls, being that intended to form the top of the heel lift, had a projection or convexity, while the opposed wall, intended to form the bottom of the heel lift, was flat. From such molds, molds satisfying the requirements of the claim in suit differ only in having the opposed wall of the molding chamber and intended to form the bottom of the heel lift concave, instead of flat, and thus coact, if so shaped, with the convexity opposed to it. As to the washer-supporting devices wherewith one wall of the chamber is to be provided, according to the claim in suit, they were familiar in the prior molds referred to and can be regarded as a novelty, if at all, only in combination with the other features of the claim.

In molds for forming articles of molded rubber other than heel lifts, the idea of having one wall of the molding chamber convex, so as to coact with a concave opposing wall, was old; as is shown by Defendant's Exhibits I, K, M, and O, and by the evidence relating to those exhibits. There would be difficulty, in any event, in discovering anything amounting to invention in merely making one wall of a heel lift molding chamber, having a convex wall opposed to it, concave instead of flat, as in the prior heel lift molds above referred to; but whether or not to do this could be regarded as patentably new, if Tufford had been the first to do it, need not be determined, because the evidence satisfies me that it had been done long before the patent in suit issued, in molds like "Defendant's Exhibit Nerger Mold," made and used by Morgan & Wright Company, at their factory in Chicago, between 1897 and 1902.

The evidence regarding such molds and their prior use was taken under an order made herein on July 24, 1917, upon a motion by the defendant to reopen the case for the introduction of newly discovered evidence, filed July 3, 1917, after completion of the original hearing on June 14, 1917. By stipulation between the parties, the

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evidence consists of the defendant's affidavits in support of said motion, the plaintiff's answering affidavits, and defendant's reply affidavits. The Nerger mold, produced as an exhibit, answers, so far as I can see, each and every requirement of the plaintiff's claim 11 here in suit. It is a single cavity mold, or mold unit. With it, or molds like it, were made over 2,000 heels, upon Nerger's order, of merchantable quality so far as appears. There was no concealment regarding their manufacture, and it was known to Nerger himself and to a number of employés of the Morgan & Wright Company, who have testified about it. Specimens of them are exhibits in the case. The heels produced were made under United States patent to Nerger, No. 661,129, issued November 6, 1900, for an improvement in rubber heel lifts. There is evidence that the mold produced many imperfect heels, and that the cost of the heels produced was too great for profit. But this was partly because of the fact that it is more economical to use multiple molds than single unit molds—a fact which seems to me immaterial upon the question here involved, because there can be no invention in combining single into multiple molds. I see no reason to doubt that the Nerger mold, properly adjusted and handled, is entirely capable of producing satisfactory heels. In 1916 Nerger sold his patent to the plaintiff in this case, together with six of the molds which had been used by Morgan & Wright in the manufacture above described. Although Nerger does not appear to have further continued the use of his mold in making heels, I am unable to hold that, as the plaintiff contends, it was merely an unsuccessful and abandoned experiment. Upon the evidence regarding it, I must regard his mold as an anticipation of the structure covered by the plaintiff's claim in suit sufficient to prevent any conclusion that the claim covers anything involving invention or patentably new. The mold described in the patent has various features to which the claim in suit makes no reference, as further stated below; but these, as will also appear, are not found in the defendant's mold.

The plaintiff's evidence sufficiently shows that concavo-convex heel lifts, such as may be made by using the mold described in the patent in the manner therein set forth, have had great commercial success and possess qualities rendering them superior to heel lifts not shaped as the patented mold shapes them, and made according to the method which the patent describes.

But, although the plaintiff is understood to have a patent purporting to cover such heel lifts, it is not complaining in this suit of any infringement of that patent. Nor is the patent upon which it sues in this case a patent for a method or process. It is a patent for a mold only, and for the purposes of this case, for a mold having only the features specified in claim 11.

The patent, it is true, contains a full description of a method or process which includes use of the patented mold. It contains also a full statement and explanation of the advantages claimed to reside in such heel lifts as are so produced. But all this cannot make it a patent for anything beyond the mold described, nor import into the broad

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terms of the particular claim in suit anything not fairly expressed by those terms in connection with the description given of the patented mold.

The patentee begins his specification by saying that his improvement in molds relates to the manufacture of resilient heels, and has special reference (1) "to the method of acting upon the plastic rubber or composition to produce a heel," and (2) "as the mold employed in practicing the method." But, as has been stated, neither the patent nor the claim in suit cover a method, although a method is thus put forward as the most important feature of the invention.

The specification goes on to declare that the object of the invention is to produce a resilient heel which will have its attaching face concave throughout its area, so that a vacuum or suction cup may be formed whereby it will be held to the shoe temporarily until the nails can be applied, and that a further object is to produce a heel which will have a flat tread surface when applied to a shoe, and which may be equipped with fastening devices so located that it can be easily trimmed down. But, as has been stated, the patent cannot be treated as for a product, either of the unpatented method set forth at length in the specification, or of the patented mold.

After describing the mold, which, and not the heel to be produced by means of it, must be regarded as the only improvement in manufacture which the patent can cover, the specification proceeds to describe "the practice of the invention." The invention being for present purposes a mold, and nothing more, this description of a method wherein the mold is used is significant only so far as it tends to describe the alleged new mold by describing its operation in use.

According to said description, rubber or composition is to be placed in the chamber of the mold so as to completely fill its opening. This is the chamber having, according to claim 11, the general outline of a heel lift and one concave wall. A top plate forming the opposed wall of the chamber, and having a convex surface coacting with the concave wall, is then to be put in position, with its convex projection entering a depression which surrounds the molding chamber. To this depression claim 11 makes no reference, nor is there any such depression to be found in the defendant's mold.

The specification provides that the recess or cavity forming the concave wall of the molding chamber is to be "a true section of a sphere," and also that the convex surface of the projection on the under side of the top plate, which is to form the opposed wall, is also to be "a true section of a sphere and an exact complement of" the concave wall of said chamber wherewith it is to coact. It further provides that said convex surface is to be "adapted to fit in the concave depression" surrounding the molding chamber and referred to in the preceding paragraph hereof. Nothing of all this is to be found either in the claim in suit, or in the defendant's mold. From that mold, not only is any depression surrounding the molding chamber absent, but neither the convex nor concave wall thereof can be properly described as a true section of a sphere.

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The description requires the plates composing the mold to be steam heated, and, when the mold is filled, subjected to hydraulic pressure, so as to compress and solidify the plastic contents of the mold. It may be taken for granted that any mold for making rubber heels would be treated, when in use, substantially in the same way. There is a statement that surplus material overflowing in the process is to be accommodated in an annular cavity surrounding the above depression which surrounds the molding chamber, therein forming a "fin" to be trimmed off before marketing the product. No such annular cavity is referred to in claim 11 or found in the defendant's alleged infringing mold. According to further statements in the specification, by means of ribs upon the top plate of the mold, about which claim 11 is silent, and which are also absent from the defendant's mold, grooves in the upper face of the heel will be produced, which will "mark off separate suction areas at the center of the heel." And finally, the pins—i. e., the "washer supporting devices"—of claim 11, are to "converge on radii of the arcs described by the concavity from which they rise, and thus form openings in the heel converging toward the concave or attaching face thereof, brought into parallel relation when the heel lift is flattened against the shoe, so that nails driven through them will enter the shoe heel perpendicularly. No suggestion as to any of this is to be gathered from claim 11, nor are there any pins or washer supporting devices so arranged in the defendant's mold.

According to the plaintiff's own evidence, the mode of operation it follows, in practice, when its patented mold is used, differs in important respects from the mode of operation described in the patent. Instead of beginning by placing rubber or composition in the molding chamber, so as to completely fill its opening, what is first done is to place a disc-like heel blank, containing a desired weight of rubber or composition, on the pins in the cavity of the chamber, upon which the convex upper member is then forced down by hydraulic pressure, whereby it is said that air is pocketed or trapped between the lower surface of the disc-like blank and the concave bottom of the chamber, the resistance of air so confined thereupon operating, as is claimed, to force the outer edges of the disc-like blank to the outer edges of the mold. It is further said that all this results in securing more density and less porosity in the edges of the heel produced. An intermittent sudden pressure upon the upper member of the mold is said to be employed in order to expel the air confined as above.

The evidence relied on by the plaintiff to show that any such effect upon the product is in fact produced seems to me by no means convincing. But, taking the facts to be as stated, it is clear that the plaintiff is using its patented mold to carry out a method other than that directed by the patent to be followed in "the practice of the invention" or in producing heels "by my improved method." Nothing is said in the patent about using the stock in disc-like blanks, and such blanks can hardly be supposed to "completely fill the opening" of the cavity in the mold, according to the directions of the patent. Nor is anything found in the patent about trapping or pocketing air underneath what is put into the cavity, nor any suggestion that any result of importance to the

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product may be secured thereby. Though a patentee is entitled to all the advantages of the invention he describes, he cannot claim the benefit of any others; and here, so far as he has undertaken to describe his invention by describing a method, he has relied only on the method described in the patent.

The defendant, if it could in any case be said to follow the method of the patent while it uses a mold constructed in so many particulars differently from the mold shown and described in the patent, does not, according to its evidence, follow the plaintiff's method as described in the plaintiff's evidence. Instead of disc-like blanks, it uses blanks in size and shape substantially like the finished heel, and leaving little scope for the production of any effect upon the outer edges thereof, such as the plaintiff claims to secure.

To the differences in construction between the mold described in the patent and the defendant's mold it may well be that some part of the success of the plaintiff's product may be due. There is at any rate nothing to show that said success is due only to those features of the patented mold which it has claimed in claim 11. The attempt appears to have been made to cover by that claim all concave-convex molds, whether in other respects such as described in the patent or not. The result has been, in my opinion, to make the claim one for what the patentee did not invent and was not patentable. If the claim could be regarded as valid, if limited to the particular structure shown and described in the patent, so as to cover only molds having the described features of the patented molds, the defendant's mold, from which so many of those features are absent as above, does not infringe it.

These conclusions require dismissal of the bill, and there may be a decree accordingly. The defendant may submit a draft decree, under rule 23 of this court, on or before May 27, and the plaintiff may file corrections thereof on or before June 2, 1918.

HILDRETH v. MASTORAS.

(District Court, D. Oregon. July 29, 1918.)

No. 7466.

1. PATENTS ⟸168(2)—CLAIMS—CONSTRUCTION.
Where the first two claims of plaintiff's patent, after being rejected by the examiner, were later allowed as claims 10 and 11, there is no reason for a strict construction of the third claim, which, after the disallowance, was made No. 1.

2. PATENTS ⟸90(5)—INVENTION—PRIORITY.
The original and first inventor is he who has not only first originated the novel concept, but who through the exercise of reasonable diligence has reduced it to practice; for a mere concept, not reduced to practice, is not in itself patentable.

3. PATENTS ⟸311—INFRINGEMENT SUIT—EVIDENCE.
In a suit for infringement, evidence that complainant's device is not operative is provable under the general issue.

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4. PATENTS ⟸49—VALIDITY—OPERATIVE DEVICE.
A patent *held*, in view of the long interference proceedings and the subsequent decision of the Court of Appeals for the District of Columbia wherein it was decided that the patent was basic, to afford prima facie proof of the operativeness and utility of the machine.

5. PATENTS ⟸47—PIONEER PATENTS—OPERATIVE CHARACTER.
A device need not be perfect in order to escape the charge of inoperativeness, and in case of a pioneer patent no one can expect the operative character of the device to respond to the highest test of perfection in the art.

6. PATENTS ⟸173—CONSTRUCTION—CLAIMS.
A pioneer patent is entitled to a broad construction of its claims, though of course it cannot be broader than the claims.

7. PATENTS ⟸328—VALIDITY—INFRINGEMENT.
The Dickinson patent, No. 831,501, claim 1 of which was for a candy-pulling machine comprising a plurality of oppositely disposed candy hooks or supports, and means for producing an in-and-out motion of those parts, *held* valid and infringed by defendant's device.

In Equity. Suit by Herbert L. Hildreth against Jim M. Mastoras. Decree for complainant.

Macleod, Calver, Copeland & Dike, of Boston, Mass., and Chester G. Murphy, of Portland, Or., for complainant.

A. W. Lafferty, D. E. Lofgren, J. L. Atkins, and W. A. Robbins, all of Portland, Or., for defendant.

WOLVERTON, District Judge. This is a suit for injunction to restrain an alleged infringement by defendant of complainant's patent. Complainant is the owner of what is known as the Herbert M. Dickinson patent, letters patent for which were issued to him, being numbered 831,501. The device is for pulling candy. Claim 1, which it is claimed is being infringed, is as follows:

"A candy-pulling machine, comprising a plurality of oppositely disposed candy hooks or supports, a candy puller, and means for producing a specified relative in-and-out motion of these parts, for the purpose set forth."

The hooks consist of a perpendicular standard or pin affixed to the bottom of a trough and in the center thereof, and two other pins or standards suspended from an arm or plate, which in turn is affixed to a support and made to rotate nearly a one-half revolution. By suitable contrivance the support which carries the pins is made to move back and forth from end to end of the trough, and at each end of the trough the pins are made, by the rotary motion of the plate to which they are suspended, to reverse their positions from one side of the trough to the other before beginning their movement in the opposite direction. In this way there is produced an in-and-out movement of the suspended pins relative to the stationary pin every time they reach and depart from the ends of the trough. This movement causes the hank of candy which is placed in the trough to be pulled by lapping on itself, as the suspended pins pass and repass the fixed pin and as their positions are reversed. The operation of the device pulls the candy, or at least that is the theory advanced by the complainant.

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Defendant is the assignee of the Langer patent, No. 1,232,697, and his device, which it is alleged infringes claim 1 of the complainant's patent, consists simply of two stationary pins, each extending horizontally from the center of a disk, and a third pin, which is made to rotate about the disks in opposite directions, so as to pass and repass between the stationary pins at each revolution. The candy is placed on the pins in operation, and is lapped and relapped as the rotating pin passes and repasses between the stationary pins. When the candy is in proper elasticity, it needs no support aside from that afforded by the pins.

[1] Preliminary to entering upon the more salient features of the present inquiry, I will dispose of a suggestion of counsel for the defendant to the effect that the Patent Office, in an interference proceeding had involving the Dickinson patent with others, has rendered claim 1 of the patent subject to a narrow rather than a broad construction. Originally Dickinson made but three claims, of which what is now claim 1 was the third, and the suggestion is based upon the fact that at one stage in the proceeding claims 1 and 2 were rejected by the examiner. However, further action was taken respecting the rejected claims, a matter which counsel seem to have overlooked, whereby claim 1 was eventually allowed in exactly the same language as first written. It now constitutes claim 10 in the patent. Claim 2 was also allowed, with an amendment to avoid a supposed conflict with Firchau, making it read "a series of more than two pins or pulling members," instead of "a series of pins or pulling members." As amended, it is now claim 11. The Firchau concept was not in its operation a machine for pulling candy at all, but one for working or mixing candy. The contrivance consists of a drum with two pins or fingers extending therein, which are rotated in opposite directions, and has none of the elements of the Dickinson machine. This disposes of any inference of narrow construction that might otherwise have been drawn from the fact of the examiner first rejecting claims 1 and 2 as first propounded by Dickinson, and also of any contention that the Firchau patent anticipates the Dickinson device. These matters of conflict were settled in the Patent Office in the interference proceeding, and need no further elucidation.

[2] Another argument presented by counsel for defendant is that there has never been any reduction to practice of the Dickinson machine, and hence that there was no completion of the inventive act, or that because thereof the thing claimed by him never eventuated into a completed invention. Reduction to practice is but an element in an investigation for determining who is the original and first inventor, where two or more persons who have conceived a supposedly novel idea respecting a device or combination not theretofore known or used are each seeking to establish the right to a patent as the prior and first inventor. The concept is not in itself patentable, and it is only after the supposed novel device has been reduced to practice that the inventor is entitled to patent. So it is that the person who is first to conceive the invention, but is later than his rival in reducing it to practice, is not regarded as the first inventor, unless he has exercised due diligence

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in efforts to perfect the invention at and continuously after the time his rival entered the field against him. And it may happen that the first to originate the concept, but last to reduce the device to practice, if he has exercised reasonable diligence under all the circumstances, will be entitled to the patent. 30 Cyc. 876. It results, therefore, that the original and first inventor is he who has not only first originated the novel concept, but who, through the exercise of reasonable diligence, in view of the surrounding and attending circumstances, was first to reduce it to practice.

[3] There is no dispute here involving priority of invention. There is a dispute, however, which presents the question whether the complainant has any invention at all, or an invention presenting any utility or importance. This is predicated upon the insistence of one of counsel for the defendant that there is a total inoperativeness of the machine constructed under the Dickinson patent. That the device is inoperative, if such is the case, is provable under the general issue. Reckendorfer v. Faber, 92 U. S. 347, 354, 23 L. Ed. 719.

[4, 5] Aside from the presumption that the patent affords that the Dickinson machine is operative, the testimony here satisfactorily shows it to be a fact. Complainant, the present owner of the patent, had and still has one of the machines in his factory. He testifies that he has used it in practical operation, and that while, as originally constructed, it did not pull candy satisfactorily, yet by shortening the reach of the pull, and speeding up the mechanical apparatus for moving the pins, it did the work all right, and would pull candy commercially. The change in construction to speed up the operation in no way affected the principle involved by the invention. A model has been introduced in evidence, showing the mechanical operation of the machine, and it is within itself a demonstration that it pulls candy.

Take any plastic, cohesive substance, held by two objects, separately adjusted, which are made to pass a stationary intervening object, one upon each side thereof, and the substance, when contact is made with the intervening object, will be caused to lap on itself and to stretch or be pulled as candy is pulled by hand. Again, when the positions of the two objects are reversed, in manner as the Dickinson device designs they shall be, one of the objects passes between the intervening or stationary object and the other of the two, and another contact with the substance is made, which will cause it to stretch or be pulled, but in a less degree, because the reach of the movement is shorter. Can there be any doubt about a device of the kind, and thus operated, stretching or pulling the substance mechanically? Surely there can be none. If none, what becomes of the alleged inoperativeness of the Dickinson device? By causing the two objects to move in opposite directions past the intervening or stationary object, and to be reversed at the respective extremities, the substance will again be caused to be twice stretched or pulled, in the same way as above indicated, and thus will be completed a cycle in operation of the Dickinson device. The continued operation consists in repeating the cycles in movement of the moving objects in relation to the stationary object.

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No further argument is necessary to convince one that the device is mechanically operative for pulling candy in some form. It may not be the best device possible for the purpose, but it is self-evident that it will pull candy. The question will receive further elaboration in the discussion of a somewhat correlated contention made by one of defendant's counsel. The contention is that, while it is conceded that the Dickinson patent is valid and the device useful, yet it cannot be used to pull candy, or rather that claim 1 of the Dickinson patent is susceptible only of a narrow construction, and, so construed, that the Langer patent does not infringe.

No better illustration in discussion can be produced than that which comes out of the interference proceeding in the Patent Office. In the long struggle Dickinson had in the Patent Office by reason of the interference proceedings, which extended over a period of five years, five other applications for patents were at one time and another involved in the controversy. In some instances, the applicants withdrew the broad claims which were said to be in conflict with those of the other inventors, and accepted patents which covered merely the special types of machines designed by them. In other cases, the question of priority was, after more or less prolonged contest, determined by the Patent Office. The five were those of Hildreth, Jenner, Thibodeau, Robinson, and Henry. The one idea common to all these applications, including Dickinson's, is that couched in the exact language of claim 1 of the Dickinson patent as finally approved and issued by the Patent Office. That the claim was considered to contain the basic principle or elements dominating the claims of all the applicants is attested by the strenuous contest made upon the part of each applicant to have it read into his patent above that of the other contestants. The Patent Office not only declared Dickinson to be the original and first inventor of the device embodying the principle, but further declared that the principle itself was basic in character and dominated all the other devices for which applications were then pending, or at some time had been during the interference proceedings. Brief reference will be made to the patents awarded in the interference proceeding, and attention directed to the different types.

The Hildreth device consists of two pins adjusted in a vertical position on oppositely disposed arms of an oscillating beam, and a third in the form of a swinging pendulum. By co-operation of the pendulum with the oscillating pins there is produced an in-and-out movement of the pins with relation to each other, which produces contact with the candy, and causes a lapping and pulling of the same, and in each cycle of operation the candy is four times lapped and pulled, the same as by the Dickinson machine.

The Jenner machine is provided with five pins horizontally disposed, three of which are stationary and the other two but the handles of a crank, which are made to revolve in the same direction, so relatively disposed to the stationary pins as to move in intersecting paths; each crank pin in its revolution circumscribing two of the stationary pins. Thus contact by the pins is three times made with the candy at each revolution of each crankpin, and the candy is accordingly lapped and

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pulled. Here again is found the in-and-out or intersecting movement, although the pins are horizontally and differently disposed, three being stationary and two moving.

The Thibodeau machine has four pins horizontally disposed, supported by two levers, a pair being attached to each lever, and the arms caused to rotate in the same direction. The levers have each a short arm and a long arm, and when the rotation takes place the in-and-out or intersecting movement is produced, and the candy when laid on the pins is lapped and pulled.

The Robinson machine contains three horizontally disposed pins, one of which is stationary. The other two are really crank-shaped arms, which are made to revolve about the stationary pin in opposite directions. Thus is secured the intersecting or in-and-out movement for lapping and stretching the candy.

The Henry machine is much of the same order, except the crank pins have the form of hooks, and are so called, and the cranks revolve in unison. The machine is double, having a set of pins on each side of the operating machinery, so that two batches of candy may be pulled at the same time.

Now, the principle of pulling candy is common to all these machines. They all have the intersecting or in-and-out movement of the pins acting relatively to each other, by which the candy is engaged and lapped, and stretched or pulled. This is practically the only way that candy can be pulled commercially. The idea was suggested, no doubt, by the method of hand pulling, by which the candy is thrown over a stationary hook and stretched. Then by holding the end in one hand, the elongated hank is seized in the center with the other, and the hank again thrown over the hook, and the pulling repeated. What was desired was a machine that would pull candy on the same principle. Dickinson first hit upon such a contrivance by resorting to the system of pins so disposed and so operated as to produce relatively the in-and-out movement, and thus to engage the candy and lap or stretch or pull it. None of the other machines produced in the interference proceeding did more. Some of them, perhaps all of them, pulled candy more successfully; but they all resorted to the same principle for pulling candy as did Dickinson. The in-and-out or intervening movement of the pins operating relatively to each other was found common to all, and this, whether the pins consisted of three or more than three, or whether they were vertically or horizontally disposed; and the question of needed support for the candy, other than the pins afforded, while the machine was in operation, was treated as wholly irrelevant to the controversy. In the light of all this, the examiner of interferences defined the issue as relating to a pioneer invention, and of a generic nature broad enough to include the widely different types of machines shown in the several applications. The decision passed by appeal to the Board of Examiners in Chief, thence to the Commissioner of Patents in person, and then to the Court of Appeals for the District of Columbia, and by each of such tribunals was affirmed. The Commissioner of Patents in his decision says:

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"Dickinson seems to have the elements of the machine called for by the issue, and those elements are mechanically operative. * * * The record furnishes no justification for the conclusion that Dickinson's machine was useless, whatever conclusion may be reached as to the comparative superiority of the various machines."

The effect of these decisions is certainly sufficient to render the patent prima facie proof of the operativeness and utility of the Dickinson machine, whatever may be the rule generally. But, being a pioneer patent, no one could expect the operative character of the device to respond to the highest test of perfection in the art. Judge Hough has stated the principle clearly in Engineer Co. v. Hotel Astor et al. (D. C.) 226 Fed. 779, as follows:

"A device need not be perfect in order to escape the charge of inoperativeness. * * * The test of operativeness is to ascertain whether the patented device does (even lamely and imperfectly) perform the acts claimed for it in the method described and (perhaps) for the reasons given."

The cases are numerous to the same purpose. See, among others, Telephone Cases, 126 U. S. 536, 8 Sup. Ct. 778, 31 L. Ed. 863; Mergenthaler Linotype Co. v. Press Pub. Co. (C. C.) 57 Fed. 502, 506; Thomson-Houston Electric Co. v. Lorain Steel Co. (C. C.) 103 Fed. 641, 644; Crown Cork & Seal Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72.

The claim that the Dickinson machine will stir candy, but will not pull it, and therefore that it is inoperative to pull candy, is not sustained. I have not overlooked the case of Besser v. Merrilat Culvert Core Co., 243 Fed. 611, 156 C. C. A. 309.

Reference has been made also to the Igou patent; but it is of a type similar in construction to the Hildreth patent, and needs no further elucidation to show that it also falls within the same principle governing all, as it respects claim 1 of the Dickinson patent.

[6, 7] The fact that the Dickinson patent is a pioneer in the art entitles it to a broad construction. Of course, it could not be broader than the claim. But a reference to the claim shows it to be broad in character, and to comprise any candy-pulling machine having a plurality of oppositely disposed hooks or supports, a candy puller, and means for producing a relative in-and-out motion of the parts. "If," says the court in Miller v. Eagle Manufacturing Co., 151 U. S. 186, 207, 14 Sup. Ct. 310, 318 (38 L. Ed. 121), "the invention is broad or primary in its character, the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such inventions." As we have seen, the principle sought to be applied is the relative in-and-out movement of the pins, so as to bring the same in contact with the candy and cause it to be lapped and pulled. The principle is basic, and dominates all machines constructed for pulling candy which seek to apply it in operation.

The defendant's machine has the relative in-and-out movement perfectly, and without it the machine would not pull candy. It is of a type, respecting the basic principle of its operation, not different from those machines considered in the interference proceeding. It

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is a marked improvement on the Dickinson machine, but it cannot be operated without applying the basic principle for pulling candy by machinery which Dickinson invented; and this in itself is a demonstration that it infringes the Dickinson patent. That the defendant's machine has two stationary pins and one moving, as against two moving and one stationary in the Dickinson and Robinson patents, makes no difference. The principle of the relatively intervening or in-and-out movement of the pins is applied in each, and that is the essential thing.

It is true that, where two machines produce the same effect merely, no justification is afforded thereby for the assertion that they are substantially the same, or that the devices used by one are therefore mere equivalents for those of the other. This would reverse the logic in reasoning from cause to effect. But infringement, it is said, "is a copy of the thing described in the specification of the patentee, either without variation, or with such variations as are consistent with its being in substance the same thing. If the invention of the patentee be a machine, it will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of mechanism which performs the same service or produces the same effect in the same way, or substantially the same way." Burr v. Duryee, 1 Wall. 531, 573 (17 L. Ed. 650). The principle is restated in Morley Machine Co. v. Lancaster, 129 U. S. 263, 273, 9 Sup. Ct. 299, 302 (32 L. Ed. 715), as follows:

"Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine."

See, also, Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 569, 18 Sup. Ct. 707, 42 L. Ed. 1136.

Turning again to claim 1 of the Dickinson patent, its language and wording, it can be read directly upon the Langer patent, and, while the mechanism is different in arrangement and in the movement of its parts, it performs the same service in substantially the same way, and the appliances adopted by the Langer patent are but mere mechanical equivalents of those used in the Dickinson machine. It results that the Langer patent infringes that of Dickinson, as it respects claim 1 of the latter patent.

Nor is claim 1 functional merely, and therefore too broad to be sustained. The reasoning of Judge Rose, in Hildreth v. Lauer & Suter Co. (D. C.) 208 Fed. 1005, 1012, to my mind satisfactorily disposes of the proposition, and I need not repeat it here.

The complainant is entitled to an injunction, and the cause will be referred to the master in chancery to take the accounting.

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In re CRAWFORD PLUMMER CO.

(District Court, D. Massachusetts. July 10, 1918.)

No. 23559.

1. BANKRUPTCY ⟸255—USE OF LEASED PREMISES BY RECEIVER OR TRUSTEE—RENTAL.
A trustee or receiver has the right to use the premises occupied by bankrupt for a reasonable period, sufficient to enable him to dispose of the bankrupt's property without unnecessary loss, and such use is not an adoption of a lease to bankrupt, but the estate must pay reasonable compensation for such use.

2. BANKRUPTCY ⟸255—USE OF LEASED PREMISES BY RECEIVER OR TRUSTEE—RENTAL.
The rent reserved in a lease to bankrupt is, under ordinary conditions, the fair measure of what should be paid by a receiver or trustee.

In Bankruptcy. In the matter of the Crawford Plummer Company, bankrupt. On review of order of referee. Reversed.

Albert A. Gleason, of Boston, Mass. (Gleason & Higgins, of Boston, Mass., of counsel), for creditors.
Asa P. French, of Boston, Mass., for receivers.

MORTON, District Judge. The question presented by these petitions for review is how much rent shall be paid out of the estate to the landlords for the time during which the premises were occupied by the common-law assignee and by the receivers in bankruptcy. The period was from April 18 to August 1, 1916, inclusive, 3⅜ months. The premises were a store on Washington street, Boston, near the best retail district. They were leased by the landlords to a third person, and by it were orally sublet to the bankrupt, on the terms stated in the lease. In legal effect the bankrupt was only a tenant at will; but the lessee and its guarantor on the lease had close business relations with the brankrupt, the arrangement had continued for a number of years, and for the purposes of the present question I think the case substantially the same as if the bankrupt had held directly under the lease. The failure occurred in April, 1916; the lease ran till December 31, 1917. The total rent amounted to $26,420 per year; i. e., $2,201.66 per month.

The matter was heard by the referee and is here on his certificate, which states the facts. He finds:

"That the rental value of this store for the purposes of permanent occupancy at the time it was occupied by the receivers was greater than the rent reserved under the leases. * * * The rental value of the premises, used only for temporary occupancy, was perhaps as low as $100 a week. The receivers were tenants at sufferance, and it was understood that they were to vacate the premises whenever a satisfactory offer to rent by lease was received by the petitioners. * * * There was no agreement between the assignee and the owners, or between the receivers and the owners, or between the trustees and the owners, with reference to the amount of rent to be paid. A statement was made by one of the receivers to the representative of the owners, to

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the effect that usually the amount of rent reserved under the lease was the sum allowed."

The learned referee allowed the sum of $1,500 per month as being what he regarded as "equitable and just," and both parties (the landlords and the trustees) have taken review proceedings from his order.

[1] A trustee or receiver has the right to use the pemises occupied by the bankupt for a reasonable period, sufficient to enable him to dispose of the bankrupt's property without unnecessary loss, and to do so by selling it there, if that be the best way. In re Chambers, Calder & Co. (D. C. R. I.) 98 Fed. 865; Remington on Bankruptcy (2d Ed.) § 984. This court has several times stopped landlords from prematurely ousting receivers or trustees. Such use of real estate is not an adoption of a lease to the bankrupt. The liquidating officers are to pay therefor reasonable compensation for the use and occupancy of the premises. In this case neither the landlords nor the lessee made any effort to oust the assignee or receivers, and, if they had, they would not have been permitted to do so, without allowing a reasonable time in which to close out the business, which was one of some size. In re Chambers, Calder & Co., supra. It was understood by the parties that efforts were being made to find a permanent tenant, but no pressure to vacate was ever put upon the assignee or the receivers by the landlords or by the lessee. In view of these facts, the element of uncertainty in the assignee's and receiver's tenancy seems to me to have been overemphasized by the learned referee.

[2] It has generally been thought that the rent reserved in a lease to the bankrupt was, under ordinary conditions, the fair measure of what the use and occupancy by receivers or trustees was fairly worth, and it has been the sum usually awarded in this district. In re Adams Cloak, Suit & Fur House (D. C. Mass.) 199 Fed. 337. In the absence of an express agreement for a lower rental, there is a presumption in favor of that sum; and it will ordinarily be allowed, unless unusual circumstances appear making it plainly unreasonable. Fleming v. Noble, 250 Fed. 733 (C. C. A. 1st Cir.). There were no such circumstances in this case; and it seems to me that the ordinary practice ought to have been followed. It is true that this makes the rent large for the business done; but that was a matter with which the landlords were not concerned, and which ought not, I think, to diminish their rights.

The order of the referee is vacated, and an order may be entered in accordance with this opinion.

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UNITED STATES v. DE BOLT et al.

(District Court, S. D. Ohio, E. D. July 3, 1918.)

No. 1105.

1. CRIMINAL LAW ⟸753(1)—DIRECTION OF VERDICT—CONSIDERATION OF EVIDENCE.
   It is the duty of the court, in considering a motion to direct a verdict, to take that view of the evidence most favorable to the party against whom it is desired that the verdict should be directed, and determine the matter from that evidence and reasonable and justifiable inferences therefrom.
2. WAR ⟸4—SABOTAGE—DESTRUCTION OF WAR MATERIAL—ATTEMPT.
   Under Sabotage Law April 20, 1918, § 3, providing that whoever, in times of war destroys war material, or whoever willfully attempts to make or causes to be made in a defective manner any war materials, a conviction can be had for an "attempt," where the evidence shows a willfull advising, soliciting, and attempt to influence another to commit the felony named in the act.
3. COURTS ⟸365—AUTHORITY OF STATE DECISIONS—CRIMINAL CASES.
   Though there are no common-law offenses against the United States, and criminal cases are controlled by federal statutes, state statutes and decisions may be persuasive.

Homer De Bolt and another were indicted and tried for violating Sabotage Law, § 3. On motions for directed verdicts. Motions overruled.

Stuart R. Bolin, U. S. Atty., and F. F. Smith, Asst. U. S. Atty., both of Columbus, Ohio.

N. J. Weisend, of Columbus, Ohio, and J. M. Lewis, of Urbana, Ohio, for defendants.

SATER, District Judge. [1] The evidence having all been submitted, each of the defendants moves for a directed verdict on the grounds (1) that the indictment does not state a cause of action, and (2) that, if the indictment is good, the evidence does not warrant a conviction. It is the duty of a court, in considering such a motion, to take that view of the evidence most favorable to the party against whom it is desired that the verdict should be directed, and, from that evidence and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not under the law a verdict might be found for that party (Nelson v. Ohio Cultivator Co., 188 Fed. 620, 629, 630, 112 C. C. A. 394 [C. C. A. 6]; Herman H. Hettler Lumber Co. v. Olds, 221 Fed. 612, 615, 137 C. C. A. 336 [C. C. A. 6]); or, to use the language of Judge Sanborn in the criminal case of Isbell v. United States, 227 Fed. 788, 790, 142 C. C. A. 312 (C. C. A. 8):

"At the close of the evidence in every trial by jury, the question of law, not whether the weight of the evidence sustains the claims of the plaintiff or the defendant, but whether or not there is any substantial evidence to sustain the claim of the plaintiff, necessarily and unavoidably arises, and the duty rests upon the trial court to direct a verdict for the defendant if there is no such evidence."

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[2, 3] The Ralston Steel Car Company, located at Columbus, Ohio, has for some time past been engaged on its premises in manufacturing for the United States, for war purposes, about 4,400 steel cars. About 400 of them are to be used in trench warfare in France; the residue are to be employed on steam railways to aid in the prosecution of the present war with Germany. In early June an attempt was made to unionize the company's plant. Some 10 or 12 employés who had joined the union were discharged. Whether their discharge was due to their union proclivities or to other cause or causes is not material to the decision of the questions presented. One Ingraham, who worked at a nine-foot spindle lathe, which was used on the company's premises in the production of the heretofore mentioned war utilities, refused all solicitations to connect himself with the union and continued to work at his machine. On the evening of June 11th a meeting of the members of the union was held, which was attended by a number of those who had identified themselves with it, and also by one Fox, who had applied for admission to the union and had arranged to pay his dues on the day following. It was understood that Fox should remain in the company's employ for the purpose of furnishing information as to the new men that might be brought in to take the places of the discharged employés, as to the work that was being done, and as to where and by whom the dies for the company were made.

On account of the alleged occurrences at and following the meeting at which some, if not all, of the discharged workmen were present, an indictment was preferred against De Bolt and Kelso, which recites that on that date they unlawfully, maliciously, feloniously, and willfully, with reason to believe that their act might injure, interfere with, and obstruct the United States in preparing for and carrying on the war with Germany and its allies, attempted to cause to be made in a defective manner the steel railroad cars then in process of manufacture by the Ralston Company, by advising and attempting to influence Fox to procure a small bottle of vinegar and to pour its contents into the bearings of the lathe on which Ingraham was working, and also to loosen the tail stocks and screws of such machine, and to do such other things to such lathe as would spoil the material in it on which Ingraham was working. The indictment does not state what effect the vinegar would have on the bearings. There is evidence, however, that tends to show that the discharge of Ingraham was desired; that vinegar applied to the bearings of the lathe would thin and cut the lubricating oil, would cause the bearings to become hot, and would necessitate the removal of the shaft and delay in completion of the work in hand; and that, although loosening of the tail stock would ordinarily be detected by a workman, such loosening would permit the material in the lathe to drop from its place and cause the work done to be defective and untrue.

The indictment is based on section 3 of what is commonly known as the Sabotage Law, approved April 20, 1918, and entitled "An act to punish the willful injury or destruction of war material, or of war premises or utilities used in connection with war material, and for other purposes," which section is as follows:

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"That when the United States is at war, whoever, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or whoever, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, shall willfully make or cause to be made in a defective manner, or attempt to make or cause to be made in a defective manner, any war material, as herein defined, or any tool, implement, machine, utensil, or receptacle used or employed in making, producing, manufacturing, or repairing any such war material, as herein defined, shall, upon conviction thereof be fined not more than $10,000 or imprisoned not more than thirty years or both."

The government has offered substantial evidence, which the defendants have vigorously combated, to prove the charge laid in the indictment. Fox, if he ever assented to the pouring of vinegar in the bearings of Ingraham's lathe or to loosening its tail stock or screws (all of which is for the jury's determination), recanted, and, being suspected by his employer and kept under surveillance, disclosed, according to his evidence, when called to the office of his employer, the entire scheme which the government claims was concocted on the evening of June 11th. The defendants' position is that, to convict of an attempt to commit a crime, it is necessary to show that an overt act was done with the specific intent to commit that particular crime, and that merely to advise, solicit, or attempt to influence another to commit a crime is not an overt act, but that some additional step constituting such an overt act is necessary to constitute an offense. They therefore claim that the indictment is insufficient in law, and that, if the evidence offered by the government be accepted as true, no offense was committed, for the reason that the defendants did nothing more than to advise, solicit, and attempt to influence Fox to pour vinegar into the bearings of the lathe and to loosen its tail stock and screws.

The gravity of the situation produced by the present war is such that Congress in its wisdom was impelled to enact the wise, but somewhat drastic, law on which the indictment is based. It denounces as a felon (see section 335, Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. 1916, § 10509]) not only the person who, with reason to believe that his act may injure, interfere with, or obstruct the United States in preparing for or carrying on the war, willfully makes or causes to be made in a defective manner any war material, such as the Ralston Steel Car Company was making, but also the person who under like conditions attempts to make or who attempts to cause to be made in a defective manner any such material. The language employed is comprehensive and unrestricted. It does not define the nature of the attempt which it condemns, but expressly makes the attempt itself a separate substantive crime, and covers any attempt to cause to be made in a defective manner war material coming within its terms. Another illustration of a law which makes it a penal offense to attempt a prohibitied act is found in section 2 of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. 1916, § 8821]). In Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 107, 29 Sup. Ct. 220, 53 L. Ed. 417, it was said not to be uncommon in criminal law to punish, not only a completed act, but

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also acts which attempt to bring about the prohibited result. The court had under consideration a Texas statute, but on page 110 it applied the same rule to the Sherman Act.

Whether the defendants attempted to commit a felony (assuming the government's evidence to be true) depends upon the answer to the question: Does the willful advising, soliciting, and attempting to influence another to commit the felony named in the statute constitute an attempt? In Bishop's New Crim. Law (Ed. 1892) vol. 1, §§ 728, 729, it is said:

"An attempt is an intent to do a particular criminal thing, with an act toward it falling short of the thing intended. Hence, the two elements of an evil intent and a simultaneous resulting act constitute, and yet only in combination, an indictable offense, the same as in any other crime."

Other definitions of attempt and of the elements of an attempt to commit a crime are found in 3 Am. & Eng. Ency. Law, 250, 251, 254, and Wooldridge v. U. S., 237 Fed. 775, 778, 779, 150 C. C. A. 529 (C. C. A. 9). Whether a mere solicitation to commit a crime—a mere advising and effort to influence its commission—is an act toward carrying the intent into execution, and is an endeavor to attempt to commit a crime, has been inferentially, but not expressly, decided by the Supreme Court. In United States v. Quincy, 6 Pet. 445, 465 (8 L. Ed. 458) it was ruled that:

"To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or any definite progress toward it; *any* effort or endeavor to effect it, will satisfy the terms of the law." (Italics mine.)

The language of the court is as broad as that of the Sabotage Act. By the great weight of authority it is an indictable offense at common law for one to counsel and solicit another to commit a felony or other aggravated offense, although the solicitation is of no effect and the crime counseled is not in fact committed. A citation of the many pertinent cases is impracticable, but reference is made to Commonwealth v. Flagg, 135 Mass. 545, 549; 12 Cyc. 182; Rex v. Higgins, 2 East, 5; Reg. v. Ransford, 13 Cox. Crim. Law Cas. 9, 15; United States v. Lyles, Fed. Cas. No. 15,646; United States v. Worrall, 2 Dall. 384, Fed. Cas. No. 16,766, in connection with which see State v. Butler, 8 Wash. 194, 35 Pac. 1093, 25 L. R. A. at page 439, 40 Am. St. Rep. 900; United States v. Craig (C. C.) 28 Fed. 795, 800; Commonwealth v. Tolman, 149 Mass. 229, 21 N. E. 377, 3 L. R. A. 747, 14 Am. St. Rep. 414 and notes; Commonwealth v. Harrington, 3 Pick. (Mass.) 26; Ohio v. Davis, Tappan (Ohio St.) 171; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105; Bishop's New Crim. Law, vol. 1, § 767 et seq.; Wharton, Crim. Law (11th Ed.) §§ 212, 218, and note to 213. Clark & Marshall's Law of Crimes, § 131, states that:

"The decided weight of authority, both in England and the United States, is in favor of the doctrine that it is a misdemeanor merely to solicit another to commit a crime, if the crime be a felony, though nothing further is done toward carrying out the unlawful purpose. The solicitation, without more, is regarded as a sufficient act to take the case out of the sphere of mere intent."

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It is true there are no common-law offenses against the United States (United States v. Eaton, 144 U. S. 677, 687, 12 Sup. Ct. 764, 36 L. Ed. 591); but state statutes and decisions may be persuasive, although criminal cases in the national courts are controlled by federal statutes (Byrne, Fed. Crim. Proc. § 1). People v. Bush, 4 Hill (N. Y.) 133, is illuminating. A New York statute made arson a felony. Another statute—the one under which the indictment was brought—provided that every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction shall be punished. The defendant was indicted for soliciting and inciting another to burn a barn. On the hearing the evidence showed that subsequent to the solicitation the defendant supplied the person solicited with a match with which to start the fire, but that such person never intended to commit the crime. The counts in the indictment charged the solicitation, but not the furnishing of the match, and were held sufficient. The case was decided without reference to the fact that the match was furnished. It was ruled that an attempt in any form to commit an offense was within the statute, a doctrine which coincides with that announced in United States v. Quincy, supra; that the defendant endeavored to make himself an accessory before the fact, as did the defendants in the instant case, if the government's evidence be true; that solicitation is a species of attempt; and that a mere solicitation to commit a felony is an offense, whether the felony is actually committed or not.

I am not unmindful that there are authorities which hold that a mere advising, solicitation, or incitement to commit a crime is not a step taken or an act done toward its commission. For the purposes of this case it is not necessary to analyze or distinguish them. The New York statute, which was aimed at attempts, and under which the Bush Case was decided, was general in its provisions. We have in the instant case the specific declaration of the Sabotage Act that the attempt therein named, being such as is recited in the indictment, constitutes a crime. To attempt to cause a thing to be done is an attempt to effect or bring about the doing of that thing. Advising and attempting to influence the doing of a thing is a means, and often a most potent means, of effecting or accomplishing the desired result. Mere words may constitute the offense of an attempt, when they solicit the commission of a crime. Wharton, Crim. Law (11th Ed.) note to section 213, and cases cited, and 3 Am. & Eng. Ency. Law, 264. There is substantial agreement among the authorities that words that are seditious, or provocative of breaches of the public peace, are subject to penal judicial action (Wharton, Crim. Law [11th Ed.] § 213); that solicitations which in any way attack the body politic, by way of treason, scandal, or nuisance, are indictable as independent offenses, and, if the solicitation involves the employment of illegal means to effect the illegal end, it may become substantively indictable (Wharton, § 213; Cox v. People, 82 Ill. 191); that all such acts or attempts as tend to the prejudice of the community are indictable (Rex v. Higgins, 2 East, 5, 21);

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and that it is criminal to counsel, advise, or entice another to commit an offense of a high and aggravated character, whose commission will tend to breaches of the peace or other great disorder and violence (Commonwealth v. Willard, 22 Pick. [Mass.] 476, 12 Cyc. 182, note). In the highly instructive and much cited case of Rex v. Higgins it was held that an attempt to incite another to steal is prejudicial to the community. Lawrence, J., there said:

"The whole argument for the defendant turns upon a fallacy in assuming that no act is charged to have been done by him; for a solicitation is an act. The offense does not rest in mere intention; for in soliciting Dixon to commit the felony the defendant did an act toward carrying his intention into execution. It is an endeavor or attempt to commit a crime."

The indictment charges an aggravated offense much more prejudicial to the community than an incitement to steal—an incitement or solicitation to commit an offense which, if committed, would inevitably cripple the nation in the prosecution of the present war, prolong its duration, increase its cost, and multiply the number of killed and wounded Americans. The offense charged is such as tends to aid our country's enemies, and is an attack on our body politic; i. e., the whole body of people living under our organized political government, and, law-abiding as our citizenship is, is provocative of disorder and breaches of the peace.

The indictment is sufficient, and the evidence such as requires the submission of the case to the jury. The motions to direct a verdict are overruled, and an exception may be noted by each of the defendants.

GRANT LUMBER CO. v. NORTH RIVER INS. CO. OF NEW YORK.

(District Court, D. Idaho, N. D. July 11, 1918.)

1. INSURANCE ⟸230—FIRE INSURANCE—NEW YORK STANDARD POLICY—CANCELLATION—RETURN OF UNEARNED PREMIUM.
   The provision of the New York standard fire insurance policy relating to its cancellation by the insurer upon five day's notice requires that the insurer return or tender the unearned premium in order to effect a cancellation.

2. INSURANCE ⟸146(3)—POLICY—CONSTRUCTION FAVORABLE TO INSURED.
   Policies of fire insurance, if ambiguous or uncertain in terms, will be construed favorably to the insured.

3. COURTS ⟸306(15)—FEDERAL COURTS—CONSTRUCTION OF STATE STATUTE.
   Where form of fire policy is prescribed by state statute, meaning of policy calls for construction of statute, so that decision of highest court of state will control.

4. INSURANCE ⟸229(2)—FIRE INSURANCE—CANCELLATION OF POLICY—NOTICE.
   Under a standard New York fire insurance policy authorizing its cancellation upon five days' notice, no particular form of notice is required; but insured must have actual knowledge of insurer's intention to cancel, or such intention must be so expressed as to give notice to ordinary man in exercise of ordinary care.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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5. INSURANCE ⟸229(2)—FIRE INSURANCE—CANCELLATION OF POLICY—NOTICE.
Under a fire insurance policy in a New York standard form entitling the insurer to cancel it on five days' notice, the insurer's draft indorsed by the insured, and its "receipt" signed by the insured, though both stating that the policy was thereby canceled, were not equivalent to a notice of cancellation.

6. CONTRACTS ⟸93(2)—KNOWLEDGE OF CONTENTS—PRESUMPTION—SIGNATURE.
The general rule is that one signing a written instrument will not be heard to say that he did not read it, but will be conclusively presumed to have had knowledge of its contents.

7. CONTRACTS ⟸94(4)—FALSE REPRESENTATIONS—SIGNATURE TO WRITTEN INSTRUMENT—EFFECT.
One signing a written instrument without reading it, upon a false representation by the other party as to its contents or scope, is not bound thereby.

8. INSURANCE ⟸229(2)—FIRE INSURANCE—NOTICE OF CANCELLATION—DRAFT AND RECEIPT.
The manager of a company insured under a fire policy authorizing its cancellation on five days' notice, by accepting and indorsing the insurer's draft in settlement of a loss and by signing its receipt without reading them, was bound by their contents only in so far as they were in the nature of a draft or a receipt, and not by a stipulation as to extraneous matter, such as express statement therein that policy was thereby canceled, and such express statement was therefore insufficient as notice of cancellation.

At Law. Action by the Grant Lumber Company, a corporation, against the North River Insurance Company of New York, a corporation. Judgment for plaintiff.

C. H. Potts, of Cœur d'Alene, Idaho, for plaintiff.

J. F. Ailshie, of Cœur d'Alene, Idaho, and E. Eugene Davis, of Spokane, Wash., for defendant.

DIETRICH, District Judge. On April 1, 1917, through the agency of the Rossi Insurance & Investment Company of Wallace, Idaho, the defendant issued its fire insurance policy for $8,000, covering the plaintiff's lumber manufacturing plant at Harrison, Idaho. A few days later, on April 27th, there was a loss by fire, which, after adjustment, was settled by the payment of $3,572.13, on or soon after May 31st. On July 27th the insured property was entirely destroyed by fire whereupon adjusters, representing the defendant as well as other insurance companies, adjusted the loss; but defendant refused to make settlement, upon the ground that its policy had been canceled in connection with the settlement of the first loss; hence this suit. The amount of the loss being admitted, the controlling, and indeed the only, question is whether or not the policy in suit was in force at the time of the second fire, or had been canceled. Trial by jury has been waived.

In support of its claim of cancellation the defendant relies upon a draft accepted by plaintiff in settlement of the first loss, and a receipt signed by it at the same time. The contention is that the instruments constituted notice, under a clause of the policy (a New York standard form) authorizing cancellation upon five days' no-

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tice, and also that they amounted to a mutual agreement of cancellation. When the first loss was adjusted, there was no suggestion that the policy would be canceled, and so far as appears such a consideration in no wise entered into the question of the amount for which settlement was to be made; nor, indeed, was there any reason why such a matter should have been considered, for admittedly either party had the right upon its own motion and without the consent of the other to cancel the policy at any time. Defendant consummated the settlement through its agent, the Rossi Company, and had no direct communication with the plaintiff. This agency also represented other companies carrying insurance upon the plant, the total amount of which was $50,000, and handled their settlements, as well as that of the defendant. Accordingly, of date June 7, 1917, it wrote the following letter to the plaintiff, inclosing therewith, among other papers, the draft and receipt in question:

"Wallace, Idaho, June 7, 1917.

"Grant Lumber Company, Harrison, Idaho—Gentlemen: We inclose herewith drafts in payment of your recent loss, as follows:

Norwich Union Fire Ins. Society	$1,116.29
Western Assurance Co.	669.78
British America Assurance Co.	669.77
North River Ins. Co.	3,572.13
Northern Ins. Co.	1,116.29
Northwestern F. & M. Ins. Co.	1,339.55

"We will forward the balance to you as soon as received. The Northwestern Fire & Marine Insurance Company have asked that we cancel their policy, which was issued just a day or two prior to the fire, and will therefore ask that the same be returned to us, and we will endeavor to place the insurance with another company, if desired.

"Very truly yours, Rossi Insurance & Investment Company,
"By R. S. Clough."

The item "North River Ins. Co. $3,572.13" refers to the loss under the policy in suit. It will be observed that the writer of the letter expressly calls the attention of the plaintiff to the decision of one of the companies to cancel its policy, but makes no suggestion that such was the desire of the defendant here. Manifestly, any one reading the letter would naturally draw the inference that all the companies named, other than the Northwestern, desired or were willing that their policies should continue in force. Presumably it was with such an impression that the manager of the plaintiff company turned to the inclosed draft and receipt covering the settlement, the amount of which had already been agreed upon. The draft is as follows:

"To the North River Insurance Company,

"374 Pine St., San Francisco, Cal.

"Claim, $3,572.13. Claim No. 2102
"Discount, $———. May 31, 1917.
"Draft, $3,572.13.

"Pay to the order of Grant Lumber Company the sum of three thousand five hundred seventy-two and 13/100 dollars, in full satisfaction, compromise, and discharge of all claims against the North River Insurance Company for loss and damage by fire which occurred on the 20th day of April, 1917, to property covered under policy No. 2031749 issued at Wallace, Idaho, agency, and in

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consideration of said payment the said policy is hereby canceled and surrendered. W. W. Alverson, Manager Pacific Department.
"E. W. Williams, Counter Signature.
"Examined E. W. W."

It bore the following printed indorsement, which the plaintiff signed:

"Payee must sign this discharge with pen and ink.
"All claims and demands whatsoever against the North River Insurance Company connected with the within-mentioned loss, are released and discharged."

The receipt is as follows:

"Receipt.

"The North River Insurance Company

"374 Pine St., San Francisco, Cal.

"Claim, $3,572.13. Claim No. 2102.
"Discount, $———.
"Draft, $3,572.13. May 31, 191—.

"Grant Lumber Company hereby acknowledges the receipt of three thousand five hundred and seventy-two and 13/100 dollars, in full satisfaction, compromise, and discharge of all claims against the North River Insurance Company for loss and damage by fire which occurred on the 27th day of April, 191—, to property covered under policy No. 2031749 issued at Wallace, Idaho, agency, and in consideration of the said payment the said policy is hereby canceled and surrendered. Grant Lumber Co., by E. Grant, Prest.
"JAP"

The plaintiff's manager, who signed the instruments, testified that he did not read the draft or the receipt, at least did not read them carefully or in full, and did not know that they contained any provision relating to the cancellation of the policy, and no doubt is entertained that such is the fact. It is further true, I think, that if the plaintiff had known that defendant desired to cancel the policy it would have procured other insurance. Except such notice as is imported by the draft and receipt, no intimation was given to the plaintiff, until after the plant was destroyed by the second fire and an adjustment of the loss had been made upon behalf of the defendant as well as the other companies, that cancellation was desired or claimed. No request had ever been made that plaintiff deliver up the policy, nor had there ever been any offer to return any part of the unearned premium. True, the defendant now contends that it was under no obligation to make any demand or tender; but it is to be noted that, after the loss had occurred and it began to claim cancellation, it made a tender (of an insufficient amount) and requested return of the policy.

Was the policy canceled pursuant to the provision authorizing cancellation upon five days' notice? That provision is as follows:

"This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy, or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium."

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I find as a fact that the full premium upon the policy was paid to the defendant. True, the payment was actually made by the Rossi Company, and by it credit extended to the plaintiff; but in extending the credit the Rossi Company did not act as the defendant's agent. In effect the plaintiff borrowed the money from the Rossi Company, and then paid it to the Rossi Company as agent, and it in turn paid it over to its principal, the defendant, the result being that plaintiff's debt to the defendant was extinguished, and it became the debtor of the Rossi Company.

[1-3] With much earnestness the defendant argues that notice of cancellation, if given, is not to be held ineffective because there was no return or tender of the unearned portion of the premium. The question has frequently been the subject of consideration in the courts, and further discussion would be profitless. Admittedly there is a sharp conflict in the decided cases; the preponderance being, as I think, with the plaintiff. Such was the conclusion reached by the New York Court of Appeals in Tisdell v. New Hampshire Fire Ins. Co., 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765. Based largely upon a critical analysis of the language of the policy provision, the contrary view is presented in a dissenting opinion; but I am better content with the conclusion of the majority. When we consider the harshness of the view that a party whose contract obligations are unperformed can at will terminate the contract without making restitution to the party who has fully performed, the intent so to stipulate ought not to be found, unless it is clearly expressed in language which leaves no room for doubt. If defendant's construction of the policy be adopted, it could at any time terminate the responsibility it had been fully paid to assume, retain the unearned premium until demanded, and then draw the insured into a controversy touching a matter which might very well be too small to warrant the expense of litigation. In the present case defendant, having held the unearned premium for two months after the alleged cancellation, tendered a portion of it and raised an issue as to the balance. In support of the rule of the Tisdell Case the following, out of many decisions, may be cited: Buckley v. Citizens' Ins. Co., 188 N. Y. 399, 81 N. E. 165, 13 L. R. A. (N. S.) 889; Southern Ins. Co. v. Williams, 62 Ark. 382, 35 S. W. 1101; Peterson v. Hartford Fire Ins. Co., 111 Ill. App. 466, reversed without reference to this question in 209 Ill. 112, 70 N. E. 757; Gosch v. Firemen's Ins. Co., 33 Pa. Super. Ct. 496; Phœnix Assur. Co. v. Munger, etc., Co., 92 Tex. 297, 49 S. W. 222; Chadbourne v. German-American Ins. Co. (C. C.) 31 Fed. 533; Ins. Co. v. Raden, 87 Ala. 311, 5 South. 876, 13 Am. St. Rep. 36; John R. Davis Lumber Co. v. Hartford F. Ins. Co., 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131. But see Straker v. Phenix Ins. Co., 101 Wis. 413, 77 N. W. 752; Manlove v. Commercial, etc., Co., 47 Kan. 309, 27 Pac. 979; Cassville Roller Milling Co. v. Ætna Ins. Co., 105 Mo. App. 146, 79 S. W. 720; Continental Ins. Co. v. Daniel (Ky.) 78 S. W. 866; Taylor v. Insurance Co. of North America, 25 Okl. 92-94, 105 Pac. 354, 138 Am. St. Rep. 906. The contrary view finds support in the following, as well as other, cases: Schwarzchild et al. v. Phœnix Ins. Co. (C. C. S. D. N. Y.), 115 Fed.

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653; Id., 124 Fed. 52, 59 C. C. A. 572; El Paso Reduction Co. v. Hartford Ins. Co., (C. C.) 121 Fed. 939; Mangrum v. Law, Union & Rock Ins. Co. (Cal.) 157 Pac. 239; German Union Fire Ins. Co. v. Clark, 116 Md. 622, 82 Atl. 974, 39 L. R. A. (N. S.) 829, Ann. Cas. 1913D, 488.

While it is stated in the defendant's brief and in some of the cases cited that the federal courts have uniformly held that the return of the premium is unnecessary, only three federal cases have been called to my attention, and one of these, the Chadbourne Case, seems to hold with the plaintiff. It is pertinent to add that, notwithstanding the conflicting views of courts of last resort, of which the defendant doubtless has had knowledge, it persists in the use of this form of policy, ambiguous though it has been found to be. There is every reason, therefore, for applying the familiar rule that contracts of this character, if uncertain, will be construed favorably to the insured. If, as was suggested at the hearing, the form is prescribed by the statutes of New York, and the defendant is unauthorized to change it or use a different form, then in effect the inquiry is as to the meaning, not of the contract, but of the statute, of which the policy is merely a transcript, and the decision of the highest court of the state should control, under the well-known rule that the construction placed upon a local statute by the courts of the state is binding upon the federal courts.

[4, 5] It is also thought that defendant failed to give the requisite notice. Granted that no particular form of notice is required, still it must be shown either that the insured has actual knowledge of the insurer's intention to cancel, or that such intention has been so expressed as to give notice to the ordinary man, in the exercise of ordinary care. As already stated, the plaintiff did not have actual knowledge, and under the circumstances it cannot be charged with carelessness in failing to take notice. The carelessness was upon the part of the defendant in employing means better suited to conceal than to reveal its intent. It would have been a very simple thing for it to give a plain, unequivocal, direct notice of its desire to cancel. It had a form of "draft" and of a "receipt," and presumably it had a form of notice. Instead of giving such notice, what did it do? It first agreed with the plaintiff upon the amount of the loss, and, it is to be presumed, directly or indirectly promised to make settlement accordingly. So far as appears, there was no suggestion or intimation that it intended to cancel the policy. In due time it caused its agent to transmit, not a notice, but a draft and a receipt, inclosed with a letter expressly notifying the plaintiff of the cancellation of another policy, but with no suggestion of a purpose to cancel the policy in suit. With this letter before him, impliedly representing that but one policy was to be canceled, the plaintiff's manager turned to the formal papers, upon which the defendant now relies as constituting notice or contract. Upon its face he saw that one of the papers was labeled "draft," and generally it had that appearance. It was for the correct amount, appropriately referred to the loss, and named the plaintiff as payee. It is submitted that in the ordinary transaction of business, not once in a hundred times does the ordinary business man

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carefully read a check or draft in full. It is sufficient that it appears to be a check or draft, and that he has knowledge of the amount and the names of the payee and maker. So it was not a want of care in this case for the plaintiff's manager to fail to observe a clause near the end of the draft, purporting to cancel the policy. When he turned the "draft" over to make the necessary and usual indorsement, he was confronted, not with a notice that the policy was to be canceled; but, in harmony with the implication of the letter of transmittal, he was advised that he "must sign this discharge," which reads:

"All claims and demands whatsoever against the North River Insurance Company connected with the within-mentioned loss are released and discharged."

This he could readily sign, because it was in accord with his understanding of the settlement. There was nothing to put him upon his guard or to suggest cancellation. He turned to the other paper, a printed form, conspicuously headed "Receipt." It was in the form of a receipt, and was apparently in substance the same as the indorsement upon the draft. Again, if to the plaintiff's conduct we apply the standard of ordinary business care and caution, its officers were not guilty of negligence in failing to read the instrument to the end and thus discovering the clause relating to cancellation.

[6-8] Defendant, of course, invokes the general rule that one who signs a written instrument will not be heard to say he did not read it, but will be conclusively presumed to have had knowledge of its contents. This rule, however, is not unqualified. There is the further familiar principle that where one signs an instrument without reading it, upon a false representation by the other party as to its contents or scope, he is not bound. Suppose that in this case, instead of writing the letter and using the forms labeled "draft" and "receipt," an agent of the Rossi Company had gone personally to the plaintiff's office to make settlement, and there made representations which were expressed or clearly implied by the letter and the printed forms. He would have said:

"I have come to make settlement of your recent fire loss upon six of the policies you hold [naming them]. One of these policies, and only one, the Northwestern, is to be canceled. Here is the draft of the North River Company for $3,572.13, the amount we agreed upon, bearing a printed release on its back, which you are to sign. Here is a formal printed receipt, which you are to sign."

Would any ordinarily prudent and cautious business man have stopped to read the draft in full, or the receipt, or have suspected that they were anything other than what they were represented to be? The defendant placed two papers before the plaintiff's officers, upon which it put its own construction by calling one of them a draft and the other a receipt. It so plainly labeled them, and the plaintiff had the right to rely upon such construction and representation. In accepting the draft and signing the receipt without reading them, its manager was bound by their contents, in so far, but in so far only, as such contents were in the nature of a draft or a receipt, and not by a stipulation upon a matter wholly outside the ordinary scope of

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such instruments. Receipts and drafts are in daily use and their general tenor is well known. They may differ slightly in form, but in substance they are the same. They are signed and accepted with little attention to their precise phraseology. There is little more reason to require that they be read in full, than that one should read the printed matter upon a silver certificate or national bank note before accepting it. Such being the common practice, to hold that the plaintiff here is bound by an interpolated clause upon a subject wholly foreign to the nature of either a draft or a receipt, and touching which there had been no discussion between the parties, would be to sanction a fraud. I do not intimate that the defendant or its agents intended to deceive. It may very well be that the Rossi Company, as well as the plaintiff, was in ignorance of the defendant's desire to cancel the policy. The means employed by the defendant to give notice of its intention to cancel were so inappropriate that it would not be strange if the agent, as well as the insured, failed to take notice of its intention. But whether actual or only constructive fraud the result is the same. I am unwilling to give place to a rule which would write "caveat" upon every draft and receipt, and put a premium on suspicion and distrust. If what the defendant did was insufficient to charge the plaintiff with notice, by a parity of reasoning there could have been no mutual consent. Admittedly no consideration passed to the plaintiff.

Relief granted as prayed for in the complaint.

Ex parte FUSTON.

(District Court, E. D. Tennessee, S. D. May 22, 1918.)

1. ARMY AND NAVY ⇐20—SELECTIVE SERVICE ACT—LOCAL BOARD—JURISDICTION.

   Under Selective Service Act, § 5, declaring that any person who shall willfully fail or refuse to register shall be guilty of a misdemeanor, and shall upon conviction be punished, and shall thereupon be duly registered, a local board, authorized to determine questions of exemption, has no jurisdiction to investigate on its own motion the question of the age of a person who had not registered and place him on the draft list, though he asserted he was not within the age limits prescribed.

2. ARMY AND NAVY ⇐20—SELECTIVE SERVICE ACT—AUTHORITY OF BOARDS.

   In view of the regulations thereunder, Selective Service Act, § 4, declaring that local boards shall have power to determine all questions including or discharging individuals, does not confer on such boards the power to determine whether an individual subject to the act failed to register.

In the matter of the petition of S. D. Fuston for writ of habeas corpus. Petition granted, and petitioner discharged.

J. H. Turner, of Nashville, Tenn., for petitioner.

Wm. Baxter Lee, Asst. U. S. Atty., of Knoxville, Tenn., for respondent.

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Memorandum Opinion.

SANFORD, District Judge. The petitioner was arrested by the sheriff of Dekalb county, Tenn., under an order issued by the local board of said county, finding that he had failed to report for military duty, as ordered, with the willful intent to evade military service, and directing that he be delivered to the commanding officer at Fort Oglethorpe for further action by the military authorities.

The petition for the writ of habeas corpus alleged that the petitioner was more than 31 years of age at the time provided for registration under the Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 76); that the local board was without jurisdiction or authority over him; and that he was illegally arrested and restrained under its aforesaid order.

Without referring to minor matters in respect to which the regularity and validity of the proceedings before the local board are challenged by the petitioner, the underlying and undisputed facts are these: The petitioner did not register under the Selective Service Act on the registration day, June 5, 1917. Later the local board, receiving information that the petitioner was under 31 years of age and subject to registration, in effect demanded that he register. Being advised that he would be subject to criminal prosecution for failure to register, the petitioner thereupon in 1918, filed a registration card with the local board and also partially filled out and filed with the board answers to two questionnaires. Both his registration card and the questionnaire accompanying same were filed under protest, and both on the face of the registration card and in his answers to the questionnaires, he stated his age as 33 years. The petitioner also filed affidavits as to his age with the board, tending to support his contention that he was more than 31 years of age. The board considered these affidavits and other statements obtained by them, and determined that he was under 31 years of age. Then, being of opinion that having failed to register on June 5, 1917, he was, under section 65 of the Selective Service Regulations, to be treated as one "who has been convicted of failure to register" and had thereby lost the right to deferred classification, without passing upon his alternative application for deferred classification on account of having dependents, he was ordered to report immediately for military duty. This he did not do; and the board thereupon ordered his arrest, as above stated, for delivery to the commanding officer at Fort Oglethorpe as a deserter.

[1] On this state of facts, I am of opinion that the local board was entirely without jurisdiction in the premises. The Selective Service Act confers upon the local board merely jurisdiction to determine the questions of exemption and the like of persons within the registrable age who have been duly registered. It confers upon it no authority whatever over persons not within the registrable age, and none to investigate, of its own motion, the question of age of a person who has not registered and to place him upon the draft lists in the event it determines that he is in fact of registrable age. The registration card and the questionnaires filed by the petitioner showed on their face

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that he was more than 31 years of age on June 5, 1917, and therefore not subject to registration. Regardless, therefore, of the fact that these papers were filed under protest, they conferred upon the board, on their face, no jurisdiction in the premises, and showed, on the contrary, on their face, that the petitioner was not within the jurisdiction or subject to the authority of the board.

The Selective Service Act contains only one provision for the involuntary registration of persons who have not registered, namely, that embraced in the provision of section 5 of the act, that

"any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered: Provided, that in the call of the docket precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this act."

It is entirely plain that the provision that such persons shall "thereupon" be duly registered relates only to persons who shall have been convicted in the court of the offense of willfully failing or refusing to register; the verdict of the jury and the judgment of the court determining the fact that they were subject to registration and resulting "thereupon" in their automatic registration. Aside from the plain and unmistakable meaning of the language itself, there is no provision for the investigation aliunde of the question of liability to registration by the local board or any other body; the sole provision being that when the fact of willful failure or refusal to register shall have been conclusively determined by conviction in the court, then, as stated, registration shall automatically follow, the liability to registration having thus been conclusively determined.

I am unable to agree with the opinion of the Acting Judge Advocate General that the phrase "shall thereupon be duly registered" is to be disassociated from the preceding reference to criminal conviction, but, on the contrary, entirely agree with the view of the assistant to the Attorney General, referred to in the opinion of the Judge Advocate General, that the enforced registration referred to in this section refers only to the registration which follows a prior conviction. The argument that as some persons subject to registration might be willing to take the chance of a criminal prosecution in order to avoid registration, this construction leaves the selective service law incomplete in such cases, cannot justify the court in supplying an omitted provision of the law, however desirable this may be; the function of the court extending merely to construction and not to legislation. However, the infrequency of cases of this character leads me to the conclusion that the unfortunate results of such construction which are apprehended, are not of the serious practical consequence attributed to them in argument.

This not only appears to be the construction of this clause given by the Department of Justice, but to be uniform construction given to the law in its administration up to this time; there being, so far as I am aware, no previous instance in which a local board has placed

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upon the registration lists, as a result of its own investigation, and without a previous conviction, a person who asserted that he was in fact not subject to registration and whose registration card on its face conferred upon it no jurisdiction.

[2] I have, I may add, not overlooked the fact that section 4 of the Selective Service Act provides that the local boards

"shall have power within their respective jurisdictions, to hear and determine, subject to review as hereinafter provided, all questions of exemption under this act, and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft, which shall be made under rules and regulations prescribed by the President."

It is, however, unnecessary to determine the scope of this provision, since, whatever may be embraced under the broad power of "including" individuals in the selective draft, such authority is, under the plain terms of the act, only to be exercised under rules and regulations prescribed by the President, and none of the rules or regulations prescribed by the President authorize the local boards to investigate upon their own initiative the question of liability to registration of a person who has not voluntarily registered, or to register such persons involuntarily as a result of such investigation by it. Hence, in the absence of such rule or regulation and under the very terms of the act, the local boards are not invested—even if they can be without amendment of the act—with any authority to include in the draft a person who has not voluntarily registered, as being within the registrable age and subject to the provisions of the Selective Service Act, unless he shall have been indicted and convicted of willfully failing and refusing to register, and has been "thereupon" and as a consequence of such conviction, registered, and thereby brought within the jurisdiction of the board in the matter of claims for exemption, deferred classification and the like.

I hence conclude that, under the admitted facts, as the petitioner's registration card and answers to the questionnaires showed that he was more than 31 years of age on June 5, 1917, the local board acquired no jurisdiction over him whatever, and was without authority either to investigate, of its own motion, the question of his age, or to place him on the draft list, or to adjudge him a deserter and order his arrest and delivery to the military authorities. His petition is accordingly granted, and he is ordered discharged from restraint and custody by the sheriff pursuant to the order of the local board.

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In re BLOOMBERG.

(District Court, D. Massachusetts. July 10, 1918.)

No. 22615.

1. BANKRUPTCY ⇐58—ACTS OF BANKRUPTCY—PREFERENTIAL PAYMENTS.
Payment by an insolvent to certain creditors of 25 per cent. of their claims, pursuant to an arrangement made by a creditors' committee, approved by most of them, for settlement of all his indebtedness on that basis, where he had secured funds to complete the settlement, were not preferential, and did not constitute acts of bankruptcy.

2. BANKRUPTCY ⇐91(2)—COMPOSITION—BONA FIDES.
An insolvent debtor, who undertakes to raise funds and compound his indebtedness, should keep accurate accounts, showing what he received and disbursed, and his failure to do so will count heavily against his assertions of honesty and good faith towards his creditors.

In Bankruptcy. Involuntary proceedings in the matter of Hyman Bloomberg, alleged bankrupt. Petition dismissed.

John J. Cummings, of Boston, Mass., for petitioning creditors.
Asa P. French, of Boston, Mass., for alleged bankrupt.

MORTON, District Judge. On February 9, 1915, a meeting of the creditors of the respondent was held, at which a committee was appointed to consider his financial affairs. On February 23, 1915, before this committee had completed its work, an involuntary petition in bankruptcy was filed against him. The committee recommended a settlement with creditors on the basis of 25 per cent., which seems to have been satisfactory to the great proportion of them. Thereupon the respondent sold his store in Brockton, Mass., with its stock and fixtures, which constituted practically his entire assets, to one Sandler for $15,000, in order to obtain the money necessary to carry through said settlement. The date when this conveyance was made is in dispute—the respondent contending that it was on April 29th; the petitioners, that it was not until May 11th. The time is important, because the present petition was filed September 11th, and the only act of bankruptcy originally alleged in it was this transfer. If it took place at the time claimed by the respondent, it was more than four months old when the petition was filed, and was therefore unavailable as an act of bankruptcy. On June 8, 1915, the first involuntary petition was duly dismissed without objection, after notice to all creditors, including the present petitioners.

Following this dismissal the respondent began to carry out the proposed settlement by making payments to his creditors, either personally or through Mr. French, his attorney. Money was placed in the latter's hands for that purpose. Sandler himself, a brother-in-law of the respondent, was a large creditor by reason of his indorsements for the bankrupt. The referee explicitly finds that the arrangement proposed included all the creditors, that Sandler was not preferred by what was done, and that there was no intention to hinder, delay, and defraud creditors.

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There was delay in completing the payments of 25 per cent., and before all the creditors had received their money the present involuntary petition was filed, after which no further payments were made. On May 12, 1916, the respondent filed a voluntary petition in bankruptcy, action on which is suspended by reason of the present proceeding.

On October 7, 1915, the petitioners amended their petition, by setting out additional acts of bankruptcy consisting of certain payments of 25 per cent. made to creditors under the settlement arrangement, alleging them to be preferential transfers. On August 28, 1916, a motion to amend was filed by the petitioners, alleging a fraudulent and preferential transfer of a lease to Sandler on May 27, 1915. If objection had been made, this motion would not have been allowed. In re Forbes (D. C.) 235 Fed. 316, No. 19617, August 16, 1916. No objection being made, it was allowed as of course. The allegations of the original petition and of each of the amendments were answered by a formal denial by the respondent, and the issues thus made were referred to and heard by the referee, who has found in favor of the respondent.

The decisive points on which the case turns are the date of the conveyance of the store to Sandler, and the purpose and intent with which it and the subsequent payments and transfer set forth in the amendments were made.

[1] As to the date of the conveyance of the store: This was a question on which the evidence was conflicting. On the one side a conveyance in writing was produced by the respondent, dated April 29, 1915, and the testimony in his behalf was that it was a bona fide instrument, made on the date therein stated. Against this were apparently inconsistent statements and conduct by him and other parties interested. In this conflict of testimony, the learned referee, who saw and heard the witnesses, and was in a much better position to arrive at the truth than this court, which has only a transcript of the testimony, believed the respondent. The situation is one in which the referee's finding carries great weight. I have carefully examined the evidence, and am not prepared to say that it was clearly wrong. It follows that the acts of bankruptcy alleged in the petition as originally filed are not sustained. What was done amounted to an informal assignment for the benefit of creditors. It is argued for the petitioners with much force that the arrangement was for many reasons an unsafe and vicious one from the creditors' point of view. If so, the creditors should have seasonably broken it up, as they had the right to do, by bankruptcy proceedings, or by objecting to the dismissal of the first petition.

The payments by the respondent to several of his creditors, which constitute the acts of bankruptcy set up in the amendment of October 7th, were made by him in carrying out the plan of compromise and settlement on a 25 per cent. basis approved by his creditors. They were made with money procured by him for that purpose from the sale of his store. The transfer of the lease was made, as the learned referee finds, in pursuance of the same plan.

The principles by which it is to be determined whether such pay-

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ments and transfer are preferences, or conveyances in fraud of creditors, seem fairly clear. A preference is defined by the Bankruptcy Act as a transfer, the effect of the enforcement of which "will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (Comp. St. 1916, § 9644). There must be an intent to prefer (section 3a [2] [Comp. St. 1916, § 9587]); but if the effect of the transfer is to give a preference, such intent is presumed on the familiar principle that one is presumed to intend the natural consequences of his acts (Collier, Bankruptcy [11th Ed.] p. 102). If one who is insolvent—and Bloomberg was insolvent—pays an outstanding unsecured claim in full, he obviously gives that creditor an advantage over other creditors in the same class. Not having money enough to pay all, he has paid one. A payment on account, which left the balance of the claim outstanding, would also operate as a preference. But if a debtor, who has property enough to pay all his creditors 25 per cent., pays one of them that percentage for a discharge of the entire debt, it is difficult to see how any preference results. That is what, on the findings of the learned referee, as I understand them, the respondent did; each of the payments alleged in this amendment was made for the discharge of a debt four times as great; there were assets enough to pay all creditors the same proportion, and the intention so to apply the assets; the mortgage of the lease was made in carrying out the settlement, as further protection to Sandler.

[2] If these findings were correct, there was no intention to prefer, and the payments under discussion were not preferences, and did not constitute acts of bankruptcy. The real question at the bottom of this, as of many bankruptcy cases, is whether there was an honest effort to straighten out the respondent's financial affairs, or whether there was not. As to creditors negotiated with and paid by Mr. French, the evidence fully supports the findings of the learned referee. As to the creditors, including Sandler, who were dealt with by the respondent, the evidence as it appears in the transcript is much less satisfactory. An insolvent debtor, who undertakes to raise funds and compound his indebtedness, should keep his accounts of what he realized for property sold, and what disposition he made of the proceeds in definite, clear shape, so that everything he did can be readily scrutinized. Failure to do so should count heavily against his assertions of good faith and equality in the treatment of his creditors. Bloomberg's accounts fall far short of this standing. Moreover, the constant evasions and assertions of ignorance in his testimony and that of Sandler seem to me suspicious, and coupled with their failure to produce satisfactory vouchers and accounts to support their statements would, I think, have led me to decline to give their testimony much weight. But, as has been said with reference to the first point, the learned referee had all this evidence before him, and also saw the witnesses, and got more into the atmosphere of the case than it is possible for an appellate court to do. With some hesitation, I must decline to hold that he was clearly wrong in his conclusions.

Report confirmed. Petition dismissed, but without costs.

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Ex parte PROUT.

In re REZENDES et al.

(District Court, D. Massachusetts. June 26, 1916.)

No. 1468.

1. HABEAS CORPUS ⊂⊃92(1)—PROCEEDINGS FOR DEPORTATION—REVIEW.
An order of exclusion and deportation unsupported by any evidence is invalid. Hence the question whether there was any evidence before the immigration tribunal in support of its findings may be raised in habeas corpus proceedings.

2. ALIENS ⊂⊃50—EXCLUSION OF IMMIGRANTS—CONTRACT LABORERS—"OFFERS OR PROMISES OF EMPLOYMENT."
"Offers or promises of employment," to come within the contract labor clause of Immigration Act Feb. 20, 1907, § 2, as amended by Act March 26, 1910 (Comp. St. 1916, § 4244), must be made by or with the authority of the proposed employer, and a mere assurance or promise in general terms of employment after reaching this country, made to an alien by a foreign steamship agent, is not ground for exclusion.

3. ALIENS ⊂⊃50—EXCLUSION OF IMMIGRANTS—CONTRACT LABORERS.
Nine Portuguese laborers, not shown to have acted in concert, bound to a point in this country where they were assured by steamship agents that they could find employment, but having no knowledge by whom or for what they would be employed, *held* not subject to exclusion as contract laborers.

Petition by William C. Prout for writ of habeas corpus on behalf of Francisco Rezendes and others. Writ granted.

William C. Prout, of Boston, Mass., pro se.
The United States Attorney, opposed.

MORTON, District Judge. This is a petition for habeas corpus brought against the Commissioner of Immigration for the District of New England to obtain the discharge of nine Portuguese immigrants who have been excluded and are now held at Boston for deportation. The case was heard as a single proceeding upon the petition, the answer, and the record of the proceedings and evidence before the immigration tribunals.

The provisions of law under which the exclusion was ordered (Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898, as amended by Act March 26, 1910, c. 128, 36 Stat. 263 [Comp. St. 1916, § 4244]), are those relating to contract laborers, and are as follows:

"Sec. 2. That the following classes of aliens shall be excluded from admission into the United States: * * * Persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled."

The cases of these aliens were grouped and heard together by the immigration authorities. Act, § 13 (Comp. St. 1916, § 4260); Rule 2, subd. 2. I shall treat them in the same way.

The majority of the Board of Special Inquiry found that each alien had "been induced or solicited to migrate to this country by offers or

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promises of employment" (Decision of Board), and on that ground alone excluded them. This decision was affirmed by the Secretary of Labor. The dissenting member of the Board of Special Inquiry was of the opinion that such finding was not warranted by the evidence.

The petitioners admit that a full hearing was accorded them by the immigration authorities, and that they were given an opportunity to present such evidence as they had to offer. Their principal contention is that, as a matter of law, the decision against them was wholly unsupported by evidence and is unreasonable and unfair.

[1] An order of exclusion and deportation unsupported by any evidence is invalid, and the question whether there was any evidence before the immigration tribunal in support of its findings may be raised on habeas corpus proceedings. Whitfield v. Hanges, 222 Fed. 745, 138 C. C. A. 199 (C. C. A. 8th Circuit); U. S. ex rel. Cline v. Williams, 189 Fed. 915 (C. C. D. Ct. N. Y.). It is therefore necessary to consider whether there was any evidence before the Board of Special Inquiry upon which the majority finding above referred to could reasonably be made.

With the possible exception of Joao Souza, whose case was not, however, differentiated from the others by the immigration authorities, there was no direct evidence against any of the petitioners. All the cases were dealt with together and disposed of by general findings of inducement and solicitation to migrate, based in the opinion of the board, as appears from its decision, on circumstantial evidence.

[2] It seems clear that "offers or promises of employment," in order to come within the statute, must be made by, or with the authority of, the person proposing to furnish the employment. A mere assurance or promise, in general terms, of employment after reaching this country, made to an alien by a foreign steamship or transportation agent, is not ground for exclusion.

[3] These nine aliens did not come from the same place in Portugal; they lived at five different places there. Those places were not, as I understand, very far apart; but there is no evidence that the immigrants were acquainted with each other, or acted in concert in coming to this country. Not more than two or three dealt with the same steamship agent for their passages. Some of them appear to be traveling alone, and there are groups of two or three together. They are all destined ultimately to Palmerton, Pa., where a large number of their countrymen reside. They follow different occupations, but are mostly laborers. They expect to go to work immediately; but with a few exceptions they have, so far as the evidence shows, no job in mind, and do not know what they will find to do. There is not a scintilla of evidence that any employer of labor in Palmerton had anything to do with their coming there. I am unable to discover any substantial evidence that the nine are in any way acting in concert or conspiracy in endeavoring to obtain admittance into this country, or that there is any combination or conspiracy for that purpose between the several groups. I have carefully considered the evidence in its relation to the individual aliens. The answers made by Joao Souza, which are specially relied on in support of the finding against him, must be considered in

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connection with the rest of his testimony; and it must be borne in mind that he was testifying through an interpreter.

In no case does the evidence, in my opinion, show an offer or promise of employment by, or on behalf of, any person proposing to employ the alien here, or reasonably support the conclusion of the board that the alien was "induced or solicited to migrate to this country by offers or promises of employment." As my decision is based upon a lack of evidence, it is unnecessary to state in detail the special facts as to each applicant.

Upon the cases as a whole, the conclusion reached by the dissenting member of the Board of Special Inquiry seems to me to have been, not merely the right one, but the only one which could fairly be made upon the evidence.

The order will be that the writ issue.

Ex parte McDONALD.

(District Court, E. D. Wisconsin. August 10, 1918.)

1. ARMY AND NAVY ⇐20—SELECTIVE DRAFT ACT—STATUS OF REGISTRANTS.
Selective Draft Act does not give persons within the draft ages any military status solely by virtue of their being within such ages, but they retain their ordinary status as civilians and citizens until it is changed through the operation of the law by their selection for service.

2. ARMY AND NAVY ⇐20—SELECTIVE DRAFT ACT—POWERS OF BOARDS.
The courts are bound to respect the determination of local and district draft boards on all matters within their respective jurisdictions, and have no power to revise their decisions, where their jurisdiction has been lawfully exercised; but the courts may determine to what effect the boards have acted.

3. ARMY AND NAVY ⇐20—SELECTIVE DRAFT ACT—POWERS OF BOARDS.
Both the local and district draft boards, within their respective jurisdictions, retain their power to hear and determine matters pertaining to a registrant until the hour specified in the notice of the local board when he is required to report for service.

4. ARMY AND NAVY ⇐20—SELECTIVE DRAFT ACT—AUTHORITY OF DISTRICT BOARDS.
Where after notice by a local board to a registrant to report for service, but before the time arrived, he was given deferred classification by the district board on industrial grounds, he could not lawfully be arrested and imprisoned by the local board for failure to report.

Habeas Corpus. Heard as an application for writ of habeas corpus by Bernard J. McDonald. Writ granted.

McGovern, Hannan & Reiss, of Milwaukee, Wis., for petitioner.

H. A. Sawyer, U. S. Atty., George Lines, and J. W. McMillan, all of Milwaukee, Wis., and John B. Sanborn, of Madison, Wis., for respondents.

GEIGER, District Judge. This matter is here upon a petition, the writ, the return upon ancillary writs of certiorari to draft boards, and returns thereto in habeas corpus.

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The writs of certiorari, of course, were issued in discharge merely of the function of bringing up certain records which, it was conceded, might throw some light upon the questions otherwise raised by the petition for the writ of habeas corpus, and do not discharge the office of an original proceeding to inquire into or to correct the doings of the tribunals to whom addressed. The pertinent facts in this case are that the petitioner, a registrant under the selective service law (Act May 18, 1917, c. 15, 40 Stat. 76) and within the jurisdiction of one of the local draft boards in the city of Milwaukee, was called for service under the ordinary notice fixing the time to report for military duty. After the giving of that notice, or after the petitioner obtained knowledge of its issuance, he appeared before the district board and made application for deferred classification because of facts within its exclusive jurisdiction to consider. That board granted his application prior to the time when he was required by the notice issued to report for military duty. Notwithstanding that determination, the local board issued an order for his apprehension, consequent upon which the respondent, Janssen, chief of police of Milwaukee, and Bodenbach, an agent of the federal government, took him into custody and placed him in the county jail for Milwaukee county. He sues out this writ of habeas corpus, claiming that by virtue of the action of the district board he was entitled, at least temporarily, until it was changed by due process under the selective service law, to his freedom.

[1] Whatever other facts have appeared here in the records or statements of counsel showing the successive action taken or attempted to be taken by either of these boards prior to the final action, are of no pertinency in determining the ultimate question in the case. I said a moment ago that the selective service law had a purpose of enabling the raising of an army, and it defines certain persons who are liable to be called. It does not give them any status, as a military status, solely by virtue of their being within certain ages. They retain the ordinary status which they have as civilians and citizens unless and until it is changed through the operation of the law. In other words, the law defines those who are liable to selection, and that, by necessary implication, means that when they are selected as prescribed by the law, they enter the service. Unless and until they are selected, they are not in the service, and enjoy their ordinary civil rights and privileges; and, if this be true, it must be true of those who have never been called, and of those, who, having been called, are not selected, either because of deferment or rejection.

Now, the law is, of course, an exercise of one of the highest of congressional powers—power to compel persons to bear arms in defense of the country; and, in so far as it determines who, for the time being, is liable to be called for that purpose, it is the exercise of the sovereign congressional authority, which is unimpeachable. As a matter of fact, beyond making the declaration respecting such liability, and those subject thereto, the law contains little except broad administrative provisions, the carrying out of which has been dele-

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gated almost wholly to the executive. True, there are guides given to the latter to govern his administration and which, probably, are binding upon him. But be that as it may, the executive has accepted the delegation of power and has proceeded to erect the machinery of the law—familiar to us all. And it consists in the main of the so-called local boards and of the district boards, reserving of course, as by the terms of the law it may be reserved, a superior revisory power in the President himself. Now, the law and the regulations established under this grant of power, define with considerable clearness the jurisdiction of these various tribunals or instrumentalities. The local boards are given a sort of original jurisdiction pertaining to one class of cases. With respect to those cases the district board is created, and it exists, as a revisory or an appellate tribunal for the express purpose of enabling reviews of the determinations of the local boards. The district board is created not only for that purpose, but, under the express terms of the law, there is wholly excluded from the jurisdiction of local boards the entertainment in certain matters, of original jurisdiction, of which, except for the revisory power of the President, is exclusive—those are the cases pertaining to deferment on industrial grounds.

Now, much of this has become familiar to us all in the past year, but it is well to bear in mind, primarily, in considering this case and others that arise, that it was the plain congressional intent, and it is certainly the plain executive intent, to have created under this law *a system* which, being established, certainly exists and must be respected for some purposes. Among such purposes for which the system is established is that of enabling orderly procedure; but there is the other equally great, if not greater, purpose, of enabling *just and effective determinations.* Therefore, being a system involving not only order, it must be held to have contemplated and to be given effect such as, upon the face of things, determinations by boards, either intermediate or final and exclusive, are entitled to receive. It would be absurd to say that a local board, being given original or initial jurisdiction of a certain matter, the determination of an appellate board of matters heard by it, by way of revision or correction, either in point of fact or of law, should be of no binding consequence. That sort of a principle, of course, is familiar to lawyers in respect of the successive relations of courts, but it is equally true, not only in executive situations, but in everyday life, that when a tribunal, as, for example, in the taxing department, having original jurisdiction, is subject to review, certainly (and the authority who establishes the reviewing tribunal should be held conclusively to contemplate that) the determination on review shall be effective and binding upon the subordinate tribunal. Now, that is the situation as it has developed under this law.

[2] Speaking plainly, if this is not a system under which the local board, having original jurisdiction, may have its findings nullified through revision, or superseded through the exertions of a higher tribunal, having original jurisdiction of matters not within the competency of the local board to determine, the law amounts to nothing

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other than a piece of legislation fraught with unlimited possibilities for confusion. Wherefore, courts ought to take that view of the law, and it brings us directly to the question: What is the attitude of the courts upon the determinations made by these functionaries created under this selective-service law? What is the power of the courts by way of revision or correction? Now, the answer to that question is not at all difficult. In my judgment, either as of first impression or based upon the course the courts have followed since the enactment of the law, it is simply this: That the courts are bound to respect the determination of any of these tribunals upon all matters within their jurisdiction, and that limits the court, at the outset, to determine and ascertain whether there has been action under the law; secondly, what is the quality and effect of that action in so far as it affects rights appertaining to the individual?

The court here, as many of the District Courts, has had applications for writs of habeas corpus seeking to review the action of local or district boards, challenging the propriety of their decisions, claiming that upon testimony in the record, or proffered testimony, a different determination should have resulted. It has been said with some uniformity, that the courts are barred the moment it appears that the tribunals had acted upon a matter properly before them. In a case brought to this court, where the petitioner, instead of proceeding by habeas corpus, sought to sue out a writ of certiorari commanding the boards to certify the records to this court to the end that it determine whether, upon the proffered proofs, petitioner made out a case entitling him to deferred classification, the court declined to take jurisdiction because, as it appeared to me, the boards had jurisdiction to determine what the petitioner himself said was determined; and in connection with that, this language was used as responsive to a contention made, supported by some authority, that the courts should issue writs of certiorari. I will quote from what was said at that time:

"Manifestly, cases dealing with individuals who aver that by reason of the express provisions of the Selective Service Act they are not within, but are left without, the entire scope of the act as prescribing and imposing liability to military service, are not pertinent. It may readily be conceded that, where the law imposes no obligation upon an individual, the courts must be open to his resistance of any effort to impose its obligations upon him. But the present case deals with an individual whose status is admittedly within the reach of the law. Indeed, he professes his willingness to submit to its obligations, but seeks for the time being to assert a right resting solely upon an executive regulation fixing and establishing conditions or considerations for classifications, and hence order and priority of call. With this as the case, should the courts exercise jurisdiction by certiorari to correct the misapplication of the executive regulations and to enforce, as the petitioner's right, the regulations as they may be applicable to the facts presented by him in court?

"Undoubtedly Congress, by detailed enactment, or the executive, with or without detailed regulation, could have imposed the service obligation upon all individuals within the scope of the law without any attempt to establish order or priority based upon considerations pertaining to the individual or to the service or the needs of the Nation. In other words, this power, existing as it did in Congress, might have been exercised and exerted by detailed provisions of the law, or might have been, as it was, delegated practically in its entirety to the executive. It is my view that the character of the legislation is such that it never was intended, by conferring upon the Executive the full

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power and discretion to determine the matters which are now comprehended within the executive regulations, to reserve to the individual who is within the scope of the law, as a matter of legal right subject to be enforced and vindicated in the courts, these very regulations which, in executive discretion, need not have been made at all, or, in like discretion, may be varied from day to day. The draft boards are purely executive agencies, and their error, committed against those who are within the draft law, is executive error in the enforcement of discretionary regulations; and I do not believe that it was or could be the congressional intent that these executive agencies constituted, as observed, to carry out an unlimited discretion, were or are to be considered in the light of quasi judicial tribunals discharging functions which pertain to everyday legal rights of a citizen. In re Kitzerow (U. S. D. C. E. D. Wis.) 252 Fed. 865.

That is broad language, and I am ready to say to-day that I will adhere to all of it. But it does not reach this case, nor foreclose the petitioner's contention. Where, for example, the regulations indicate to the boards order and priority of call of registrants, or the considerations upon which order and priority shall be determined, namely, dependency or the like, it will be readily conceded that when the boards have determined the facts the courts should not take up the case and rebalance it, because that would lead practically to a judicial selective service ultimately. Every one within the range of the law could at least attempt to invoke the jurisdiction of courts for that sort of review. So we get back to the proposition. What is the function of the courts when inquiry is made on behalf of a citizen who seeks to prosecute a remedy which, if granted, will lead to his liberty? Plainly, the court is limited to asking the question, Have these boards acted; and if so, how? To what effect has the law been applied to the individual?

In my judgment the error made on behalf of the respondents in the discussion of the case arises right at this point, in asserting that this is to be regarded as a "military question." The questions to which I have referred, such as whether exemption or deferment should or should not be granted, are plainly executive questions. In fact, it makes little difference what characterization they be given, for their determination is binding upon the courts. But the questions whether the boards have acted at all, and, secondly, to what effect have they acted, are questions of fact, always open to judicial determination. It is the question whose answer determines whether the individual is, or must go, in or out of the service, and likewise whether he can or cannot invoke the court's aid. Now, the present case presents an approach from an angle opposite to that presented in the Kitzerow Case. There, the moment it appeared that the boards had acted, the court, having judicially determined that the boards had acted against the petitioner, said to him:

"We are bound by that determination and you must accept it as placing you in the service."

The petitioner here says that the boards have acted, but they have acted the other way. Now, if the premise be correct that until a man has been selected as the law prescribes he shall be selected, he retains his functions as a civilian, surely there must be a tribunal in which one who claims that he has not been drawn can establish that fact and enforce the rights growing out of it.

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These boards exist in the manner in which I have indicated. The local board, up to the time its action was attempted to be superseded by the district board, was plainly within its jurisdiction. And that raises the question, presented naturally and of necessity by the petitioner, Did the district board have jurisdiction to make a superseding determination? Obviously, if the respondents come into court with an order of arrest, based solely upon the action of the local board, if the possession of a document of that kind is a bar to the exercise of judicial power, the writ here must be discharged; but, if the premise which I announce is correct, the petitioner is not bound by an order made by a board, which, under the very plain terms of the regulations and the obvious intent of the system to which I have adverted, has been superseded in its effect by the action of the other board, the district board. Therefore he has the right to come into court to test out the ultimate quality of the warrant which is returned here by the respondents as justifying his imprisonment.

[3] That brings us to the question as to whether the district board did have jurisdiction in this matter. I am ready to hold that it did, upon two grounds, one of which is easy: First, the practical concession of all parties here that there is nothing in law which forbade the district board originally to hear and determine this application for deferred classification at the time it in fact heard and determined it; secondly, jurisdiction appears entirely clear under the regulations issued by the Provost Marshal General and by the President. Under such regulations induction into service contemplated by the law is the point whereat the jurisdiction of these two boards ends, and, as such, is the time and hour fixed in the notice given by the local board. That regulation, of course, is supportive of the very idea to which I have adverted, namely, order, harmony, and effectiveness. It may be an interesting question, not relevant here, whether from and after that time, and prior to taking the oath as a soldier, the registrant is in fact a full-fledged soldier. But it is entirely clear that at no time, prior to the actual induction defined in the regulations, is the power of these boards within their respective jurisdictions to hear and determine matters pertaining to the case of a registrant wholly cut off. There is no statutory or other bar. Indeed, the regulations, wisely and in the interest of justice, seek to preserve and retain that power until the last moment. So I am ready to determine, both upon the concession and upon the record returned here, that there is nothing whatever in the law or the regulations which cuts off the power of the district board to exercise its original jurisdiction at any time prior to the induction which is defined in the regulation, namely, the hour specified in the notice of the local board. Notwithstanding some little contention respecting the exercise of jurisdiction informally, thereby ignoring regulations prescribing time within which a thing shall be done as a matter of practice or procedure, I consider it of no moment here. Such regulations are directory. The mere fact that the district board entertained this application prior to the time specified in the notice and made its determination prior to that time operated, in my judgment, under the very express terms of the regulations wholly to supersede the determination

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of the local board. That really disposes of this case. I say that the petitioner can come in here and for the purpose of having a judicial determination of the question as to what this board or these boards had determined and what the quality of their determination is; can present the facts here, bringing in the action of the district board as the final arbiter of the matter of his going into or staying out of the service—at least for the time being.

[4] Now, what can be meant, the concession being made on behalf of the respondents that this district board had jurisdiction, by the general suggestion that the court is still barred from giving relief because it is a "military question"? It is not a determination of a "military question," because the intended consequences of the application of the law through this exclusive instrumentality leave the registrant where he was as a civilian. The affirmative action of the tribunal is against induction into service. Upon questions propounded during argument, it is interesting to inquire what the quality of the determination of the district board is, whether it was binding; and if so, upon whom. And in response to those queries it was said that it was binding until overridden by "higher military authority." Well, that answer is not availing for a variety of reasons, the first one being that it creates—it brings forth in the administration of the law—a situation fraught with nothing but confusion. The President and the executive, under the promptings of this very law, have determined that the district board should decide the matter, and it would be rather anomalous to say that a system had been created whereby the higher board could determine the matter, but the lower board need not in the slightest degree respect the finding, thereby forcing the one in whose favor it had been made to appeal to higher authority. But let us pass that for a minute and test it out in another way. Let us assume that the matter be characterized in that indefinite sort of a way as a military question, beyond the power of courts to consider. Notwithstanding that, it is conceded that the petitioner here, being between the boards and suffering the loss of his liberty unjustly, must have some sort of a recourse. Well, the query arises, What may that recourse be? And if the answer be that he might appeal to the Provost Marshal or to the President, let us grant that that might be done, let us assume that the local board having received the determination of the President to affirm the district board, the local board still remains obdurate, and respondents here, upon promptings of the local board, still refuse to release the petitioner. It is interesting to inquire, What remedy is left open to the President of the United States or the Provost Marshal to enforce their concurrence with the district board? What means or method would avail to relieve the petitioner of the aggressions? Would not the President insist upon according to petitioner the very right he now asserts—a civilian right based upon the award of the tribunal constituted for that very purpose? And obviously the asserted right, if subject to vindication, enjoyment, and protection at all, is so not as a matter of whim or caprice, but upon the formal pronouncement of a duly constituted instrumentality that the individual is for the time being not selected.

It seems absurd to say that, though reclassification or deferred

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classification have been committed to the district board (exclusively in industrial cases), and their determination is and must be corrective of a status previously had under local board jurisdiction, nevertheless the district board's determination—binding on everybody—need not be respected by anybody. In the present case the local board has not attempted to justify its acts except upon the hypothesis that it could, optionally, ignore the action of the district board in its change of petitioner's status. There is no contention that his custody is based upon the deferred status. In this conflict it surely does not aid in the solution of the problem to say that the exertion of the local board's power as against the district board's conceded power to exempt him involves a "military question." And with this as the situation some power must exist to determine whether, under the law, the petitioner has or has not been drafted so as to bring about a surrender of his freedom as a civilian.

If a conflict between tribunals created under this law, howsoever ended or solved, would leave the individual whom it concerned a member of the military establishment, then it might be called, properly, a military question. But when it is conceded that the determination of the district board is effective, or intended to be effective as an executive release, discharge, or exemption, then the question, what in truth has been determined, certainly need not be given any special characterization. The answer to such question determines whether any right, subject to guaranty in enjoyment, has been conferred upon or retained by the individual. As already indicated, where such determination is intended to operate as exemption, the registrant is left—until superseded by the orderly processes of the law—in possession of his ordinary freedom, and, as also indicated, he should have recourse to judicial tribunals to relieve against an aggression in contravention of such exemption. This, of course, all proceeds upon the premise that in creating the "system" under this law, determinations of the executive tribunals are to be effective alike in the instances where they operate to reject or release the individual as in those where he is selected or actually called. In the one as in the other, courts accept the determination, refuse review, but, manifestly, in the former, cannot refuse to the individual such protection and guaranty in enjoyment of the right, as by the express force of the determination, the law intends should follow. Obviously, upon such view of what the "system" is and what it intends, habeas corpus must be the available remedy—the remedy which, if applied, may lead to a judgment enforceable not only through the strength of judicial but also of the supreme executive will. The suggestion that courts keep their hands off, to the end that "higher military authority" vindicate the personal right of the petitioner brings with it the query respecting remedies over and manner of guarantying the enjoyment of a conceded ordinary civil right. It may be conceded that a higher military authority could in the present case wrest the petitioner from the operation of the local board's order, but the mode and manner of enforcing obedience to the superior decree has not been suggested or defined.

I am satisfied that petitioner makes out a case entitling him to judgment of discharge, and such may be entered.

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MARQUETTE CEMENT MINING CO. v. OGLESBY COAL CO.

(District Court, N. D. Illinois, E. D. September 7, 1918.)

1. DEEDS ⟸100—CONSTRUCTION—EXTRINSIC CIRCUMSTANCES.
To aid in the construction of deeds, evidence of all the surrounding circumstances is admissible to show the situation and relation of the parties and what they sought to materially accomplish.

2. MINES AND MINERALS ⟸55(6)—GRANTS OF MINING RIGHTS—CONSTRUCTION.
The right of support is vital to the owner of the surface and strata overlying a mine, and is not presumed to have been given up by a conveyance of mining rights unless expressly or by strong implication.

3. MINES AND MINERALS ⟸122—GRANTS OF MINING RIGHTS—CONSTRUCTION —"SURFACE."
The word "surface" in mining controversies means that part of the earth or geologic section lying over the minerals in question, unless the contract or conveyance otherwise defines it, and the owner of a higher stratum is entitled to the same right of support as the surface owner.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Surface.]

4. MINES AND MINERALS ⟸55(6)—GRANTS OF MINING RIGHTS—CONSTRUCTION.
A provision in a conveyance of coal mining rights excepting coal under that portion of the surface occupied by buildings of the grantor did not, by implication, permit mining in such manner as to cause subsidence of the surface or overlying strata on other parts of the tract.

5. MINES AND MINERALS ⟸55(6)—GRANTS OF MINING RIGHTS—CONSTRUCTION.
A deed conveying the right to mine coal under a tract of land "without entering upon or injuring the surface thereof" requires the mine to be so worked as not to let down the surface.

6. COURTS ⟸367—GRANTS OF MINING RIGHTS—RULES OF PROPERTY.
Where mining rights are granted in view of a local rule of the state, such rule will be followed by the federal courts in construing the grant, whether or not it is to be considered strictly as a rule of property.

7. MINES AND MINERALS ⟸55(6)—SEVERANCE OF TITLE TO MINERAL—RIGHTS OF SURFACE OWNER.
Under the law of Illinois, as by the general common law, where the underlying minerals are severed by conveyance from the surface the owner of the surface has a clear right to its support.

8. NEGLIGENCE ⟸100—CONTRIBUTORY NEGLIGENCE—WHEN PROVABLE AS DEFENSE.
Contributory negligence is not a defense to an action for breach of an absolute legal duty.

9. MINES AND MINERALS ⟸125—INJURY FROM WORKING—INJUNCTION—REMEDY AT LAW.
Where the mining of coal by defendant causes subsidence which seriously interferes with complainant's mining in a higher stratum of limestone, causing damage, and will continue to do so to an extent which cannot be measured, the remedy at law is not adequate and does not exclude jurisdiction in equity.

10. INJUNCTION ⟸137(2)—PRELIMINARY INJUNCTION—BALANCING OF INJURY.
The rule as to balancing of injuries, to be considered in some cases upon application for preliminary injunction, does not apply where the right and its breach are clear.

11. EQUITY ⟸61—RIGHT TO RELIEF—LEGAL STATUS OF PARTIES.
When each party is pursuing his own right, and collision results, the one without legal culpability of any kind must prevail if the other occupies legally indefensible ground.

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In Equity. Suit by the Marquette Cement Mining Company against the Oglesby Coal Company. Decree for complainant.

Tenney, Harding & Sherman, of Chicago, Ill., and Duncan & O'Connor, of Ottawa, Ill., for plaintiff.

Adams, Crews, Bobb & Wescott, of Chicago, Ill., for defendant.

SANBORN, District Judge. This is a bill for an injunction by the owner of a limestone cement mine to restrain the defendant from so operating its mine situated directly beneath the former as to remove the subjacent support. It is conceded, and shown by the evidence of both parties, that there is an actual subsidence of 20 to 25 inches. The defendant, while admitting subsidence, contended on the trial, and gave evidence tending to show, that it was so gradual that the damage occurring in plaintiff's mine was not caused by such subsidence, but resulted from a careless and improper manner of mining the cement rock. It was decided at the trial, however, that certain of the damage was caused by the subsidence, particularly on account of the uneven or differential lowering of the strata of rock and shale underlying the limestone stratum in which the cement mine is operated. Certain other injuries in the cement mine have been due to the plaintiff's method of mining, in not leaving pillars of sufficient size to support the overburden, or by mining shale underneath the pillars, and thus leaving insufficient support. It remains only to recite enough of the facts to aptly apply the governing rules of law, after an examination of the legal principles properly applicable.

Defendant's position is that the suit for injunction cannot be maintained because the remedy at law is adequate, and it is therefore entitled to a trial of the facts by a jury, under the third amendment to the federal Constitution and section 120 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1132 [Comp. St. 1916, § 1112]). It further contends that subsidence was authorized by the dealings of the parties, it being understood that the coal could not otherwise be taken out, and that the correspondence and contract leading up to the conveyances passing between the parties, by which the cement mine and the coal seam were severed, as well as those conveyances themselves, recognized the right of subsidence by the defendant. A further claim, that all the injuries to the cement mine were caused by negligent and improper mining methods pursued by plaintiff, was decided at the trial in respect to portions of the mine in plaintiff's favor, as already referred to.

The property in question is at Oglesby, Ill., in the La Salle geological region, and the strata of limestone, coal, shale, etc., are sedimentary deposits. The plaintiff's mine is about 100 feet below the surface, and the coal seam now being mined by defendant is about 500 feet below the other. From the surface down to the cement mine the geologic section is glacial drift and various sorts of shale and clay. Then comes the limestone bed, about 40 feet thick, composed irregularly of nodular limestone (hubbly limestone and shale), fine-grained limestone, and crystalline limestone, with two thin horizontal shale partings. The mine floor is shaly limestone or soapstone under-

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laid with shale, supported by a thin layer of hard thin-bedded black shale or slate. This floor is of varying thickness, from 4 to 15 feet; and below it, down to the coal seam in question, are conglomerate rock, soft clay shales, some silty or sandy, hard shales, coal seams seven and five, green and grey shales, some very hard shale, a thin layer of limestone, and some 20 feet of tough, hard, shale composing the roof of the coal mine. The various layers are quite generally horizontally disposed to each other, and seams and partings abound. During the slow process of settlement due to subsidence, it is supposed that the shales, rock, and other kinds of earth move or slide on each other, finding their final adjustment in much the same form as before, though in a more blocky condition. Upon this the geologists, mining engineers, and miners who testified for defendant based their opinion that the subsidence caused no damage to the plaintiff's mine.

Plaintiff's mining is carried on by the room-and-pillar or pillar-and-stall system, by the advancing and not the retreating plan, the final step being to get as much material as possible by robbing the pillars and roof coming back. Defendant uses the long-wall system. The former consists in beginning at the mine opening, cutting tunnels or entries in the limestone ledge, and taking off rooms from them, leaving a limestone roof of varying thickness, theoretically sufficient to sustain the hundred-foot overburden when pillars of sufficient size are allowed to remain. When the boundary is reached such part of the pillars and roof is taken as is practicable as the work recedes. The work commenced in a small way some 30 years since, and for a long time the rooms were made larger than the best mining practice required. Within the last two or three years the entries and rooms have been made smaller and the pillars larger. Since the making of cement requires a certain amount of silica, found in the shales, the floor of the rooms was mined in certain parts for this purpose, and in places the pillars settled, causing floor heaving and cracking, roof-cracks, roof-falls, spawling, and some cave-ins. These occurred mainly in parts where there was no coal mining near enough to have any influence, and are not claimed to have been caused by it. Others are claimed to be wholly or partly due to the subsidence, and these, particularly the Hand cave and the Calumet Entry cave, will be mentioned presently.

The Title to the Two Mines.—That part of the cement mine which is now being worked consists of a tract about 7,000 feet long, roughly estimated at 200 acres. A part was originally owned by plaintiff and a part by defendant, and they arranged to sever the ownership by having the coal rights in plaintiff's land conveyed to defendant, plaintiff retaining all the rest, and, where defendant was owner, by having the fee conveyed to plaintiff, reserving the coal and the right of removal.

In the negotiations and writings leading up to these conveyances, as well as in the deeds themselves, it is claimed by defendant that there is an implied understanding that defendant might remove the coal even though subsidence was caused. These negotiations were

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begun by a letter of August 3, 1904, from defendant to Mr. N. W. Duncan, an officer of the plaintiff. In this letter it was proposed that the parties sever their respective ownership in the following manner: Defendant proposed to convey the cement rock and clay lying within 75 feet of the surface, with the right to mine them without entering upon the surface, and in the process of mining pillars of a specified size should be left, but no covenant not to injure the surface should be required. Mr. Duncan, it was proposed by this letter, should convey to defendant the coal and other minerals, not including cement rock and clay lying within 75 feet of the surface, with the right to mine the coal without entering upon or injuring the surface, Duncan to reserve such part of the coal and other minerals as might underlie the cement plant.

After negotiations covering some time, conveyances were made to and from each party. Deeds from plaintiff or its grantors to the defendant described the No. 2 coal seam, and so much of the rock, clay, and other minerals just above and just below the vein of coal as might be required in connection with the mining and removing of the coal, together with the right to mine and remove the same, and the adjacent rock, clay, and other minerals, "without entering upon or injuring the surface thereof," excepting the coal under a tract 200 feet wide by 600 feet long under plaintiff's manufacturing plant. Deeds made by defendant to plaintiff excepted the coal and minerals just above and below, with the same right to mine and remove it "without entering upon or injuring the surface thereof." Most of the deeds back and forth contain like provisions, but those which do not seem to be unimportant on the questions of construction and are not particularly stated.

Effect of Subsidence from Coal Mining.—After mining cement rock for many years, and having practically no trouble in the mine, in 1910 roof-falls, pillar-cracks, and floor-heaves commenced to appear, followed in some cases by cave-ins to the surface. The first cave-in was the Garage cave, May 15, 1910, followed by the Riley cave, September 18, 1910, a small cave on the south boundary in 1912, and two caves nearby in 1913. All these were caused by shale mining and not by coal mining. On September 10, 1913, occurred the Hand cave, the largest of all. At this time the coal face was approaching, but did not reach the immediate vicinity until February, 1914. The pillars left in this area were quite small, and the testimony leaves it uncertain whether the trouble was caused wholly by subsidence, but it was probably due both to that and the methods of mining. Early in 1914 an entry about 700 feet long and 35 feet wide, known as the Calumet entry, was driven in the solid rock in the western part of the mine immediately under the advancing coal mining face, and in December, 1914, the whole tunnel fell, in the course of a few days. The testimony leaves no doubt that this was caused by subsidence.

There were other distinct cave-ins in the region of the advancing coal face which were caused in part by subsidence, and in part by small pillars, shale mining, or both.

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The most clear evidence of injury caused by subsidence is in the northwestern part of the mine, from the Hand cave region to the northeast corner. After the Calumet entry disaster plaintiff employed engineers to endeavor to locate the cause or causes of the injury. Surveyors' monuments were set upon the surface, and in the mine, in considerable numbers. Readings were taken of their position at frequent intervals, and in this way subsidence was detected and measured. In the region of subsidence there were constant and continuous roof-falls, many of a serious character, and much damage to pillars and floor. All these have continued to the present time, and were going on in the same way down to the close of the trial. The evidence of these injuries, and their connection with subsidence, are numerous. They are in the area above the advancing coal face, and are absent in other parts of the mine; such injuries as there occur are due to local causes. There is also observed the absence of any important injury where subsidence has become complete and the earth has reached its final settlement. The injuries referred to as caused by subsidence cannot be attributed to floor weakness, excessive overburden, the presence of water, the character of the limestone, blasting with dynamite, or a "squeeze" or "creep" from the Hand cave. The mine is an exceptionally dry one, and the evidence shows that, while loose shale is quickly disintegrated by water, it is not so when under pressure. Added to all this is the fact, clearly demonstrated by the evidence, that the subsidence is a differential one. It is hardly possible to think of an uneven sinking of the support of a series of rooms and pillars without the necessity of serious damage. How can one pillar sink while another 50 feet away is stationary without the twisting, straining, and cracking described in the testimony? It is indeed possible to conceive that such a differential subsidence might occur in an untouched area in its natural state which would not cause much injury; but it must be otherwise in a ledge from which three-fifths of the rock has been taken out, the remainder having been left in the form of roof, pillars, and floor.

[1] *The Construction of the Deeds.*—Evidence of all the surrounding circumstances was properly submitted to show the situation and relation of the parties, and what they sought to materially accomplish. Butterley Co., Ltd., v. New Hucknall Colliery Co., Ltd., 99 L. T. 818 (A. D. 1908), 102 L. T. 609 (A. D. 1910); Beard v. Moira Colliery Co., Ltd., 112 L. T. 227 (A. D. 1914); Jones v. Consolidated Anthracite Collieries, Ltd., 114 L. T. 288 (A. D. 1915).

[2] The right of support is vital to the owner of the overlying surface and strata. Therefore it is not presumed to have been given up unless expressly or by strong implication. Wilms v. Jess, 94 Ill. 464, 34 Am. Dec. 242; Kansas City N. W. R. Co. v. Schwake, 68 L. R. A. 675, note 1; Catron v. South Butte Min. Co., 181 Fed. 941, 104 C. C. A. 405.

[3] The word "surface" in mining controversies means that part of the earth or geologic section lying over the minerals in question, unless the contract or conveyance otherwise defines it. It is not merely the top of the glacial drift, soil, or the agricultural surface. Humphries

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v. Brogden, 12 Q. B. 739. The owner of the higher stratum is entitled to the same rights as the actual surface owner. Yandes v. Wright, 66 Ind 319, 32 Am. Rep. 109. See 68 L. R. A. 679; Robertson v. Youghiogheny River Coal Co., 172 Pa. 566, 33 Atl. 706; Mundy v. Rutland, L. T. 23 Ch. Div. 81.

[4] There is nothing in the letters, negotiations, or deeds which gives a different meaning to the word "surface," or, either expressly or by implication, secures to the defendant the right to subside the overlying cement mine. On the whole, the implication is to the contrary by reason of the deeds giving the right to mine and remove coal "without entering upon or injuring the surface." All the restrictions are upon defendant's right to mine and not upon the plaintiff. Nor do the preliminary negotiations indicate an intention to waive the right of support. It is highly improbable that the plaintiff would intentionally agree that the relatively unimportant agricultural surface should be preserved, while assenting to the letting down of its enormously valuable rock ledge and mine. That it was careful to protect its manufacturing plant beyond all question is not a clear implication of its consent to subside its mine. As the court said in Wilms v. Jess, supra:

"But, it is contended, appellant and his codefendant were exonerated from protecting the surface, because the lease here stipulates that 'no pillars shall be withdrawn within six hundred feet of the shaft,' upon the principle that, 'having expressed *some* the parties have expressed *all* the conditions by which they intend to be bound under that instrument.'

"By looking to the lease, we think it quite clear this stipulation has relation to the mine only, and no reference whatever to the superincumbent soil. The whole clause relates to the manner of working the mine and the condition in which it shall be left. It requires that the mining shall be done in a workmanlike manner, that no pillars shall be withdrawn within six hundred feet of the shaft, and that the entries giving access to the coal not mined at the termination of the lease, shall be turned over, etc., in good condition, etc.—all for the obvious purpose of preserving the shaft and access to coal not mined.

"No attempt is made to regulate the rights and obligations of the parties, in respect of the superincumbent soil, further than to confer the right of way thereover and the surface use to the extent necessary to an efficient and economical working of the mine, leaving them to be governed in other respects in reference thereto by the common law."

In the English cases cited it was ruled that the parties, by their agreements in the leases or conveyances by which their ownerships were severed or secured, had agreed that the lower owner might remove the right of support, the provisions for this purpose giving rise to a clear implication. Thus, in the Butterly Case, plaintiffs owned the top seam of hard coal, and defendants the deep, soft seam, 150 yards below. It was common knowledge at the time the interests were created (as in this present case) that the lower seam could not be worked without causing subsidence. The lease of the upper seam contained a provision that the lessor might lease the lower or soft coal seam to others, and should in such leases indemnify against any physical damage caused by the working of such lower mine. Later the lessor leased the soft seam to defendants, who worked the mine and caused damage to the plaintiff by subsidence, for which it rendered bills to the lessor, which were paid. It also appears from the various reports of the decision that the defendants claimed the

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right, under the leases, to subside the surface, including the upper seam, on paying plaintiff for the damage caused. It was held that the plaintiff had no right to an injunction, but only to such compensation for subsidence as had been agreed upon. It was also assumed in the opinions in the Butterly Case that the subsidence would only make the working of the upper mine more expensive without stopping the mining altogether, but I find this would not be the result in the case at bar. There was also a provision in defendants' lease that they would work the mine in the most approved manner, which was held inconsistent with the right of the plaintiff to have an injunction against their working it at all.

In the Beard Case cited the landowner conveyed certain real estate, reserving all minerals, with the power to mine them "in as full and ample a way and manner as if these presents had not been made and executed." It was also provided in the deed that the grantor should pay at the rate of $20 a year per acre of land undermined. The former decisions were followed, and the right to continue mining affirmed. The following statement of the law by Lord Loreburn in Butterknowle Colliery Co., Ltd., v. Bishop Auckland, etc., 94 L. T. 793, was approved:

"Whenever the minerals belong to one person and the surface to another, the law presumes that the surface owner has a right to support, unless the language of the instrument regulating their rights, or other evidence, clearly shows the contrary. In order to exclude a right of support, the language used must unequivocally convey that intention, either by express words or by necessary implication. For the same presumption in favour of a right of support which regulates the rights of parties in the absence of an instrument defining them will apply also in construing the instrument when it is produced. If the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would not create an inconsistency with the actual clauses of the instrument, then it means that the surface cannot be let down."

[5] In the case now under consideration the provision in the deeds that Oglesby Company shall not enter upon or injure the surface amounts to a clause that the coal mine shall not be worked so as to "let down the surface," and such provision does not create any inconsistency with the one giving it the right to mine and carry away.

The Jones Case, also cited, related to damage to buildings on the surface, and there was the same provision as to compensation, to the effect that reasonable compensation should be made, for injury "whether by letting down the surface or otherwise."

The result of an examination of the English authorities cited on the argument seems to be that the rules are similar to those adopted in this country, yet there is here a stronger tendency in favor of the right of subjacent support than in the High Court of Judicature in England.

[6] *The Governing Rule of Law is that of Illinois.*—In 1880, long before the conveyances of severance between the parties here were made, the rule as to subjacent support was settled in Illinois by the case of Wilms v. Jess, 94 Ill. 464, 34 Am. Dec. 242, substantially reaffirmed by Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335. The former decision is commented on in other parts of this opinion. Since

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the conveyances were made in view of the local rule the federal courts will follow it, whether or not it is to be considered strictly as a rule of property. Any other rule would be intolerable, as applied to the ownership and enjoyment of property. Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856; Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228; Id., 179 Fed. 191, 102 C. C. A. 457, 66 W. Va. 711.

[7] The Illinois rule, as so established, is that the right of support is absolute, a substantive part of the mass of rights constituting ownership of land. It is not an incident of ownership nor an easement. In Wilms v. Jess a lease was made of the exclusive right of boring and digging for coal, and for "taking out and working the said coal, together with the right of way and surface of so much of the track [sic] as may be necessary for the economical use of the same." "It is further understood and agreed that the said party of the second part shall mine the coal in a workmanlike manner, no pillars to be withdrawn within six hundred feet of the shaft, and that the entries giving access to the coal not mined at the termination of this lease shall be turned over to the party of the first part in as good condition as the nature of the mine will admit." The court say:

"The lease under which appellant claims, confers the right to work the mine and take out the coal, and, as incident thereto, the use of usual and appropriate means therefor; and it also gives a right of way and surface use of so much of the superincumbent soil as is necessary for the economical and efficient working of the mine. It does not, however, assume to confer any right to destroy or injure or further burden the superincumbent soil.

"Where the surface of land belongs to one and the minerals to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals cannot remove them without leaving support sufficient to maintain the surface in its natural state. Humphries v. Brogden, 12 Queen's Bench, 743 (1 Eng. Law & Equity, 241); Harris v. Ryding, 5 Meeson & Welsby, 59; Smart v. Morton, 5 Ellis & Blackburn, 30.

"But, it is contended, appellant and his codefendant were exonerated from protecting the surface, because the lease here stipulates that 'no pillars shall be withdrawn within six hundred feet of the shaft,' upon the principle that, 'having expressed *some* the parties have expressed *all* the conditions by which they intend to be bound under that instrument.'

"By looking to the lease we think it quite clear this stipulation has relation to the mine only, and no reference whatever to the superincumbent soil. The whole clause relates to the manner of working the mine and the condition in which it shall be left. It requires that the mining shall be done in a workmanlike manner, that no pillars shall be withdrawn within six hundred feet of the shaft, and that the entries giving access to the coal not mined, at the termination of the lease, shall be turned over, etc., in good condition, etc. —all for the obvious purpose of preserving the shaft and access to coal not mined.

"No attempt is made to regulate the rights and obligations of the parties in respect of the superincumbent soil, further than to confer the right of way thereover, and the surface use to the extent necessary to an efficient and economical working of the mine, leaving them to be governed in other respects in reference thereto by the common law.

"The rule is well settled, when one owning the whole fee grants the minerals, reserving the surface to himself, his grantee is entitled only to so much of the minerals as he can get without injury to the superincumbent soil. Coleman v. Chadwick, 8 Pa. St. 81 [21 Am. St. Rep. 93]; Horner v. Watson, 29 P. F. Smith [Pa.] 251 [21 Am. Rep. 55]; Jones v. Wagner, 10 [16] Id. 429 [5

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Am. Rep. 385]; Harris v. Ryding, supra; Zinc Co. v. Franklinite Co., 13 N. J. (2 Beasely's Ch.) 342; Smart v. Morton, supra.

"And it is held, where a landowner sells the surface, reserving to himself the minerals with power to get them, he must, if he intends to have power to get them in a way which will destroy the surface, frame the reservation in such a way as to show clearly that he is intended to have that power. Hext v. Gill, 7 Law Reports, Chancery Appeal Cases, 699.

"But, it is contended, this obligation to protect the superincumbent soil only extends to the soil in its natural state, and that no obligation rests on the owner of the subjacent strata to support additional buildings, in the absence of express stipulation to that effect. This is, doubtless, true; but 'the mere presence of a building or other structure upon the surface does not prevent a recovery for injuries to the surface, unless it is shown that the subsidence would not have occurred except for the presence of the buildings. Where the injury would have resulted from the act if no buildings existed upon the surface, the act creating the subsidence is wrongful, and renders the owners of the mines liable for all damages that result therefrom, as well to the buildings as to the land itself.' Wood on Nuisance, § 201; Brown v. Robins, 4 Hurlstone & Norman, 185; Hamer v. Knowles and another, 6 Hurlstone & Norman, 459.

"The act of removing all support from the superincumbent soil is, prima facie, the cause of its subsequently subsiding; but if the subsiding is, in fact, caused by the weight of buildings erected subsequent to the execution of the lease of the mine, this is in the nature of contributive negligence, and may be proved in defense. The authorities do not require that plaintiff's proof shall exclude that hypothesis in the first instance."

This is the law of the state where the mines are situated and that law the court should follow. The case also conforms, I think, to the trend of authority in other states as well as in the British Empire. Where the underlying minerals are severed by conveyance from the surface, the owner of the latter has a clear right to the support of the surface. Seitz v. Coal Valley Coal Mining Co., 149 Ill. App. 85; Noonan v. Pardee, 200 Pa. 474, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722; Donk Bros. Coal & Coke Co. v. Novero, 135 Ill. App. 633; Penman v. Jones, 256 Pa. 416, 100 Atl. 1043; Jones v. Wagner, 66 Pa. 429, 5 Am. Rep. 385; Humphries v. Brogden, 12 Q. B. 739, 64 E. C. L. 739, 17 Eng. Ruling Cas. 416; 18 Am. & Eng. Ency. Law, § 556; 1 R. C. L. § 34, p. 395; Wood, Nuisances, 194; 3 Lindley, Mines (3d Ed.) §§ 818, 819; White, Mines & Mining Injuries, §§ 212, 215; Costigan, Mining Law, pp. 504–506; 2 Snyder on Mines, §§ 1020–1025; MacSwinney on Mines, 291; Williams v. Gibson, 84 Ala. 228, 4 South. 350, 5 Am. St. Rep. 368; Marvin v. Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322; Lord v. Carbon Iron Mfg. Co., 42 N. J. Eq. 157, 6 Atl. 812; Erickson v. Michigan Land & Iron Co., 50 Mich. 604, 16 N. W. 161; Carlin v. Chappell, 101 Pa. 348, 47 Am. Rep. 722; Williams v. Hay, 120 Pa. 485, 14 Atl. 379, 6 Am. St. Rep. 719.

Effect of Plaintiff's Mining Methods.—Defendant in its answer admits that plaintiff has suffered serious damages in its mining operations, but alleges that this is due to "its notoriously reckless, unworkmanlike, and unscientific methods of mining, in violation of well-established mining practice and sound engineering judgment." The proof shows that in some parts of the mine the pillars are too small, and that shale has been mined so as to further weaken them, and that

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this has been followed by injury in no way caused by subsidence. In other places this method of mining has contributed to such injury. In still others, particularly in the western, southwestern, and northwestern part of the east portion of the mine the injury is wholly due to subsidence. Plaintiff started its operations many years ago, when the science was not so advanced as at present. It has employed skilled workmen, its foreman and superintendent, Spurr and Moyle, being men of exceptional character and experience. Since troubles from subsidence commenced it has employed as mining engineer Mr. Shultz, most able and well equipped for his work, and who has much improved on the mining practice. I find as a matter of fact that the injuries on the southwest entry and haulage, with the exception of the extreme southerly ends, the Calumet entry, and the northwest part of the east portion of the mine, were due alone to the subsidence, and that most serious injury will follow the advancing coal face to the east and southeast; also that the method of plaintiff's mining did not contribute to the injuries in these parts, although the contrary is true as to the portion northwest, north, and northeast of the main entry to the mine, and that in this region the mining methods were not such as would at this day be approved.

[8] As to the effect of such negligence it is not necessary to decide, since I find that the continuance of coal mining will vitally injure territory in which the mine practice is good and sufficient. However, no charge of negligence is made against defendant, simply the breach of an absolute legal duty. In such a case the only defense, aside from laches or release of such duty, or some other defense not alleged (such as estoppel), is that the subsidence caused no injury. Contributory negligence (as the term implies) is a defense only when a party omits something in his operations which common prudence requires—a breach of negative duty. The rule seems never to have been applied to cases of absolute duties, like the statutory obligation of railroads to fence their right of way against domestic animals, except when the owner, seeing them on the track before an approaching train, deliberately refuses to remove them. Donovan v. Hannibal, etc., R. Co., 89 Mo. 147, 1 S. W. 232; Zimmerman v. H. & St. J. R. Co., 71 Mo. 476. To this extent only is the rule of "the last clear chance" applied to the negligent breach of absolute legal duty. The inapplicability of these rules to the present case seems obvious. In a general sense, it is true, defendant may be said to be negligent in not propping up its mine so as to prevent subsidence. Defendant might possibly leave pillars of coal sufficient to support the surface, but I assume that would be entirely impracticable under a prohibitive expense.

I think the objection or argument that the law of support applies only to land in its natural state, and not to a weakened structure like the cement mine, rendered more susceptible to injury by having more than half of the rock removed, has no application to the case. I find as a fact that the injuries would have occurred even if the mining methods had been the same as those now in use, which are above criticism. The subsidence was the wrongful cause of the injuries,

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the sole proximate cause. The rule of law held in the Wilms Case, 94 Ill. 464, 34 Am. Dec. 242, herein quoted, should be followed.

[9] *Is the Remedy at Law Adequate.*—By the Seventh Amendment to the Constitution, the right of jury trial in cases at common law is preserved, and, if the present case should properly be a legal one, defendant has a settled right to a jury trial upon the question whether the conceded subsidence actually causes injury, as well as upon all other facts. The same rule was adopted by the Judiciary Act of 1789, now found in section 723, R. S., and section 267 of the Judicial Code (Comp. St. 1916, § 1244). Later legislation provides that a suit brought in the wrong forum shall be transferred to the proper side. Sections 274a, b, c, Judicial Code and Equity Rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv).

It is the settled rule that the remedy at law, to be an adequate one, must be as certain, prompt, complete, and efficient to the ends of justice and its prompt administration as the remedy in equity. Texas Co. v. Central Fuel Oil Co., 194 Fed. 1, 114 C. C. A. 21, and cases cited. This was specific performance of a contract for the delivery of crude petroleum at the rate of not more than 20,000 barrels a day, and the alleged breach was a refusal by the Central Company to perform. An injunction was prayed to prevent violation. Equity jurisdiction was sustained, because plaintiff could not recover all the damages it might sustain, and because they were impossible of proof, the amount of oil which the defendant could produce being uncertain. So in this present case no one can tell what damage the cement company may sustain by future subsidence. Future actions at law would be necessary as the injury progressed. Recurring suits for damages would be more vexatious and expensive than effective. United States Freehold Co. v. Gallegos, 89 Fed. 769, 32 C. C. A. 470, where there was a continuous diversion of water; Northern Pac. Ry. Co. v. Cunningham (C. C.) 103 Fed. 708, a continuing trespass by the pasturing of sheep. One person cannot be permitted to continuously damage another and compel the owner to accept money in satisfaction. "The rule applies with special force when the threatened trespass would result in depriving the complainant of the enjoyment of a property right." West Virginia Pulp & Paper Co. v. Cheat Mountain Club, 212 Fed. 373, 129 C. C. A. 49. The removal of granite from a quarry was restrained pending a decision by the land department, for the reason that the injury might be irreparable. Northern Pac. Ry. Co. v. Soderburg (C. C.) 86 Fed. 51; Wallula Pac. Ry. Co. v. Portland & S. Ry. Co. (C. C.) 154 Fed. 902. In the present case the testimony establishes the fact that the injury already sustained and to result from continued coal mining is an irreparable one.

A decision relied on by defendant is Berkey v. Berwind-White Coal Mining Co., 220 Pa. 65, 69 Atl. 329, 16 L. R. A. (N. S.) 851. A conveyance had been made of a coal stratum, with the right to mine and remove it. An injunction was sought to restrain the coal owner from so mining as to subside the surface. The jurisdiction was denied on the ground that the anticipated injury was not ir-

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reparable. The court said that if the act to be committed was in the nature of a trespass, or tort, or nuisance, which by reason of the persistency with which it is repeated threatens to become permanent, courts of equity will interfere by injunction; citing Pennsylvania cases. Then the court continues:

"The present case does not come within the reason or spirit of the rule announced in these cases. Under the facts of the case at bar it cannot be successfully contended that the injury is irreparable, at least in the sense that it cannot be adequately compensated in damages; and certainly the mining and removing of coal by the party who owns it and has the right to remove it, and whose operations are conducted by the most approved methods known in mining operations, cannot be said to be a trespass, or tort, or nuisance, within the meaning of the rule of the above-cited cases in which equitable relief has been granted. In the above cases the respondents were trespassers, without any right of property in the thing injured, while in the present case appellants are the owners or lessees of the coal with the right to remove it."

"It is often difficult to determine whether the remedy at law is adequate, and in passing upon this question equity jurisdiction has been extended from time to time by our courts. A court of equity, in passing upon the question whether the remedy at law is adequate, should have due regard to the situation of the parties. The case at bar is an illustration. The appellee sold and conveyed all of his coal to one of the appellants, which leased it to the other, and has been paid the consideration in full. By his express covenant the mining company is given the right to mine and remove all the coal, so that when, in the prosecution of its mining operations, it undertakes to mine and remove the entire stratum, it is only doing what the appellee, in the express language of his covenants, said could be done. A rule of law, as old as the commonwealth, comes to his aid by charging upon the underlying mineral estate the servitude of surface support, in the absence of the waiver of this right in the grant. The law has thus done for him what he has not done for himself. Of course, he is entitled to have his rights protected, no matter how they arise; but his vendee and its lessee, the appellants here, on the other hand, must also be protected in the enjoyment of the rights acquired under the deed of conveyance. This was the situation of the parties at the time of the filing of the present bill. The appellants have the title to all the coal, with the right to mine and remove it. The appellee, under the rule of law above referred to, had no title to the coal or any part of it, but only the right to have his surface sufficiently supported. In a sense, both parties are standing upon their legal rights. It was not for the appellee to say how much coal should be mined and removed, because the coal did not belong to him. He can insist upon his right to have the surface reasonably supported, and if this is not done, and injury results by failure in this respect, he can recover damages to the full extent of the injury done. None of our cases have gone further than this up to the present time. We are now asked to take a step in advance by recognizing the right of the owner of the surface to proceed in a court of equity to restrain the owner of the coal from mining and removing it in such a manner as may cause subsidence or breaking of the surface. In other words the court is asked to restrain a mining company from mining its own coal because it may reasonably be anticipated that the removing of the coal will cause a subsidence or breaking in the surface. Such a remedy would be a proper one if the facts of a particular case warranted such intervention. If the threatened injury is of an irreparable character, which could not be compensated in damages by an action at law; or if buildings or other permanent improvements would be endangered; or if overlying strata of coal, or other mineral estate, would be seriously and permanently disturbed or displaced by the mining of all the coal—it is clear equity would in proper case intervene to restrain such acts, even before the injury had been done. But none of these conditions are shown to exist in the present case. The coal has already been mined from the lower and more level parts of the tract, and the coal yet to be mined is overlaid with a hilly surface furnishing a covering from 200 to

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250 feet thick. The vein of coal varies from 3 feet 6 inches to 4 feet in thickness, and the evidence produced at the hearing, as well as the experience of all those familiar with mining operations, shows that very little, if any, damage will be done that part of the surface by mining and removing the coal. The loss of springs of water is principally relied on by complainant to show damage to his surface, but the evidence is not sufficient, in our opinion, to establish the fact that the springs were affected by failure to furnish surface support. Springs of water are frequently affected by the mining of coal even when the surface is properly supported, and under the facts of the present case the weight of the evidence would seem to show that failure to provide surface support was not the cause of the springs drying up. As to the buildings, the evidence is clear that the coal has not been mined from under the same, and therefore it cannot be said that any damage has been done to them from this cause. If at any time the appellants should undertake to mine the coal from under the buildings or other permanent improvements in the tract, the owner could prevent the same by injunction. The appellants deny that they have mined the coal from under the buildings, and aver that it is not their intention to do so, and under these facts a case for equitable relief is not made out in this respect."

It seems to me that the foregoing discussion clearly shows that in case of irreparable injury equity has jurisdiction. Other cases sustaining the jurisdiction are El Doro Oil Co. v. United States, 229 Fed. 946, 144 C. C. A. 228; Archer v. Greenville Gravel Co., 233 U. S. 60, 34 Sup. Ct. 567, 58 L. Ed. 850; Big Six Development Co. v. Mitchell, 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332; Eastern Oregon Land Co. v. Willow River L. & T. Co., 201 Fed. 203, 119 C. C. A. 437; Oolagah Coal Co. v. McCaleb, 68 Fed. 86, 15 C. C. A. 270; United States v. Midway & N. Oil Co. (D. C.) 232 Fed. 619, 624; Peck v. Ayres & Lord Tie Co., 116 Fed. 275, 53 C. C. A. 551; Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. 686, 8 L. R. A. 578, 21 Am. St. Rep. 828.

Manifestly an injunction of such grave import as that here sought should not be granted except in a clear case. Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335. But when it is clear that subsidence will seriously impair the mining use, the injury is irreparable, and should be restrained. Bibby v. Bunch, 176 Ala. 585, 58 So. 916, Ann. Cas. 1918, ——.

[10] *Rule as to Balancing Injury.*—Defendant relies on the rule sometimes applied that courts will refuse an injunction when it will damage defendant more than it will benefit plaintiff, or more than plaintiff would be injured by its refusal. The principle is often applied in applications for temporary injunctions in suits to enjoin and account, especially where the right is in some doubt. Where the right and its breach are clear, the principle of balancing injuries does not apply. Loomis v. Collins, 272 Ill. 221, 111 N. E. 999; Wente v. Commonwealth Fuel Co., 232 Ill. 526, 532, 83 N. E. 1049. The rule is sometimes applied, also, when the benefit to plaintiff would be small and defendant's injury great. St. Louis Union Trust Co. v. Galloway Coal Co. (C. C.) 193 Fed. 106, 120; Stewart Wire Co. v. Lehigh Coal & Nav. Co., 203 Pa. 474, 53 Atl. 352. And in all cases, of course, the court will consider the comparative injury to the parties. Loomis v. Collins, 272 Ill. 221, 235, 111 N. E. 999. Other decisions illustrating the rule are Walters v. McElroy, 151 Pa. 549, 25

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Atl. 125; Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 57 Atl. 1065, 66 L. R. A. 712; Harrington v. McCarthy, 169 Mass. 492, 48 N. E. 278, 61 Am. St. Rep. 298; Hodgkins v. Farrington, 150 Mass. 19, 22 N. E. 73, 5 L. R. A. 209, 15 Am. St. Rep. 168; and Kershishian v. Johnson, 210 Mass. 135, 96 N. E. 56, 36 L. R. A. (N. S.) 402.

The result of this suit may involve the abandonment of a valuable business on either side. Defendant will apparently be obliged to cease mining for many years if the decree goes against it. So, if there is no remedy by injunction, plaintiff may be compelled to cease mining forever in all parts of its territory north of the Vermillion river. That plaintiff is doing only what it is absolutely authorized by law to do cannot be denied. In a sense, also, defendant is proceeding lawfully. Its mining methods are correct and careful, and the deeds expressly authorize it to mine the coal if it can do so without injury to what lies above. This distinction, I think, makes the measure of the rights of the parties. It cannot so mine without letting down the earth above, and most seriously injuring the cement mine. In other words, plaintiff is acting strictly within its rights, while defendant, although doing the best it can, is unlawfully injuring the plaintiff in such a way as to preclude the probability of the future damage being capable of measurement. By analogy to the equitable maxim that where the equities are equal the law prevails, it may be said, in a general way, that while the right to injunction is not absolute, but in a sense discretionary, and whatever the decree the loser is bound to be greatly injured, perhaps equally injured, yet where plaintiff is strictly within its right, but defendant is not, equity should give effect to defendant's breach of plaintiff's legal right by letting down the rock ledge, and restrain such breach until the coal mining can proceed without injury.

[11] When each party is pursuing his own right, and collision results, the one without legal culpability of any kind must prevail, if the other occupies legally indefensible ground.

The form of decree submitted by plaintiff's counsel contains some provisions not here discussed, and is therefore appended.

Decree.—This cause came on to be heard by the court at this term upon the pleadings and the evidence, oral and documentary, offered in open court, and was argued by counsel, and thereupon, and upon consideration thereof, it was ordered, adjudged and decreed as follows:

1. That the complainant is a corporation organized under the laws of the state of Illinois and a citizen of that state; that the defendant is a corporation organized under the laws of the state of Wisconsin and a citizen of that state; that the amount in controversy in this case, exclusive of interest and costs, exceeds the sum and value of $3,000, and that this court has jurisdiction of the cause.

2. That the complainant is the owner in fee of the property referred to in the bill, and more particularly described in Exhibit A thereof, as follows: * * *; and that the source and date of its title thereto and of the interest of the defendant therein are correct-

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ly stated in said Exhibit A; that the defendant owns the coal located in said premises, and known as geological seams Nos. 7, 5, and 2, and also known as the first, second, and third veins, and is entitled to mine and remove said coal only to the extent that this can be done without impairing the natural support which the coal in each of said veins furnished for complainant's property located above the same, and without causing the said property of complainant to subside; that the defendant has no right to impair the support furnished to the complainant by the said coal which the defendant owns, or to conduct any mining or other operations in either vein which will impair said support or cause the property of the complainant to subside; that no written agreement between the parties hereto or contained in any of the contracts or deeds in the chain of title of either party to any part of said property gave to the defendant the right to impair the natural support of the complainant's property, or to cause or to allow the property of the complainant, or any part thereof, to subside by reason of any operation of the defendant in connection with the mining of its said coal; that the defendant has the right to remove only so much of said coal as can be removed and leave complete and adequate support for the complainant's property, and such support as will prevent any subsidence of the complainant's property by reason of the defendant's mining operations; and that no agreement, oral or written, was made between the parties which gave to the defendant any other or greater right.

3. That the facts with reference to the character, value, and extent of the complainant's machinery, plant, outfit, and improvements upon said property, the extent and nature of its business, the character and value of its property for the purpose of conducting the manufacture of cement, the extent and nature of its mining operations, the necessary connection between its manufacturing plant and its cement mine, the value of the land for the purpose of such manufacture, and the consequences of any injury, either to the plant or to the mine caused by a subsidence of any part of the property, are correctly stated in the bill.

4. That the defendant has for some years been engaged in mining the coal in geological seam No. 2 (known also as the third vein), under a portion of the complainant's property, and in doing so has extracted all of the coal and a portion of the rock and other material above and below the coal in that vein, but has not supported the roof of the defendant's mine, or the complainant's property situated above said mine, nor prevented the subsidence of the complainant's property caused by the removal of said coal and other materials, either by the building of walls which gave such support or otherwise, but, on the contrary, has caused the property of the complainant to subside. During the trial of the case it was conceded on behalf of the defendant that its mining operations have caused such subsidence of some parts of the complainant's property to the extent of at least 20 inches.

5. That the subsidence of the complainant's property so caused by the defendant's mining operations, and the withdrawal of the natural

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support furnished to the complainant's property by the said coal, extends continuously into the complainant's property as the mining operations of the defendant continue, is uneven and unequal in its action and effect; that it has caused, continues and will continue to cause, the roof, floor, and pillars in the complainant's said mine to crack, seams in the floor, roof and pillars to open, the roof of the rooms and passageways, from which limestone is being extracted in the complainant's said mine, to fall, and to place in great danger not only the lives of the complainant's workmen and its mining machinery used in conducting its business, but also the mine structure itself; that the effect of this subsidence will, if continued, not only greatly increase the expense of continuing the complainant's business, and reduce the amount of limestone and other materials which it could otherwise reasonably obtain from its said mine, but will destroy the ability of the complainant to obtain from the mine a large amount of limestone and cement material which otherwise could be obtained, and will practically wreck a large and valuable portion of the complainant's property and greatly depreciate it in value; that such subsidence, if continued, will also greatly endanger complainant's manufacturing plant located upon its said property, for the safe and successful operation of which it is necessary that there be no disturbance of the soil underneath the foundations of the plant or any change in the level of the foundations thereof.

6. That the effect of this subsidence of the complainant's property thus caused by the defendant's mining operations has been and will continue to be injurious to the complainant, entailing upon it a very serious loss and the hazard of the destruction of its business and of the most valuable element of value in its property; but that it is impossible accurately to ascertain from time to time the exact amount of the damage so suffered, or for the complainant to enforce any remedy at law which will be adequate for the protection of its rights and interests as against the wrongful act of the defendant in causing the property of the complainant so to subside, and that the only remedy in any way adequate for the enforcement and protection of the complainant's rights is by an injunction as granted by this decree.

It is therefore ordered, adjudged, and decreed that the defendant, its agents, servants, and attorneys, be, and they are hereby perpetually enjoined from continuing to mine the coal or other materials underlying any part of the complainant's property described in the bill in such a manner as to cause or allow any part of the said property of the complainant to subside by reason of the withdrawal of the coal, and also from extracting said coal and other material without leaving and providing adequate support which will at all times prevent the soil and property of the complainant above said coal from subsiding, and also from impairing the natural support which said coal furnishes to the said land and property of the complainant.

It is further ordered, adjudged, and decreed that a writ of injunction issue restraining the defendant as herein provided, and that the complainant recover its costs against the defendant, to be taxed by the clerk, and that execution issue therefor in the usual manner.

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ST. LOUIS-SAN FRANCISCO RY. CO. v. McELVAIN.

(District Court, E. D. Missouri. June 28, 1918.)

No. 4858.

1. COURTS ⟸264(1)—JURISDICTION OF FEDERAL COURTS—ANCILLARY SUITS.
A federal court has jurisdiction, regardless of citizenship of parties or amount involved, of an ancillary suit to prevent relitigation in other courts of issues it has heard and determined in the original suit, and to protect the titles and rights of purchasers under its decree.

2. COURTS ⟸264(1)—JURISDICTION—ANCILLARY SUIT—ENFORCEMENT OF DECREE.
A dependent suit may be maintained by a party to the original suit, or by one who claims under the adjudication and decree therein, against one who assails that adjudication or decree in a subsequent suit in a court without appellate jurisdiction, on the ground that it is illegal or ineffectual, although the latter was not a party to the original suit, the adjudication, or decree.

3. JUDGMENT ⟸672—PERSONS CONCLUDED—CREDITORS' SUIT.
A general creditor, who proves his claim under an interlocutory decree in a suit brought by another general creditor in behalf of all, becomes a party, and is bound by the final decree therein.

4. MORTGAGES ⟸532—FORECLOSURE SALE—TITLE AND RIGHTS OF PURCHASER.
A foreclosure sale of the property of a mortgagor, in a suit by the mortgagee against the mortgagor, to which his unsecured creditors are not parties, by name or by service of process upon them, conveys the property mortgaged to the purchaser free from all claims of such creditors, either against the property or against the person of the purchaser.

5. JUDGMENT ⟸678(5)—PERSONS CONCLUDED—UNSECURED CREDITORS.
Unsecured creditors of a mortgagor are represented in a suit for foreclosure by their debtor, the mortgagor, and a decree and sale which bars the mortgagor, in the absence of fraud, bars them.

6. COURTS ⟸508(1)—FEDERAL COURTS—INJUNCTION AGAINST PROCEEDINGS IN STATE COURT.
Where a federal court first obtains jurisdiction of the subject-matter in controversy, it may enjoin all proceedings in a state court, commenced afterward, which would have the effect of defeating or impairing its jurisdiction, or the lawful effect of its orders or decrees, or titles which it has made in the exercise of that jurisdiction.

7. COURTS ⟸508(1)—FEDERAL COURTS—INJUNCTION AGAINST PROCEEDINGS IN STATE COURT.
It is no defense to a dependent injunction suit to prevent the nullification or impairment of the just legal effect of the adjudication, decree, or sale made by order of a federal court, or the title to property granted thereunder, that the defendant proposes to do so by means of a subsequent action at law and the trial by a jury of the issues already adjudged by such court.

8. RAILROADS ⟸195(2)—MORTGAGE FORECLOSURES—SALE TO REORGANIZED COMPANY—RIGHTS OF UNSECURED CREDITORS.
There is no moral turpitude nor illegality in an agreement between bondholders, secured by mortgages, stockholders, and the unsecured creditors of an insolvent railroad company that there shall be a foreclosure and sale of the mortgaged property to a new corporation, in which all the members of the three classes shall be permitted, at the option of each, to receive bonds or stock in substantial proportion to the respective ranks and equities of the classes.

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9. COURTS ⟸262(2)—EQUITY JURISDICTION—"ADEQUATE REMEDY AT LAW."
The "adequate remedy at law," which will prevent the maintenance of a suit in equity in a federal court, is a remedy as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity, and which would prevent a suit in equity in a federal court.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adequate Remedy.]

In Equity. Suit by the St. Louis-San Francisco Railway Company against J. M. McElvain. On motion for preliminary injunction. Granted.

Cravath & Henderson, of New York City, and William F. Evans, of St. Louis, Mo. (Robert T. Swaine, of New York City, of counsel), for complainant.

C. G. Shepard, R. L. Ward, and Everett Reeves, all of Caruthersville, Mo., for defendant.

SANBORN, Circuit Judge. This is an application for a preliminary injunction to prevent J. M. McElvain from further prosecuting an action he has brought in the circuit court of Pemiscot county, Mo., against the complainant, St. Louis-San Francisco Railway Company, a corporation, and the purchaser at the foreclosure sale under the final decree of this court in North American Co. v. St. Louis & San Francisco Railroad Co. (in Equity, No. 4174, Consolidated Cause Final) 246 Fed. 260, and other cases, of all the property of that railroad company. McElvain's alleged cause of action is that the railroad company was indebted to him before the receivers of its property were appointed on May 27, 1913; that the final decree of foreclosure of the mortgages on its property and the sale thereof under that decree were made under a pre-conceived plan and agreement of the bondholders and stockholders of that corporation, whereby for their stock those stockholders received stock and bonds of the railway company which in effect bought at the sale under the decree and now holds the property of the railroad company. In its complaint the complainant has alleged the pertinent proceedings in the consolidated cause and in its constituent causes, and the nature of McElvain's action, including these facts:

The receivers of all the property of the railroad company were appointed on a general creditor's administrative bill in May, 1913, for the benefit of all the creditors of that corporation as their respective interests might appear. The bill in that suit was a class bill, brought by North American Company, a general creditor secured by none of the mortgages that have been foreclosed, a creditor of the same class as McElvain, for the benefit of itself and all others of that class. On April 3, 1914, Rail Joint Company, a corporation, and an unsecured creditor of the railroad company, filed its complaint in this court against the railroad company in behalf of itself and all other creditors of that company, alleged the insolvency of the railroad company, and prayed for the appointment of receivers of its proprty, the administration thereof, and the enforcement of the liens, rights, and claims of all its creditors. The railroad company answered, and on the complaint

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and answer this suit was, by order of this court, made on April 3, 1914, consolidated with the suit of the North American Company, and the appointments of receivers and all other orders in that suit were extended over the second suit and the consolidated cause, and the latter cause was named "North American Co., Complainant, v. St. Louis & San Francisco Railroad Co., Defendant, in Equity, No. 4174, Consolidated Cause." On May 29, 1914, this court rendered an interlocutory decree in this consolidated cause No. 4174, to the effect that all the property of the railroad company was thereby sequestered and set apart to pay the debts and obligations of or against the railway company, that all the holders of claims or demands against the railroad company, and all persons who claimed any interest in or lien upon any of the funds or property in the hands of the receivers as creditors of the railroad company, should file verified statements of their claims with the special master, Hon. Thomas T. Fauntleroy, at St. Louis, Mo., on or before October 1, 1914, and that each of them who failed so to do should thereby be barred from any share in the distribution of any of said funds or property, or the proceeds thereof. McElvain filed his claim against the railroad company with the master under this interlocutory decree, and it was allowed by the master and this court as a general unsecured creditor's claim.

On May 22, 1914, the trustees under the general lien mortgage of the railroad company, dated August 27, 1907, filed their complaint in this court against the railroad company for the administration of the trusts created by that mortgage, its foreclosure, the appointment of receivers, and a sale of the property of the mortgagor covered by it to satisfy the debt which it secured. On July 9, 1914, the trustee of the refunding mortgage of the railroad company, dated June 20, 1901, filed its complaint in this court against the railroad company for the foreclosure of that mortgage, the appointment of receivers, and the sale of the property of the railroad company to satisfy the debt secured by that incumbrance. By an order of this court made on January 21, 1916, and by prior orders, all the suits hereinbefore mentioned were consolidated into the suit entitled "North American Co., Complainant, v. St. Louis & San Francisco Railroad Co., Defendant, in Equity, No. 4174, Consolidated Cause, Final," and the final decree was rendered in this consolidated cause, and also in each of the cases brought by North American Company, Rail Joint Company, the trustees under the general lien mortgage, and the trustee under the refunding mortgage, respectively.

That decree adjudged the respective rights of all the creditors of the railroad company in the mortgaged property and in the property free from mortgages, and in the distribution of the proceeds thereof, excepting only such rights and claims as by the decree were expressly reserved for the exclusive subsequent determination of this court. It adjudged the foreclosure of each of the mortgages, the sale of all the property of the railroad company, the application of the proceeds of its mortgaged property to the payment of the debts secured thereon and to the payment of the claims prior in right or superior in equity to those of the bondholders, and the application of the proceeds of

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the sale of the property that was free from mortgages to the payment of the creditors who had established their claims under the interlocutory decree according to their respective equities. Practically all the available property of the railroad company was covered by the mortgages, and the final decree rendered on March 31, 1916, provided that after the sale under the decree and the confirmation thereof the master should convey all the property to the purchaser, and that after such conveyance the purchaser should hold, possess, and enjoy that property free from the liens of the mortgages mentioned, and free from all claims, rights, interests, or equities of redemption of the railroad company, of its creditors and stockholders, and of all persons claiming through or under them.

The decree, however, in effect provided that, if the sale should be made to any purchaser for the benefit of any corporation organized, or to be organized, pursuant to any plan or agreement whereby any stockholder or stockholders of the railroad company should receive any stock, bonds, or other beneficial interest in such corporation on account of their stock in the railroad company, the sale would not be confirmed, unless there had been made to creditors of the railroad company who had presented their claims to the master or the court, in accordance with the orders of this court, a fair and timely offer of participation in such corporation through stocks, bonds, or otherwise. The sale under the final decree was made to or for the benefit of the complainant on July 19, 1916, pursuant to a plan and agreement made by the bondholders secured by the two mortgages and the stockholders of the railroad company, dated November 1, 1915, whereby the stockholders of the railroad company, upon the payment of certain specified amounts in cash, were entitled to receive certain amounts of bonds and stock of the complainant in proportion to the rank and amounts of the stock of the railroad company which they held and either assigned or surrendered. Before the sale under the final decree an offer was made to McElvain and to the other unsecured creditors, who had proved their claims before the master, of $50 par value of the 6 per cent. noncumulative preferred stock, and $50 par value of the common stock of the railway company for each $100 of their duly presented claims, and this offer to McElvain has since been repeated, the last time on March 1, 1918, but he has always rejected it.

After the sale under the decree notice was given to the railroad company and its attorneys in the consolidated cause final, No. 4174, that a motion would be made to confirm the sale on August 29, 1916. Louis Houck and seven other unsecured creditors of the railroad company filed objections to the confirmation of the sale, which raised for determination by the court all the issues sought to be raised by McElvain by his action in the circuit court of Pemiscot county, Mo.; that is to say, that, because the railway company was organized for the purchase of the property at the sale under the decree pursuant to the plan and agreement whereby the stockholders of the railroad company were offered bonds and stock of the railway company upon the payment of certain amounts in cash and the surrender or assignment of their stock in the railroad company, a fraud was perpetrated on the unsecured

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creditors of the railroad company; that the railway company would not pay the full value of the property formerly owned by the railroad company, and would not pay for that property under the decree; that that property was, and after the sale still would be, subject to the payment of the claims of the unsecured creditors; and that the railway company would still be legally liable to pay them the amounts of their claims against the old company. Houck and his associates made still other objections to the confirmation of the sale.

Evidence was given on the issues thus presented, there was a final hearing on the motion, the objections, and the evidence, and upon arguments of counsel the court found that the objections were not tenable, and made an order of confirmation of the sale, wherein it adjudged and decreed that under and pursuant to and in connection with the plan and agreement of November 1, 1915, for the reorganization of the St. Louis & San Francisco Railroad Company, a fair and timely offer of cash, or a fair and timely offer of participation in St. Louis-San Francisco Railway Company, a corporation, organized for the purpose of becoming the owner, through a sale under the final decree, of the property of the railroad company, had been made to all the creditors who had presented their claims as ordered by the court, that the special master should convey the property of the railroad company to the railway company upon payment to him of the purchase price thereof bid at the sale, and that the railway company thereafter should hold the same free from the claims of the railroad company, of its creditors, and of all parties claiming under them or either of them. The special master made and delivered the conveyance to the railway company as directed. He subsequently reported to the court that the purchase price had been paid, his reports were approved and confirmed by the orders of this court, and he was directed to pay to the unsecured creditors whose claims had been allowed their pro rata shares of the proceeds of the sale, and he has paid or tendered to McElvain his share pursuant to that direction.

After the confirmation of the sale, and the conveyance of the property to the railway company, it mortgaged it to secure its bonds to the amount of more than $194,000,000, and it issued its stock, of the par value of $57,000,000, and these bonds and this stock was now in the hands of numerous holders, who have purchased them for value without notice of McElvain's claim. This issue of bonds and stock, and the taking and purchase thereof by the holders, has been done in reliance upon the final decree and the order of confirmation of this court, and in the belief that thereunder the railway company and the property it holds were exempt from all claims of the creditors of the railroad company not expressly reserved in the final decree for the exclusive determination of this court.

After all this had been done, and on June 13, 1917, McElvain brought an action against the railway company in the circuit court of Pemiscot county, Mo., to recover of it the amount of his old claim against the railroad company for damages to a carload of mules inflicted by the negligence of that company in February, 1913, a claim which he had subsequently reduced to a judgment against the railroad company, ren-

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dered by the circuit court of Pemiscot county on April 5, 1916. The railway company has demurred to his petition in that action in the state court, and that action is still pending, but has proceeded no farther. That petition of McElvain alleges no ground or reason for imposing upon the railway company, or upon the property formerly of the railroad company conveyed to the railway company under the decree and sale, liability for his claim and judgment against the railroad company, other than that the railway company was organized, and the final decree and sale were made and executed, pursuant to the plan and agreement whereby the stockholders of the railroad company were offered the participation in the railway company heretofore stated.

The facts which have now been stated are drawn from the allegations of the complaint admitted by the demurrer. The railway company asks that McElvain be enjoined from further prosecuting his action in the state court on the grounds that he can succeed in that action only by annulling the decree, the order of confirmation of the sale, the adjudication of this court embodied therein, the contract of sale made by this court with the purchaser at the foreclosure sale, and the title to the property granted to the railway company by the court's master's deed.

[1] Counsel for Mr. McElvain challenge the jurisdiction of this court to entertain this suit in equity, or to grant the injunction sought, on the ground that there is no federal question involved, no diversity of citizenship, and that the amount in question is less than the jurisdictional amount. But neither a federal question, nor diversity of citizenship, nor the jurisdictional amount necessary to sustain an original suit is requisite to the maintenance of a suit dependent upon or supplementary to an original suit, like the creditors' and foreclosure suits against the St. Louis & San Francisco Railroad Company, which have been described, of which this court had full jurisdiction. Brun v. Mann, 151 Fed. 145, 150, 80 C. C. A. 513, 518; Julian v. Central Trust Co., 193 U. S. 93, 113, 24 Sup. Ct. 399, 48 L. Ed. 629; White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67; Dewey v. West Fairmont Gas Coal Co., 123 U. S. 329, 8 Sup. Ct. 148, 31 L. Ed. 179; Shinney v. North American Savings, Loan & Bldg. Co. (C. C.) 97 Fed. 9, 12. Such a dependent suit is but a continuation, in a court of equity, of the original suit, to the end that more complete justice may be done.

A suit in equity, dependent upon an original suit or action of which the federal court had jurisdiction, may be maintained in that court (1) to aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; (3) to enforce or adjudicate liens upon or claims to property in the custody of the court in the original suit; and (4) to enforce its decree or judgment in the original suit, to prevent the relitigation in other courts of the issues it has heard and adjudged in the original suit, and to protect the titles and rights acquired by purchasers under its decree, or judgment from attacks by suit or otherwise, based on the theory that its adjudications in the original suit were illegal and ineffective, and to accomplish these ends the court has the jurisdiction and authority to use its writs of in-

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junction and its writs of assistance. Julian v. Central Trust Co., 193 U. S. 93, 113, 24 Sup. Ct. 399, 48 L. Ed. 629; Carey v. Houston & Texas Ry. Co., 161 U. S. 115, 126, 127, 132, 16 Sup. Ct. 537, 40 L. Ed. 638; Minnesota Co. v. St. Paul Co., 2 Wall. 609, 633, 17 L. Ed. 886; Riverdale Cotton Mills v. Mfg. Co., 198 U. S. 188, 195, 25 Sup. Ct. 629, 49 L. Ed. 1008; Freeman v. Howe, 24 How. 450, 460, 16 L. Ed. 749. Campbell v. Golden Cycle Min. Co., 141 Fed. 610, 612, 613, 73 C. C. A. 260, 262, 263; Lang v. Choctaw, Oklahoma & Gulf R. Co., 160 Fed. 355, 360, 361, 87 C. C. A. 307, 312, 313; Virginia-Carolina Chemical Co. v. Home Ins. Co., 113 Fed. 1, 6, 51 C. C. A. 21.

Counsel for Mr. McElvain argue that this suit cannot be maintained as a dependent suit, because a dependent suit can be maintained only between those who were parties to the original suit, either in person or by representation, and they insist that McElvain was not such a party. There are two answers to this contention:

[2] First. A dependent suit may be maintained by the party to the original suit, or by one who claims under the adjudication and decree therein against one who assails that adjudication or decree in a subsequent suit in a court without appellate jurisdiction, on the ground that it is illegal and ineffectual, although the latter was not a party to the original suit, the adjudication, or the decree. Julian v. Central Trust Co., 193 U. S. 93, 113, 24 Sup. Ct. 399, 48 L. Ed. 629; Virginia-Carolina Chemical Co. v. Home Ins. Co., 113 Fed. 1, 6, 51 C. C. A. 21. In the leading case of Julian v. Central Trust Co., 193 U. S. 93, 113, 24 Sup. Ct. 399, 48 L. Ed. 629, a decree of foreclosure and a sale of the property of the Western North Carolina Railroad Company, the mortgagor, were made at the suit of the trust company, the trustee for the bondholders in the federal court. The sale and delivery of the master's deed were made in August, 1894, to the Southern Company, which immediately took possession thereof, and thereafter operated it.

In the course of its operation the Southern Company caused, by its negligence, the death of Mr. James, one of its employés. Mrs. James, the administratrix of his estate, sued the Western North Carolina Railroad Company in one of the state courts of North Carolina for damages for his death, on the ground that for numerous specious reasons the decree of foreclosure, the sale, and the deed thereunder were ineffectual, the railroad and property were still that of the Western North Carolina Company, and it was liable for the negligent operation of its railroad by the Southern Company. The state court so held, and rendered a judgment against that company, which was affirmed by the Supreme Court of the state. Thereupon Mrs. James caused an execution to be issued upon that judgment and delivered it to Julian, the sheriff, who levied it on the railroad property as that of the Western North Carolina Company and advertised it for sale. Thereupon the Southern Company and the Central Trust Company brought a dependent suit in the federal court, which rendered the original decree, to enjoin the sale of the property by the sheriff, to enforce the adjudications and decree in the foreclosure suit and to protect the rights and title of the Southern Company thereunder, and the Supreme Court sustained that suit, the decree and the adjudications in the original suit,

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the rights and title of the Southern Company thereunder, and the injunction against the sale by the sheriff of any of the property levied upon under the execution from the state court. But neither Mr. James nor Mrs. James was a party to the original suit, either in person or by representation. If the purchaser at the foreclosure sale under the decree of the federal court in the Julian case could maintain a dependent bill against such strangers as Mrs. James, so much the more may the purchaser at the sale of the property of the Frisco Company under the original suits maintain a dependent suit against McElvain, who was a creditor of that company before and at the time of the foreclosure suit and sale.

[3, 4] Second. McElvain was a party by representation to the creditors' suits and the foreclosure suits in which the final decree and sale were made; to the creditors' suits because he was one of the class of general unsecured creditors in whose behalf those suits were brought, and he filed and proved his claim as such under the interlocutory decree therein, and he was a party to the foreclosure suits because he was represented therein by his debtor, the mortgagor. The unsecured creditors of an insolvent mortgagor have no claim or interest, except against and through the title of the mortgagor. A foreclosure and sale of the property of the mortgagor, in a suit by the mortgagee against the mortgagor to which the unsecured creditors are not parties by name, or by service of process upon them, conveys the property mortgaged to the purchaser free from all claims of such creditors of the mortgagor either against the property conveyed or against the person of the purchaser.

[5] The reason why such a decree and sale estops the unsecured creditors of the mortgagor from asserting any personal liability of the purchaser for their debts against the mortgagor, and from any claim upon the property sold, is that they are represented in the foreclosure suit by their debtor, the mortgagor, and a decree and sale which bars the mortgagor, in the absence of fraud, bars its unsecured creditors. In the same way and for the same reason stockholders of the mortgagor are barred by a decree and sale which bars the mortgagor, their representative. Because stockholders and unsecured creditors of the mortgagor are parties by representation to a suit to foreclose a mortgage to which the mortgagor is a party, they may maintain a suit dependent upon the original foreclosure suit against the purchaser at the foreclosure sale, and the purchaser may maintain such a dependent suit against them. Carey v. Houston & Texas Ry. Co., 161 U. S. 115, 116, 121, 122, 131, 132, 16 Sup. Ct. 537, 40 L. Ed. 638. This dependent suit, therefore, may not be defeated by the claim that McElvain was not a party to the original suits.

[6] Counsel maintain that this court may not lawfully issue its injunction to prevent Mr. McElvain from further proceeding in his action in the state court, because section 720 of the United States Revised Statutes, which is now section 265 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, § 1242]), declared that:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such

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injunction may be authorized by any law relating to proceedings in bankruptcy."

But in a case in which a federal court first obtains jurisdiction of the subject-matter in controversy, as this court did, by the commencement and prosecution to decree and sale of the original suits, and where it acts in aid of its own jurisdiction to enforce or protect its orders or decrees, or the title or disposition under them of the property within that jurisdiction, it may, notwithstanding the section cited, enjoin or restrain all proceedings in the state court commenced after it obtained jurisdiction, which would have the effect of defeating or impairing its jurisdiction or the lawful effect of its orders, decrees, adjudications, or titles which it has made, or is making, in the exercise of that jurisdiction. Sharon v. Terry (C. C.) 36 Fed. 337; French, Trustee, v. Hay, 22 Wall. 250, note, 22 L. Ed. 857; Lang v. Choctaw, Oklahoma & Gulf R. Co., 160 Fed. 355, 359, 360, 87 C. C. A. 307, 311, 312; Swift v. Black Panther Oil & Gas Co., 244 Fed. 20, 22, 156 C. C. A. 448, and cases there cited.

[7] Counsel insist that Mr. McElvain's action is a simple action at law, that he is entitled to a jury trial of it, and that for this reason he may not be enjoined from prosecuting it. The action of Mrs. James in Julian v. Central Trust Co. was a simple action at law based on the claim that the foreclosure and sale decreed by the federal court in that case were illegal and void, and although her claim was sustained by the courts of her state, the Supreme Court affirmed the injunction of the federal court against her and the sheriff, an injunction which perpetually prohibited them from proceeding further to nullify or impair the legal effect of the adjudications of the federal court in its foreclosure suit, its decree and sale, or the title of the Southern Company, the purchaser thereunder. It is no defense to a dependent suit to prevent the nullification or impairment of the just legal effect of the adjudications, decree, or sale made by order of a federal court, or the title to property granted thereunder, that the defendant proposes to do so by means of a subsequent action at law and the trial by a jury of the issues already adjudged by such court.

Finally, counsel for Mr. McElvain argue that he does not seek by his action to again litigate any question heard and decided by this court in the original suits, or to nullify or impair the legal effect of any adjudications made, the final decree rendered, the sale made, or the title granted thereunder in the creditors' and mortgagees' original suits in this court. Let us see. His action is grounded on the contention that the final decree, sale, and conveyance of the property formerly of the railroad company to the complainant were, as against him, an unsecured creditor, fraudulent in law and void, and did not have the effect to convey the title to the property to the complainant free from his claim against that property, or free from his claim of a personal liability of the complainant for the debt of the railroad company to him, although the contrary was adjudged by this court by its decree and orders, but that the decree and those orders leave that property still the property of the railroad company and charge the complainant with personal liability for his claim. And this Mr. McElvain

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maintains because: First, the agreed plan and scheme of the bondholders and stockholders of the railroad company, under which the decree and sale were made, offered, and by its performance gave, to the stockholders of the railroad company, for their stock, a beneficial interest in the railway company, for their stock, a beneficial interest in the railway company consisting of bonds and stocks thereof, and this brought the decree and sale and the title thereunder beneath the ban of the decisions in such cases as Northern Pacific Ry. Co. v. Boyd, 177 Fed. 804, 101 C. C. A. 18; Id., 228 U. S. 482, 502, 504, 33 Sup. Ct. 554, 57 L. Ed. 931; Louisville Trust Co. v. Louisville, etc., Ry. Co., 174 U. S. 674, 682, 684, 19 Sup. Ct. 827, 43 L. Ed. 1130; Central Improvement Co. v. Cambria Steel Co., 210 Fed. 696, 701, 702, 127 C. C. A. 184, 189, 190; Kansas City Southern Ry. Co. v. Guardian Trust Co., 240 U. S. 166, 36 Sup. Ct. 334, 60 L. Ed. 579; and because, second, the upset price for the sale of the property and the price at which it was sold was so far below its real value that a just and reasonable price was not paid for it by the railway company, although by the decree the upset price was adjudged fair, and by the order of confirmation of the sale and the orders accepting and disposing of the purchase price this court adjudged that the price bid at the sale was just and reasonable and that the railway company had paid that price in full.

Now were not these claims of Mr. McElvain, the maintenance of which is indispensable to his success in his action in the state court, tried and adjudged against him in the original suits which the mortgagees brought in this court? When those suits were brought the St. Louis & San Francisco Railroad Company was hopelessly insolvent, all its property was thereupon lawfully sequestered and placed in the hands of the receivers appointed by this court, to be sold and distributed to its creditors and stockholders in accordance with their respective rights and equities. There were numerous mortgages for large amounts upon the various portions of the property of the railroad company underlying the mortgages that were foreclosed. The holders of the bonds secured by the mortgages that were foreclosed had the indisputable right to a foreclosure of these mortgages, and a sale of the mortgaged property to themselves for the full amount of those mortgages, to be paid by a simple surrender of their bonds, unless some one would bid and pay a larger amount in cash. They had the equitable and legal right by foreclosure to acquire the indisputable title to the mortgaged property, and to prevent the unsecured creditors and the stockholders of the railroad company from receiving anything whatever on their claims and stock, unless they raised and bid money sufficient to discharge the mortgages in foreclosure which it was practically impossible for them to do. At that time, in order to enable the property in the hands of the railroad company to earn a reasonable income, it was necessary to raise a large amount of money to purchase equipment, to improve the railroad, and to pay other necessary expenses, and it was desirable to retain the good will and the aid of the stockholders and the unsecured creditors of the railroad company.

[8] To this end the bondholders proposed the plan and agreement

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between themselves and the stockholders and the unsecured creditors of the mortgagor, which was finally accepted and performed by the holders of more than 90 per cent. of the amount of the bonds and more than 90 per cent. of the amount of the unsecured claims and of more than ninety per cent. of the amount of the stock. There is no moral turpitude, nor is there any illegality in the making and performance of an agreement between the bondholders secured by mortgages, the stockholders, and the unsecured creditors of an insolvent mortgagor, that there shall be a foreclosure and sale of the mortgaged property to or for the benefit of a new corporation in which all the members of the three classes shall be permitted at the option of each of them to take the bonds or stock of the new corporation in substantial proportion to the respective ranks and equities of the classes. Indeed, a foreclosure and sale under such an agreement is the most practicable, equitable, and beneficial method of foreclosure and sale of vast railroad or other properties that has yet been devised. For, as Mr. Justice Brewer said in delivering the opinion of the Supreme Court in Louisville Trust Co. v. Louisville, etc., Ry. Co., 174 U. S. 674, 683, 19 Sup. Ct. 827, 830 (43 L. Ed. 1130):

"We may not shut our eyes to any facts of common knowledge. * * * We must therefore recognize the fact, for it is a fact of common knowledge, that, whatever the legal rights of the parties may be, ordinarily foreclosures of railroad mortgages mean not the destruction of all interest of the mortgagor and a transfer to the mortgagee alone of the full title, but that such proceedings are carried on in the interests of all parties who have any rights in the mortgaged property, whether as mortgagee, creditor or mortgagor."

No court, so far as the briefs and citations of counsel and the investigation of the court have informed it, has ever held that a foreclosure decree and sale under such an agreement is either fraudulent in law or fraudulent in fact, or illegal as against either unsecured creditors or stockholders. In Northern Pacific Ry. Co. v. Boyd, 228 U. S. at page 503, 33 Sup. Ct. at page 560, 57 L. Ed. 931, the Supreme Court said:

"But it is now settled that such reorganizations are not necessarily illegal, and, as proceedings to subject the property must usually be in a court where those who ask equity must do equity, such reorganizations may even have an effect more extensive than those made without judicial sale, and bind creditors who do not accept fair terms offered."

The foreclosure decrees and sales which have been held fraudulent in law and voidable as against unsecured creditors in the Boyd Case, and the other cases cited above, were those that had been made under agreements between the secured bondholders and the stockholders of the mortgagor, whereby the stockholders received beneficial interests, by means of stock, bonds, or otherwise, in the purchasing corporation, without giving or offering any such beneficial interest whatever to the unsecured creditors, in violation of the trust under which an insolvent corporation holds its property, for, first, its secured creditors; second, its unsecured creditors; and, third and last, its stockholders. The plan and agreement under which the foreclosure decree and sale in this case was made was no secret, it was pre-

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sented to this court in the original suits, and this court adjudged in the final decree that the sale under it would not be confirmed unless nor until a fair and timely offer of beneficial participation in the purchasing company was made to the unsecured creditors. Before the hearing upon that confirmation was had, such an offer, an offer much more beneficial than the provision in the agreement for the stockholders, had been made to the unsecured creditors; most of them had accepted it; a few, and among them Mr. McElvain, had not. Mr. Houck and several other unsecured creditors, who had not done so, challenged the confirmation on the ground that the offer to the unsecured creditors was not fair and just, that the plan, agreement, and offer were, and the foreclosure and sale would be, fraudulent in law as against unsecured creditors under the decisions upon this subject in the Boyd Case and others which have been cited.

Upon this subject evidence was introduced, extensive arguments were heard, and this court found and adjudged that the offer was just, timely, and fair; that the plan and agreement and offer, and the foreclosure and sale thereunder, perpetrated no fraud upon any of the unsecured creditors and violated no trust in their favor; but that they were just and equitable—and upon that finding and adjudication it ordered the foreclosure sale confirmed and the property conveyed and delivered to the railway company, free from any legal or equitable claims of the unsecured creditors of the mortgagor against that property, or against the purchaser at the sale, except those claims which were reserved in the decree for the exclusive determination of this court.

Nor was this finding, adjudication, and order made until after the objections that the upset price and the price bid at the sale were much less than the value of the property, and that the property was sold so low that the sale at that price would be unjust, inequitable, and unlawful, were made, argued, and decided. The facts then established, however, were that every bondholder, every stockholder, every unsecured creditor, had received an offer to permit him to participate in the benefits of the purchase on the equitable basis on which others of his class were permitted to participate therein under the plan and agreement that, if the purchase price was low, each bondholder, creditor, and stockholder had the opportunity to participate in the profits of the purchase of the property at that low price; that every unsecured creditor had the opportunity to participate by simply assigning or surrendering his claim against the railroad company and accepting the par value of his claim in the stock of the railway company without contributing any money; that the purchase price of the property was in reality, not only the amount bid at the sale, but that amount, plus the value, whatever that was, of all that part of the bonds, unsecured claims, and stock above the amount paid thereon out of the amount bid, which was exchanged for the stock and bonds in the new railway.

In view of these facts, and the existing situation, this court then found and adjudged that the upset price and the bid were just, fair, and equitable; that the sale and delivery of the deed and property

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would pass the title to the purchaser, the railway company, would leave that company free from liability for the claims against the railroad company not reserved in the decree for the exclusive determination of this court, and would leave the property free from any liens of the mortgagees in the foreclosure suits of the stockholders of the old company and of its unsecured creditors; and that the sale ought to be confirmed. Thereupon it was confirmed, the master conveyed the property to the railway company, collected and distributed the purchase price, reported his action to this court, which by its orders approved his reports, and adjudged that the railway company had paid for the property in full. So it is that in the original suits brought by the unsecured creditors, and in the original suits brought by the bondholders secured by the mortgages foreclosed, this court considered, decided, and adjudged that the claims now made by McElvain in his action in the state court, the maintenance of which is indispensable to his success in that action, are unfounded. He now seeks by that action to try again by a jury in the state court the issues thus decided, and by means of that trial and the resulting judgment he seeks to strike down the final decree, the sale, and the conveyance of the property formerly of the railroad company, and thus to deprive the complainant, the purchaser at the sale, of the benefit of the title conveyed to him and of the adjudications of this court that the complainant took and holds the property so conveyed free from all liens and claims upon it and free from all claims of personal liability on account of the debts of the old railroad company, except such claims as this court reserved by the decree for its exclusive determination.

The jurisdiction and authority have been conferred, and the duty has been imposed, upon the federal courts, as has been demonstrated in the earlier part of this opinion, to sustain dependent suits to prevent the relitigation by subsequent suits in other courts of the issues heard and adjudged by the federal courts in original suits, to protect the rights and titles acquired under their decrees in such suits from attacks, by suits or otherwise, by those bound by such decrees, when such suits are founded on the theory that the adjudications of the federal courts were illegal or ineffective, and to use their injunctions and writs of assistance to effect this prevention and protection, and they may not lawfully renounce this jurisdiction or disregard this duty.

[9] Counsel object to this suit, and to the issue of the injunction, upon the grounds that no irreparable injury will result from the action of McElvain, and that the complainant has an adequate remedy at law. But useless and baseless litigation by subsequent suits in courts, with no appellate jurisdiction to relitigate issues decided in a federal court, to nullify or disregard its decrees and orders, and to avoid the titles and rights adjudged and granted thereunder, on the ground that its adjudications were unlawful or inequitable, inflict ample injury to sustain a suit in equity. And the adequate remedy at law, which will prevent the maintenance of a suit in equity in a federal court, is a remedy "as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity." Boyce v. Grundy 3 Pet. 210, 215, 7 L. Ed. 655; Oelrichs v. Spain, 15 Wall. 211, 228, 21 L. Ed. 43;

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Hayden v. Thompson, 71 Fed. 60, 63, 17 C. C. A. 592; Springfield Milling Co. v. Barnard & Leas Mfg. Co., 81 Fed. 261, 265, 26 C. C. A. 389; Rogers v. Penobscot Mining Co., 154 Fed. 606, 613, 83 C. C. A. 380.

Moreover, it is such a remedy in a federal court only that will prevent the maintenance of a suit in equity in a national court. The fact that there may be such a remedy in a state court is not material. Smyth v. Ames, 169 U. S. 466, 516, 18 Sup. Ct. 418, 42 L. Ed. 819; Arrowsmith v. Gleason, 129 U. S. 86, 98, 9 Sup. Ct. 237, 32 L. Ed. 630; National Surety Co. v. State Bank of Humboldt, 120 Fed. 593, 602, 56 C. C. A. 657, 61 L. R. A. 394. The complainant has no such remedy and there is no logical or lawful escape from the issue of the injunction sought. Let a preliminary injunction, such as the complainant prays for in his complaint, effective until the final judgment in this case, or the further order of this court, issue upon the filing of a bond by or on behalf of the complainant in the sum of $1,000, approved by the clerk of this court, conditioned to pay to the defendant McElvain, his heirs or assigns, such costs and damages as may be incurred or suffered by him in case he shall be found to have been wrongfully enjoined or restrained by the injunction.

In re ROSEBOOM.

(District Court, N. D. New York. September 3, 1918.)

1. BANKRUPTCY ⊜184(3)—LIENS—CHATTEL MORTGAGE.
A chattel mortgage for purchase money on the stock in a retail store contemplated that the mortgagor should continue the business, goods sold to be replaced by others which it was provided should be subject to the mortgage. The mortgagor afterward sold the store to bankrupt, who assumed payment of the mortgage with full knowledge of its terms. *Held*, that the mortgage created an equitable lien on goods substituted by the mortgagor and sold to bankrupt, good as against the mortgagor and as against bankrupt and his creditors as to such goods as were removed by the mortgagee before the bankruptcy.

2. BANKRUPTCY ⊜151—TITLE OF TRUSTEE—LIENS.
In the absence of fraud, a trustee takes the property in the same plight and condition, and subject to the same liens and equities, as when the bankrupt held it.

In Bankruptcy. In the matter of George W. Roseboom, bankrupt. Application by receiver for an order requiring delivery to him of certain personal property by G. G. McNamara. Referred.

This is a proceeding in the nature of an application by the receiver appointed by this court in bankruptcy for the delivery to him by G. G. McNamara of certain personal property which he claims belongs to the bankrupt estate, and which McNamara claims he is entitled to hold under and by virtue of a chattel mortgage thereon executed and delivered to him by one Willard Teetsel, and an equitable lien created thereby, who was then the owner of certain of the property, and who became the owner of other of the property thereafter, and who subsequently sold this property, with other personal property he had purchased, to George W. Roseboom, the bankrupt, subject to such mortgage, and

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which mortgage Roseboom assumed and agreed to pay. As to certain personal property it is, in effect, an application by said McNamara for the delivery to him of such property as is not now in his possession under the said mortgage.

Alexander Neish, of Walton, N. Y., for McNamara.
Vere H. Multer, of Binghamton, N. Y., for receiver.
R. F. Bieber, of Binghamton, N. Y., for Roseboom.

RAY, District Judge (after stating the facts as above). [1] April 29, 1916, one Willard Teetsel, of Walton, N. Y., was justly indebted to one Galusha G. McNamara in the sum of $3,199.40, the purchase price of certain goods and chattels described in the mortgage hereafter referred to, and on which day McNamara sold Teetsel the said personal property, consisting of goods and fixtures in a store, a horse and delivery wagon, a harness, and a pair of sleighs. The schedule of mortgaged property included the following:

"Together with any and all other property that may be substituted for the above-named property, and at any and all times hereafter, in said store, precisely the same as if the property there in the store at any time hereafter was specifically mentioned and described herein, and it is treated and regarded the goods subsequently hereto placed in the store as a substitute for the goods now therein are to be treated the same as if specifically described herein, first party to keep the goods insured for three thousand dollars, as interest of parties appear."

The interest and $500 of the principal was to be paid annually. If default was made and continued for 60 days, then the entire sum, at McNamara's election, was to become due. The mortgage contained a power on default to take and sell the property to satisfy the debt, or any balance, and also a clause authorizing McNamara to take the property if at any time he deemed himself unsafe. The mortgage in form sold and transferred the property to McNamara, but it was a security for such indebtedness. This mortgage was kept good by filing and refiling under the chattel mortgage law of the state of New York. This was a retail store, and Teetsel took possession and continued the business, selling from and replenishing the stock in the usual manner customary in such stores and in such a business, and as contemplated by the mortgage.

June 9, 1917, Teetsel, by written bill of sale, sold the business and all the property in the store, and the other property, to the now bankrupt, George W. Roseboom, who agreed to pay therefor $7,073. This bill of sale contained the following:

"And whereas, there is a mortgage upon said property now held by Galusha G. McNamara upon which there is unpaid twenty-six hundred ninety-nine dollars and forty cents, with interest thereon from April 29th, 1917, which amount has been deducted from the aforesaid purchase price, and the second party hereby covenants and agrees to pay the same as a part of the purchase price according to the terms of said mortgage, which is $500 of principal and interest annually with right to pay faster if the mortgagee so desires. And I further covenant that the goods are free and clear from all liens or incumbrances except as aforesaid and that the title is perfect in me and I have good right and full power to sell the same."

Roseboom took possession and continued the business, selling and replacing to some extent, but made default in his payments. Teetsel

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had and has no creditors. Roseboom has creditors and is a bankrupt. Roseboom had full knowledge of the mortgage and of its terms and conditions.

Some days before the filing of the petition in bankruptcy McNamara, deeming himself insecure and unsafe, with the consent of Roseboom, took possession of and took away from the store a large quantity of this mortgaged property, as much as he deemed necessary to satisfy the balance due on his mortgage, which was about $2,600 or $2,700. Roseboom claimed he was solvent, and an attempt was made to effect an arrangement by which the property should be returned to the store, and some of it was returned; but it almost immediately developed that Roseboom had, at least, largely underestimated his indebtedness, and in fact had largely misrepresented it. Thereupon the attempted arrangement was repudiated by McNamara, as he had the right to do, and he repossessed himself of some, and perhaps most, of the property so taken by him.

Then, in June, 1918, a petition in bankruptcy was filed, and application to this court made for the appointment of a receiver. The facts not fully or properly appearing, this court not only appointed a receiver, but directed McNamara to return to the receiver the property so taken by him on his mortgage, which he did. The receiver was authorized to continue the business. Further facts having been brought to the attention of this court, an order was made enjoining further action by such receiver, and requiring the said receiver and bankrupt to show cause why the property actually taken by the mortgagee prior to the filing of such petition in bankruptcy should not be returned to him for disposition under the mortgage and lien of McNamara.

It is clear from the terms of the mortgage given by Teetsel to McNamara, and later assumed by Roseboom, with full knowledge of all its terms, that it was contemplated Teetsel should sell goods in the usual course of business, and purchase other goods and replace those so sold, and that the lien of such mortgage should attach to such goods so subsequently acquired by Teetsel for replacement. This mortgage and lien was perfectly good as between the parties, and, while Teetsel could not mortgage goods he did not then own, the agreement was good in equity, and created an equitable lien on the subsequently acquired property, good as against Teetsel and Roseboom when the latter purchased the property and assumed the mortgage. Even if void as to the creditors of Teetsel, he had none. The lien was not void as to Roseboom or his creditors. Roseboom was not and is not an innocent purchaser in good faith and for value. He knowingly took the property subject to the lien, and the equitable lien of McNamara was perfected by actual possession taken by him prior to the bankruptcy proceedings. There was no fraud in the transaction. Plainly and unquestionably this was an agreement between Teetsel and McNamara, and later an understanding between Roseboom and McNamara that goods sold should be replaced, and that McNamara should have a lien on all the goods for the balance of his mortgage debt.

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This was not valid so as to bind property purchased by Roseboom after he took possession, as against his creditors (Kribbs v. Alford, 120 N. Y. 519, 525, 24 N. E. 811), but was valid to bind, as against Roseboom and his creditors, the property actually owned by Teetsel when he gave the mortgage, and create a lien on that which Teetsel subsequently purchased and put in the store in replacement of those sold by him, so far as reduced to the possession of the mortgagee prior to the bankruptcy. Kribbs v. Alford, supra; McCaffrey v. Woodin, 65 N. Y. 459, 22 Am. Rep. 644; Wisner v. Ocumpaugh, 71 N. Y. 113; Coats v. Donnell, 94 N. Y. 168–177; Titusville Iron Co. v. The City of New York, 207 N. Y. 203, 100 N. E. 806. In this last case it is held:

"Mortgages or contracts pledging subsequently acquired property, though void at law, will nevertheless be enforced in equity as between mortgagor and mortgagee as agreements to give liens, and also as against purchasers with notice. But it is settled law in this state [N. Y.] that they will not be enforced as against creditors."

The bankruptcy court is a court of equity, and proceeds on equitable principles.

[2] The trustee of a bankrupt, in the absence of fraud, takes the property in the same plight and condition, and subject to the same liens and equities, as when the bankrupt held it. Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Zartman as Trustee v. First National Bank, etc., 216 U. S. 134, 138, 30 Sup. Ct. 368, 369 (54 L. Ed. 418), where the court said:

"The trustee claims that he takes the same kind of title as a bona fide purchaser for value, but the rule applicable to this and all similar cases is that the trustee takes the property of the bankrupt not as an innocent purchaser, but as the debtor had it at the time of the petition, subject to all valid claims, liens, and equities. * * * The trustee took the bankrupt's property in the same condition, and subject to the same liens, as the bankrupt himself held it. The trustee is in no sense a bona fide purchaser for value and entitled to protection as such."

In the instant case the lien was more than four months old. The mortgagee had reduced certain of the property to his actual possession, with the assent of Roseboom, before the bankruptcy, and, unless this equitable lien created by the mortgage was and is void as to the creditors of Roseboom, McNamara can and should hold it, excepting of course such property as Roseboom purchased and put in the store after he purchased of Teetsel.

In Sexton, Trustee in Bankruptcy, v. Kessler & Co., 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995, certain securities were set apart by a New York house in its own vaults as security to an English house for drafts thereon. The New York house retained and exercised the power, from time to time, to change the securities, and even withdraw some of those remaining if the securities had increased sufficiently in value to keep the security good. The English house had knowledge of all this. Some little time prior to the bankruptcy of the New York house the securities were taken into possession by the English house. It was held that it had the right so to do and

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hold same and the proceeds as against the trustee in bankruptcy. The court said:

"When the English firm took the securities it only exercised a right that had been created long before the bankruptcy and in good faith. Such we understand to be the law of New York, and, in the absence of any controlling statute to the contrary, such we understand to be what the law should be."

In the instant case the agreement was not that the mortgagor should deal with the property as his own, but, by fair construction, that when he sold he should replace that sold and keep the security good. There is a long line of cases holding that where the agreement is that the mortgagor is to or may sell and dispose of the property as his own and use the proceeds as his own, or replace or not as he pleases, the transaction is fraudulent as to creditors of the mortgagor on its face. But in Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885, this subject is quite fully discussed, and it is pointed out in deciding the case that there was an express agreement that the mortgagor might sell, "and apply the proceeds to the payment of the debt, 'excepting such portion thereof as is necessary for the expenses of the business, or as he * * * (the mortgagor) may need to replenish or increase the said stock of goods.'" The mortgage was held void as to the creditors of the mortgagor for the reason that "the mortgage does not require all the proceeds of the mortgaged chattels to be applied either on the mortgage debt or to the acquisition of new property, but only the surplus, after deducting the expenses of carrying on the business." In the instant case we have no such agreement, express or implied. There is no presumption of an illegal agreement or understanding.

In 1 Jones on Liens (Ed. 1914) § 36, it is said:

"*Lien on Changing Stock of Goods.*—An equitable lien may be imposed upon a changing stock of goods by agreement of the parties, * * * and such lien may be enforced as against the general assignee of the firm for the benefit of their creditors. The fact that it was agreed that the owners of the stock of goods should keep it replenished up to its value at that time, and the further fact that, without knowledge or consent of the obligors (in the security), the owners disposed of parts of the stock and put in other stock to supply its place, do not affect the lien, but this will attach to the mingled goods in the condition they are in at the time the lien is enforced." Citing Arnold v. Morris, 7 Daly (N. Y.) 498.

And in section 42 the same author says:

"*Equitable Lien on Future Property.*—There may be an equitable lien on future property. Whenever a positive lien or charge is intended to be created upon real or personal property not in existence, or not owned by the person who grants the lien, the contract attaches in equity as a lien or charge upon the particular property as soon as he acquires title and possession of the same." Citing Wismer v. Ocumpaugh, 71 N. Y. 113; Barnard v. Norwich, etc., 4 Cliff. 351, Fed. Cas. No. 1007; Coates v. Donnell, 48 N. Y. Super. Ct. 46.

In Griffin and Curtis on Chattel Mortgages (2d Ed., 1916) 27, 28, and 29, it is said:

"But a mortgagor may agree to mortgage property not then owned [by him], or to give a lien upon it as soon as he gets it, and equity will enforce the agreement and establish the lien. * * *

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"(c) *After-Acquired Property.*—A mortgage of property to be subsequently acquired is not effective in passing the title of such property to the mortgagee. Such a mortgage may, however, be construed as an agreement to give a mortgage on such property when acquired and may thus operate as an equitable lien thereon. At law the mortgagee has no title to the property, but has a license to seize the property when it is acquired by the mortgagor. Upon such seizure title passes to the mortgagee." Citing McCaffrey v. Woodin, 65 N. Y. 459, 22 Am. Rep. 644; Perkins v. Batterson, 66 Hun, 583, 21 N. Y. Supp. 815; Kennedy v. National Union Bank of Watertown, 23 Hun, 494.

Also:

"A mortgage upon a retail stock of goods, which purports to cover goods to be purchased in the future, is effective only as an equitable lien." Citing Ludwig v. Kipp, 20 Hun, 265; Stewart v. Fidelity, etc., 19 Misc. Rep. 49, 42 N. Y. Supp. 705; Levy v. Welsh, 2 Edw. Ch. (N. Y.) 438.

Also:

"But such a mortgage, if otherwise valid, is not void because it professes to cover after-acquired property; it may be good as to the previously acquired property." Gardner v. McEwen, 19 N. Y. 123; Yates v. Olmstead, 52 N. Y. 632; Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885.

From the foregoing we deduce the following:

1. This mortgage was given for a full and fair consideration by Teetsel to McNamara.

2. There was no agreement, express or implied, that the mortgagee might sell and dispose of the property and dispose of it or the proceeds as his own property.

3. It was and is good, as between mortgagor and mortgagee, as a valid chattel mortgage on all property then owned by Teetsel, as it was duly filed and renewed.

4. The mortgage or instrument may be and is construed as an agreement to give a lien, and as one creating an equitable lien on all the property subsequently acquired by Teetsel, the mortgagor, and turned over to Roseboom, his vendee.

5. Roseboom not only knew of the mortgage and lien, but assumed, agreed to pay, same when he purchased.

6. This mortgage and lien were good and valid as against Teetsel, and Roseboom, his vendee; and to all goods in the store transferred to Roseboom, and on hand when McNamara took possession, he (McNamara) acquired legal title by virtue of the mortgage and equitable lien at that time.

7. McNamara acquired possession and title to most of the property prior to the bankruptcy of Roseboom with Roseboom's knowledge and consent.

8. The right and title of McNamara to such property was and is superior to the rights of the creditors of Roseboom and this receiver and that of the trustee when one shall be appointed.

9. McNamara cannot hold any of the property purchased by Roseboom and put in the store after he purchased of Teetsel.

However, the receiver alleges in his answer that he can prove (1) that there was an oral agreement between Teetsel, the mortgagor, and McNamara, the mortgagee, at the time of the execution of the mortgagee, by which Teetsel was to retain the property, and sell

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and dispose of same as his own, and use the proceeds, or such part as he saw fit, as his own, and that this made the mortgage and lien void as to the creditors of Teetsel, and also as to the creditors of Roseboom, his vendee; and (2) that after Roseboom became the owner there was an oral agreement entered into between him and McNamara that Roseboom should or might retain the possession of the mortgaged property, and sell and dispose of same as his own, and use the proceeds, or such part thereof as he saw fit, as his own, and that this agreement made the mortgage and lien void as to the creditors of Roseboom. The effect of such oral agreements, or either of them, if made, I will not now pass upon. If no such agreements were made, it will not be necessary to pass on the questions of law. The matter will be referred to Hon. A. H. Sewell as special master to take evidence whether or not such agreements, or either of them, were made, and report the evidence to this court, with his findings of fact and conclusions of law.

The claimant, McNamara, will be permitted to select and set apart the property which he can identify, or claims to identify, as property owned by Teetsel when he executed the mortgage, and also that which Teetsel purchased and put on the premises by way of replacement and taken into possession prior to the filing of the petition in bankruptcy; also that answering to such description not taken into actual possession prior to the filing of such petition. If there is a dispute as to identity, the special master will take evidence and determine and report the facts and his conclusions of law. Until title is determined on the coming in of the report of the special master, McNamara and the receiver and trustee, when appointed, will be enjoined and restrained from disposing of any of such property.

THE MIDDLESEX.

(District Court, D. Massachusetts. June 13, 1916.)

Nos. 1043, 1336, 1335, 1432.

1. COLLISION ⇐82(2)—FAULT—EXCESSIVE SPEED IN FOG.
   A speed of four knots through the water, by a long and heavily laden schooner at night in a fog, *held* not excessive, such speed being necessary to give her steerageway.
2. COLLISION ⇐81—SCHOONER AND STEAMSHIP—WARNING SIGNALS IN FOG.
   That a schooner at sea did not sound her whistle or exhibit a flare at night in a dense fog *held* not a fault contributing to a collision with meeting steamship, where she was sailing free and her fog horn was sounded at proper intervals.
3. DEATH ⇐13—WRONGFUL DEATH ON HIGH SEAS.
   State statutes in force at the home ports of the vessels, giving a right of action for wrongful death, do not authorize a recovery for death due to collision on the high seas.
4. DEATH ⇐23—CONTRIBUTORY NEGLIGENCE.
   The captain of a schooner drowned when his vessel was sunk in a collision at sea *held* on the evidence not chargeable with negligence for failing to get into a boat when requested to do so by the mate.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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In Admiralty. Suit by the Russell Company against the steamer Middlesex. Intervening petition of Edmund Winfield and Edward Lawrence, and libels by Mary E. Thomas, administratrix of the estate of John Thomas, by Frederick Foster, administrator of the estate of John W. Cook, and by James H. Dooley, administrator of the estate of Arthur Carberry, against the Coastwise Transportation Company. Decree for interveners Winfield and Lawrence, and dismissing libels in the other suits.

Case No. 1043:

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for claimant.

Lewis, Adler & Laws, of Philadelphia, Pa., and Frederick Foster and Warner, Stackpole & Bradlee, all of Boston, Mass., for libelant and petitioners Winfield and another.

Case No. 1336:

Lewis, Adler & Laws, of Philadelphia, Pa., and Frederick Foster, of Boston, Mass., for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for respondent.

Case No. 1335:

Lewis, Adler & Laws, of Philadelphia, Pa., and Frederick Foster, of Boston, Mass., for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for respondent.

Case No. 1432:

Frederick Foster and Sawyer, Hardy, Stone & Morrison, all of Boston, Mass., and Lewis, Adler & Laws, of Philadelphia, Pa., for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for respondent.

MORTON, District Judge. These cases grow out of a collision between the steamer Middlesex, owned by the Coastwise Transportation Company, and the five-masted schooner George P. Hudson, which occurred on 11th July, 1914, at about 10:20 p. m., on the high seas, at a point about six miles eastward of Pollock Rip Slue lightship. There was a dense fog at the time. The Hudson sank almost immediately; her captain and two of her crew were drowned. The proceedings now before the court are to recover damages for their deaths, and damages for personal injuries received in the collision by two surviving members of the Hudson's crew. The death claims are presented by three separate libels in personam against the owner of the Middlesex; the claims for personal injuries by an intervening petition in the orignal libel in rem brought against the steamer by the owners of the schooner and her cargo. No claims for loss of property of any sort are now before the court. No fault is charged against either vessel in respect to lights. It is conceded by the claimant that the steamer's speed, which was six or seven knots an

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hour at least, was excessive, and that she was at fault in respect thereto.

The principal questions are: First, whether the schooner was at fault for excessive speed and failure to give proper warnings of her presence; and, if so, second, whether such fault on the part of the schooner diminishes the damages if otherwise allowable; and, third, in the death cases only, whether damages can be recovered against the steamer for loss of life.

[1] As to the schooner's speed: She was bound north, running free with the wind over her port quarter. All her lower sails and most of her topsails and jibs were set. She was a long vessel, heavily loaded, and deep in the water. It is difficult to form a satisfactory conclusion as to her speed at the time of the accident. Her crew all testify, in substance, that she had little more than good steerageway—perhaps three or four miles an hour through the water—and this is to some extent corroborated by the nearly unanimous testimony that the wind was light, and by the fact that tackles had been fastened to some of the booms to keep them from swinging in. On the other hand, it is clear that in the two and a half hours preceding the collision the schooner had come a distance of about twelve nautical miles—an average speed of about five knots. About one knot an hour was due to the favoring tide, so that her speed through the water averaged about four knots. It is contended by the claimant—the argument being based on a reading of the log and an estimate of the time when the reading was made, testified to by Williams, the mate of the schooner—that within the hour preceding the collision she had covered about seven miles. If so, her speed was certainly immoderate. The argument assumes that the distance from the whistling buoy to the point where the reading was made was as indicated by the log. In fact it was that distance, plus the drift of the tide, which would not show on the log. Williams did not take the time when he read the log, and there is the possibility of substantial error on that important point. There is nothing to show any freshening of the wind after that time or any other reason for increased speed in the last hour before the collision.

I am not satisfied, on the evidence, that the schooner was making at the time of the collision more than her average speed for the two and a half hours immediately preceding, i. e., about four knots per hour through the water, and about five knots over the ground; and the question is whether this was excessive. Of course, a sailing vessel cannot stop and reverse like a steamer. Her only method of avoiding obstacles ahead is by a change of course. Below a certain speed, a long, heavily laden vessel like the Hudson loses almost completely her ability to maneuver. She must maintain such speed—and, under the circumstances here shown, such speed only—as will enable her to change course effectively if danger arises. The point at which that rate is exceeded by any particular vessel at any given time is a matter of judgment, depending on many things. Even with steamers it is not uniform; much greater differences must be allowed for in sailing vessels. It devolves upon the respondent

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to establish that the Hudson's speed was immoderate and in my opinion it has failed to do so. In The Chattahoochee, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801, s. c. 74 Fed. 899, 21 C. C. A. 162, relied on by the respondent, the speed through the water, on which ability to maneuver depends, was at least two or three knots greater, and the schooner was smaller and presumably quicker in action.

[2] It is also urged that the Hudson should have shown a flare-light as the steamer approached, or have blown danger signals on her own steam whistle, in order to give additional warning of her presence and location. As to blowing the whistle, I think that would have tended rather to confuse and mislead than to assist the approaching vessel. The schooner was certainly not at fault for failing to do it. As to the flare, while I think that an unusually careful master would perhaps have displayed one, I cannot say that the course and distance of the on-coming steamer were so apparent to the men on the schooner that they were required to do so in the exercise of prudent seamanship. Additional warnings of this character are intended to be used either to attract the attention of an approaching vessel which apparently has overlooked the vessel resorting to them, or to warn an approaching vessel when she cannot otherwise be expected to locate accurately the place of the vessel showing the flare. In this case the schooner had a fog horn which, upon the great weight of the testimony, was a suitable one, and was being sounded at frequent intervals after the steamer's whistle was heard. The steamer was approaching from ahead and the schooner's horn was pointed in that direction. It was not evident on the schooner that the horn would not afford to the steamer adequate information of her presence and location. To hold her at fault for not showing a flare would practically amount to establishing a rule that sailing vessels were bound to do so whenever they became aware of danger from a steamer approaching in a fog at night. I do not think that the failure of the schooner to display a flare was a fault on her part.

Various other faults are alleged against the schooner, none of which seem to me to be established nor to require discussion. On all the evidence I find that the Hudson was free from fault in respect to the collision, and that it was due solely to the fault of the Middlesex.

It follows that on the intervening petition of Winfield and Lawrence for personal injuries each petitioner is entitled to a decree for full damages, and the petition must be referred to an assessor to state the damages.

[3] There remains the question whether damages can be recovered for the deaths of Captain Thomas and the two men who were drowned. In this connection certain additional facts must be stated. The Middlesex was owned by a New Jersey corporation; her home port was Boston. The Hudson was owned by a Maine corporation. The laws of New Jersey (Compiled Statutes, vol. 2, pp. 1907, 1908) allow the recovery of damages for death. The laws of Maine also permit recovery for death. (Maine Rev. Statutes 1903, c. 89, §§ 9, 10). The New Jersey statute allows a recovery based upon the loss sustained by the

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person entitled to the damages. Under the Maine statute the damages are assessed upon the same principle, but are limited to an amount not exceeding $5,000. There is no such limitation in the New Jersey statute. The two statutes, therefore, differ in a substantial provision. The Massachusetts statutes (Acts of 1907, c. 375, as amended) allow recovery for damages for death caused by negligence, but are based upon an entirely different principle; the damages being awarded not as compensation for loss, but as a penalty assessed with reference to the degree of culpability. No case has gone so far as to allow damages for death on the high seas under the circumstances here disclosed, and I rule that they are not recoverable. The principles involved have been so well and fully considered in the following cases and articles that an extended discussion of them is unnecessary: The Scotland, 105 U. S. 24, 29, 30, 26 L. Ed. 1001; The Belgenland, 114 U. S. 355, 369, 5 Sup. Ct. 860, 29 L. Ed. 152; The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264; La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973; Thomassen v. Whitwell, 9 Ben. 403, Fed. Cas. No. 13,929; "The Remedy for Death at Sea," by Judge Harrington Putnam, Case and Comment, July, 1915; "An Attempt by Lawyers to Remedy the Law," by FitzHenry Smith, Jr., Case and Comment, July, 1915; "Extra Territorial Marine Torts," by George Whitelock, Esq., 22 Harvard Law Review, pp. 413–418; Benedict, Admiralty Jurisdiction and Practice (4th Ed.) p. 183.

[4] As to the conduct of Capt. Thomas, a further question is raised which, in view of the possibility of an appeal, ought perhaps to be decided. It is contended by the respondent that he was negligent in not getting into the boat when he had the opportunity to do so; that this negligence on his part was the proximate cause of his death; and that for this reason his representative would not be entitled to recover for the death. It seems clear that Capt. Thomas intended to get into the boat later. He was somewhat incapacitated physically, and might well want the boat in such a position as to make it as easy as possible for him to get into it. It was a very great emergency; some members of the crew who were saved were still rushing aft towards the boat when he refused to get into it; the schooner sank with very unusual rapidity, which he probably did not foresee. Considering all the circumstances, I do not think that he was negligent in failing to get into the boat when requested to do so by the mate, although had he taken that advice he would not have been drowned.

Decrees may be entered dismissing the libel in each of the death cases.

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THE CHEPSTOW CASTLE.

UNION-CASTLE MAIL S. S. CO., Limited, v. PENDLETON SHIPBUILDING & NAV. CO. et al.

(District Court, D. Massachusetts. August 9, 1916.)

Nos. 1469, 1476.

1. COLLISION ⇐49—FAILURE TO CHANGE COURSE—EVIDENCE OF FAULT—SUFFICIENCY.
In suit for collision between steamer and schooner, evidence *held* to show that latter was not at fault for holding its course after steamer had made sudden change of course toward it.

2. COLLISION ⇐49—SCHOONER'S LIGHTS—SUFFICIENCY OF EVIDENCE.
In suit for collision between steamer and schooner, evidence *held* to show that latter's lights were properly set and burning and were not obscured by her sails.

3. COLLISION ⇐48—SCHOONER AND STEAMER—BURDEN OF PROOF.
Where a sailing vessel carrying proper lights was run down at sea by a steamer on a night when the seeing was good, the latter has a heavy burden to show itself not at fault.

4. COLLISION ⇐45—SCHOONER AND STEAMER—SHOWING OF FLARE.
Where steamer changed her course so as to head more toward a schooner, making it appear to master of latter that it was being overlooked, the latter was not at fault in showing flare light.

5. COLLISION ⇐49—SCHOONER AND STEAMER—SUFFICIENCY OF EVIDENCE.
In suit for collision between schooner and steamer, evidence *held* to show that latter was at fault for failing to slow or stop seasonably and for failing to discover and keep clear of former.

In Admiralty. Libel by the Pendleton Shipbuilding & Navigation Company against the steamship Chepstow Castle, with cross-libel by the Union-Castle Mail Steamship Company, Limited, against the Pendleton Shipbuilding & Navigation Company and others. Decree adjudging the Chepstow Castle solely at fault, and referring the case to an assessor to state damages, and cross-libel dismissed.

Case No. 1469:

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for libelant.

Kirlin, Woolsey & Hickox, of New York City, and FitzHenry Smith, Jr., of Boston, Mass., for claimant.

Case No. 1476:

Kirlin, Woolsey & Hickox, of New York City, and FitzHenry Smith, Jr., of Boston, Mass., for cross-libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for respondents.

MORTON, District Judge. These two cases arise out of a collision on the high seas, about 15 miles southwest of Winter Quarter Shoal lightship, off the Virginia coast, between the three-masted schooner Emma F. Angell and the steamer Chepstow Castle. The collision occurred about 2:25 a. m. on the morning of April 8, 1916.

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The schooner sank almost immediately. Her crew were saved. The first case is a libel by her owners to recover damages for her loss. There is a cross-libel by the owners of the Chepstow Castle to recover for the damage to her.

The night was overcast and dark, with occasional squalls, but no fog or mist. The seeing was good. The wind was moderate to fresh, about southeast. The schooner was headed about south southwest, on the wind, but not quite closehauled. She was bound to Norfolk. She was carrying substantially all sail, including four head sails.

The Chepstow Castle is about 425 feet long and of about 5,000 net tons. She was proceeding in a northeasterly direction at full speed, about 10 knots per hour. There was a difference of about two points from a straight line in the courses of the vessels as they approached each other, the schooner having the steamer on her starboard bow and their courses intersecting.

The steamer was first seen from the schooner when about three miles distant. Shortly afterwards she was observed to change her course slightly towards the schooner, plainly showing her red light against the schooner's green. The master of the schooner inferred from this maneuver on the part of the steamer, and from her failure to make any further change of course to avoid his vessel, that the schooner was being overlooked by the steamer. In order to attract her attention he showed a bright flare light aft on his starboard rail. The steamer held her course, which was one involving danger of collision. The master of the schooner then swung an ordinary white lantern on the schooner's starboard quarter. As the steamer still made no change in direction or speed, he ordered the whistle of the donkey engine to be sounded.

About this time the steamer was observed to swing sharply to starboard and head almost directly across the schooner's bow. The vessels were then pretty close together. The schooner held her course for a short time until it became evident that a collision was unavoidable. Then her helm was put down and an effort made to bring her into the wind, which would be towards the southeast. Almost immediately after this was done the steamer, then heading approximately east, struck the schooner about opposite the spanker rigging and cut almost through her. Her crew got into the boat, and the schooner sank within a very few minutes.

The navigation of the steamer was, at the time, in charge of her second officer. She had one man on lookout, who was stationed in the crow's nest; the officer was on the bridge, and with him there was the helmsman. There were two other men in the watch who were not assigned to special duty. Her captain came on the bridge after the emergency had arisen and before the vessels came together. The testimony of the witnesses for the steamer is not entirely harmonious, but the account of the accident given by them may be summarized as follows:

The steamer's course was laid for the Winter Quarter Shoal lightship, and the officer on watch was looking out for that light. About 15 minutes before the collision he saw what he took to be a gleam

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of it below the horizon. He took a cross-bearing of another light on shore, which was about on his port beam, and then went to the chart-room to put the steamer's position on the chart. He reported the lightship to the captain as dead ahead, and received orders to keep it slightly on the port bow. The steamer thereupon changed her course about half a point to starboard. This was the change which, as above mentioned, was observed on the schooner shortly after the steamer was sighted. When the officer returned to the bridge the gleam of the lightship was no longer visible. He was somewhat puzzled by its disappearance, and began sharply to look for it, using field glasses and scanning that part of the horizon. Some minutes later his attention was attracted by a bright light about on the range where the light vessel had been. It was, however, much closer at hand than the light vessel would have been if his location of his vessel were correct. He testified that he recognized the light as being a flare light, that he thought he had overrun his course and was close to the lightship, and that he supposed the lights on the lightship had given out and she was showing a flare to warn him to keep off. What he did, as he says, was to put his helm hard aport, swinging the steamer towards the east. According to the testimony of the helmsman on the steamer this change of course was not made until some time after the flare had disappeared. It was observed on the schooner, as above stated. The danger whistles from the schooner were heard on the steamer—a succession of short blasts on the steam whistle. There was, however, no reduction in the steamer's speed. The lookout very soon reported a sailing vessel dead ahead, and the green sidelight of the schooner was for the first time observed on the steamer. At this juncture the captain of the steamer came on the bridge. He says that the schooner was then 300 or 400 yards distant; other witnesses on the steamer put it much less—as short as half her length, i. e., about 215 feet. He at once ordered the engines reversed. No change was made in the helm, which was hard aport. The steamer slid forward, still swinging, and collided with the schooner, as above described.

The steamer asserts that the collision occurred wholly because of the fault of the schooner, and alleges three principal faults: (1) That the schooner's green light was not brightly burning or was obscured by her headsails; (2) that the display of the flare light by the schooner was a fault which misled the steamer and contributed to the accident; and (3) that the schooner negligently held her course when by changing it she could have avoided the collision.

[1] As to the last alleged fault, I am of opinion, for reasons which I stated orally at the conclusion of the arguments, that it is not established. The situation in which the schooner found herself after the steamer's last and sudden change of course towards her was a desperate and confusing one. The steamer was both swinging and slowing. Even after the event, gentlemen equally well qualified to form an opinion disagree as to what the schooner should have done, certain expert witnesses saying that she should have luffed, and the steamer's counsel that she should have kept off. The lookout on the

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steamer says there was not time for the schooner to change her course after she was seen from the steamer. The master of the schooner was, in my opinion, entirely right in holding his course as long as he did. If he had done otherwise, his action would certainly have been charged against his vessel as a grave fault if a collision had occurred.

[2] The questions as to lights are more difficult. The steamer contends that the schooner's side light was either dim or obscured, and that it did not meet the requirements of law. This contention is founded upon the testimony of the lookout, the officer on watch, and the helmsman of the steamer, who being, as they say, attentively watching the sea ahead, entirely failed to discover the green light until it was too close at hand for them to avoid a collision. And this testimony is further strengthened by that of other persons on the steamer who happened to be on deck and to look ahead during the time when the schooner's light ought to have been visible and who did not see it. On the other hand, some of these same witnesses, among them the lookout, also testified that when they noticed the schooner's light, just before the collision, it appeared to be all right and to be burning brightly.

The evidence for the schooner satisfies me that she was being navigated with more than ordinary care. Her master became apprehensive about the steamer while the latter was still a considerable distance away. He testified that he directed the man on lookout to inspect the schooner's lights, and that the lookout reported them all right. The lookout, who was called as a witness, corroborates this testimony. It is certain that a flare light was shown, and that by her master's order the steam whistle on the schooner was blown in further efforts to attract the steamer's attention. The whole evidence for the schooner, which at various points is corroborated by witnesses on the steamer, indicates that considerable uneasiness in regard to the steamer's conduct was felt by those on board the schooner, and that a high degree of vigilance was being exercised. Under such circumstances, it seems wholly natural that her lights would be inspected. I therefore attach more importance than I might under different circumstances to the testimony of her officer and crew as to the condition of her lights. Just before the collision her green light was properly burning and was seen from the steamer. There is not a suggestion in the testimony that anything was done to it while the vessels were approaching each other. As to the testimony of the second officer of the steamer and his failure to see the schooner's lights, in another case recently tried before me, an officer using glasses in an effort to pick up a light vessel just beyond the horizon overlooked, as I thought, a sailing vessel close at hand. The Surf, 230 Fed. 485, 488. It is by no means impossible that that occurred in this case also. The helmsman's attention was on his course and compass. His failure to see the schooner's light affords no strong evidence that the light was not visible. The lookout's testimony is significant, but is outweighed by the other evidence in the case. I find that the schooner's lights were properly set and burning.

It is further suggested on behalf of the steamer that the green light, although properly burning, may have been obscured by the head sails. This is an easy suggestion to make, and one not infrequently offered on

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behalf of a vessel which has overlooked the lights of another vessel approaching nearly head-on. In this case it is repelled by the unanimous testimony of the men on the schooner, and also, as I think, by the circumstances of the case. The vessels were not approaching head to head, but at an angle, the steamer being pointed ahead of the schooner and across her bow. She never did cross the schooner's bow. The schooner's head sails would have had to be far out to obscure her lights under such conditions. The schooner's course, with reference to the wind, was such as to make it wholly unlikely that her head sails would be slacked way off. I find that her green light was not obscured by her sails.

[3] We have then the case of a sailing vessel, carrying proper lights, run down at sea by a steamer on a night when the seeing was good. The mere statement of the accident obviously throws a heavy burden of explanation upon the steamer to exculpate herself. The final contention made on her behalf is that the schooner was at fault for showing the flare. The flare burned with an intense white light lasting about two minutes. While it was burning I have no doubt that it was impossible on the steamer to make out the schooner's green light. The vessels were coming together at the rate of about 15 knots an hour. It is evident that for a considerable distance the steamer was, by reason of the schooner's conduct in showing the flare, left without information as to the schooner's direction.

I see no sufficient reason to doubt the correctness of the statement of the law as to flare lights recently made by me in Russell v. S. S. Middlesex, 253 Fed. 142 (District Court Mass. June 13, 1916), in which it was said that—

"Additional warnings of this character are intended to be used either to attract the attention of an approaching vessel which has apparently overlooked the vessel resorting to it, or to warn an approaching vessel when she cannot otherwise be expected to locate accurately the place of the vessel showing the flare."

[4] There is no doubt that the flare was not shown until after the steamer had changed her course so as to head more towards the schooner. The master of the schooner then displayed the flare, which was seen on the steamer; he then swung the lantern, which was not seen on the steamer; he then blew his steam whistle, which was heard on the steamer. His supposition that he was being overlooked when the flare was shown was correct. If it was not displayed until the vessels were fairly near together, as would be inferred from the testimony of some witnesses on the steamer, there is no sufficient explanation for her previous failure to see the green light, and the showing of the flare was, I think, justified. If, on the other hand, the flare was shown fairly early in the approach of the two vessels, as would be inferred from the testimony of the master of the schooner and some witnesses on the steamer, there remained ample time, after the effect of it had disappeared, for the steamer to have seen the schooner and to have avoided her. Some latitude must certainly be given to the judgment and action of a shipmaster in matters of this sort, and I am not prepared to say that the schooner was at fault for having shown the flare.

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Another point, although not necessary to the decision of the case, perhaps ought to be referred to. Before the schooner was seen from the steamer repeated short blasts of the former's steam whistle, plainly saying danger, were heard on the steamer, and yet the engines were not even slowed. She was kept at full speed until the captain reached the bridge, and his first act on getting there was to order them hard astern. This delay was not unimportant, because, if the steamer had been slowed down a short time sooner than she was, and other things had remained the same, the schooner would have crossed the steamer's bow and got clear.

[5] The steamer was at fault for failing to slow or stop seasonably, as well as for failing to discover and keep clear of the schooner. The schooner was free from fault.

There must be a decree in the first case adjudging the Chepstow Castle solely at fault for the collision and referring the case to an assessor to state the damages, and in the cross-libel a decree dismissing the libel.

AGENCY OF CANADIAN CAR & FOUNDRY CO., Limited, et al., v. AMERICAN CAN CO.

(District Court, S. D. New York. August 5, 1918.)

1. CONSTITUTIONAL LAW ⊂⊃68(1)—DISTRIBUTION OF GOVERNMENTAL POWERS—EXECUTIVE DEPARTMENT.
   The question of the sovereignty of a foreign government is a political question determination of which by the executive or legislative department of the United States government binds the judicial department.

2. EVIDENCE ⊂⊃334(1)—LAW OF FOREIGN COUNTRY—CERTIFICATE OF AMBASSADOR.
   The certificate of the ambassador of a foreign country to the United States as to the law of his country or the personnel and authority of officials of his government is admissible in the courts of the United States.

3. INTERNATIONAL LAW ⊂⊃9—EFFECT OF CHANGE OF SOVEREIGNTY.
   The principle is firmly established in our courts that the rights and liabilities of a state are unaffected by a change either in the form or personnel of its government, however accomplished, whether by revolution or otherwise.

4. TRIAL ⊂⊃55—RECEPTION OF EVIDENCE—DISCRETION OF COURT—WAR CONDITIONS.
   The trier of facts may determine whether as matter of fact a cable dispatch purporting to be sent by authority of a foreign government is genuine and was sent as indicated, war exigencies requiring that court shall deal with such situations in a sensible way, not too much fettered by inelastic rules while safeguarding against reception in evidence of fabricated communications.

In Equity. Suit by the Agency of the Canadian Car & Foundry Company, Limited, and the Recording & Computing Machines Company, against the American Can Company. Decree for complainants.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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T. Ludlow Chrystie, of New York City, Arnold Wainwright, of Montreal, Canada, and Francis K. Raynor, of New York City, for plaintiff Agency of Canadian Car & Foundry Co., Limited.

Walter C. Noyes, of New York City, and H. A. Toulmin and H. A. Toulmin, Jr., both of Dayton, Ohio, for plaintiff Recording & Computing Machines Co.

Philip G. Bartlett, Julius F. Workum, and Graham Sumner, all of New York City, for defendant.

The parties will be referred to as "Agency Co.," "Recording Co.," and "Can Co."

MAYER, District Judge. The suit is to recover $1,500,000 with interest. Defendant concedes, and always has conceded, that it owes $1,500,000 to somebody; but, because of certain transactions and documents, defendant's position is that it cannot safely pay the money to plaintiffs, and that it may hereafter be subject to a judgment or decree in some suit or action which may be brought by some "Russian government."

Two principal propositions are relied upon by plaintiffs:

(1) That under the documents and transactions in the case the Russian government has not any beneficial interest in the money due from defendant, and therefore that plaintiffs alone are entitled thereto.

(2) That if any beneficial interest in the $1,500,000 existed in favor of the Russian government, a release and assignment executed by authorized representatives of the Russian government disposed of and discharged such beneficial interest. If the plaintiffs prevail, there arises the question of what interest, if any, is due to the respective plaintiffs, i. e., the date from which interest should run and the rate. There is also a minor subsidiary controversy between Can Co. and Recording Co. which was referred to a special master. The master has submitted a clear and concise report in respect of the matter before him. His report is confirmed, and further reference thereto is unnecessary.

1. The basis of the indebtedness owing by Can Co. is the manufacture and delivery of fuses by Recording Co. The liability of Can Co. to pay for fuses manufactured by Recording Co. arose under two agreements dated, respectively, August 23, 1916, and November 21, 1916, the details of which need not be recited. The net result was that Recording Co. manufactured 1,500,000 time fuses which were delivered and accepted. Recording Co., however, was indebted to Agency Co., and Agency Co. had large contracts with the Russian government for the manufacture of munitions.

On October 31, 1916, an arrangement was entered into by Can Co., Recording Co., and Agency Co. which was expressed in the following letter:

"October 31, 1916.

"American Can Company, 120 Broadway, New York City—Dear Sirs: In consideration of your making advances to Recording & Computing Machines Company of the sums provided in your contract, dated August 23, 1916, with that company for the manufacture of 1,250,000 Russian time fuses, and of

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your making the payments to that company of the purchase price of time fuses, as provided in said contract, out of which the sum of one dollar ($1.00) of the purchase price of each fuse delivered shall be paid by you to us, until all sums which may now or hereafter be due from and payable by that company to us are adjusted and paid or otherwise satisfied:

"We hereby agree that you may take security for such advances on all materials purchased by that company from the sums so advanced, and that we will waive any claim or lien which we may have upon the time fuses manufactured for you by that company under its said contract with you, and that we will not interfere with the delivery to you by that company of the time fuses so manufactured for you by that company under its said contract with you. * * *

"Yours very truly,

"Agency of Canadian Car & Foundry Company,

"C. H. Cahan, Chairman of the Board of Directors.

"Accepted by:

"American Can Company,

"J. R. Harbeck, Vice President.

"Accepted by:

"Recording & Computing Machines Company,

"H. A. Toulmin, Vice President."

The above is the document of primary importance in the case.

On January 2, 1917, an agreement (too long to quote) was entered into between "General A. Zalubovsky, President of the Imperial Russian Supply Committee in America, Acting for and on Behalf of the Chief Artillery Board of the Imperial Russian Government," and Agency Co. The instrument was signed, "For Lieutenant General A. Zalubovsky, President of the Imperial Russian Supply Committee in America, by Major General Khrabroff, Vice President." By this agreement, inter alia, Agency Co. assigned to the Russian government the agreement or order of October 31, 1916, supra, "to receive from American Can Company all sums of money payable to the Agency Company under the terms of said agreement," and the Russian government agreed to make certain payments to Agency Co.

Contemporaneously with the agreement of January 2, 1917, there was indorsed on the order of October 31, 1916, the following:

"New York City, January 2, 1917.

"For valuable consideration, Agency of Canadian Car & Foundry Company, limited, hereby assigns to the Imperial Russian Government, all the right, title and interest of said company in and to all sums of money payable under the within agreement, dated October 31, 1916.

"Agency of Canadian Car & Foundry Company,

"By C. H. Cahan,

"Chairman of Board of Directors. [Seal.]"

As part of the transaction of January 2, 1917, Recording Co. on January 11, 1917, entered into an agreement with the Russian government (acting through the same officials) that contractors with Recording Co. for time fuses (which included defendant) should deduct $1 from the purchase price of each fuse and pay the same to the Russian government until payment should be made in full of the amount which the Russian government was required to pay to Agency Co. under the agreement of January 2, 1917.

On September 14, 1917, Can Co. agreed with Recording Co. that Can Co. retain $1,500,000 "for account of Agency of Canadian Car and

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Foundry Company or the Imperial Russian government, as their interests may appear" until such time as there was a final adjustment of account between the interested parties or a final determination by law.

Certain differences having arisen, the details of which may be passed by, matters were finally settled between Recording Co., Agency Co., and the Russian government acting through Gen. Khrabroff, now president of the Russian Supply Committee, and the settlement was expressed in elaborate detail in an agreement dated December 18, 1917, and executed by the three parties. On the same day, and as a part of the same transaction, the Russian government, acting through Gen. Khrabroff as "President of the Russian Supply Committee in Behalf of the Russian Government" assigned to Agency Co. and Recording Co. all its right, title, and interest, if any, to the $1,500,000 held by Can Co. Under date of December 19, 1917, Gen. Khrabroff, as president of the Russian Supply Committee in America, also executed and delivered a general release to Recording Co. By an agreement dated December 22, 1917, Recording Co. and Agency Co. stated and adjusted their accounts as between themselves; the amount due Agency Co. out of the $1,500,000 being fixed at $713,176.07.

From the foregoing outline of the essential facts and an examination of the documents, it is clear beyond question that the Russian government has not any beneficial interest in the money held by Can Co. Even if Gen. Khrabroff lacked authority to sign on behalf of the Russian government, that government could not successfully maintain in any court in this country any suit or action against Can Co. for the $1,500,000, or any part thereof, once Recording Co. and Agency Co. had settled their differences.

2. It would be unnecessary to go further, but for the fact that defendant expresses the fear that in some jurisdiction—possibly foreign—it may be held that under the documents the Russian government has a beneficial interest, and that this it has never relinquished because of lack of proof that Gen. Khrabroff had authority to bind the then existing Russian government by his signature to the settlement agreement of December 18, 1917.

The contention, in effect, is that the Russian Supply Committee originally acted for the Imperial Russian government, of which the Czar was head; that that government has fallen and other governments have followed, and, as a result, the Russian Supply Committee no longer had authority; and that proof is wholly lacking as to the powers or status of Gen. Khrabroff.

[1] The attempt was made to offer lay proof as to who were, at present, in control of the Russian government, or, in other words, who or what the present government of Russia is. This line of testimony was excluded upon the well-settled principle that the question of sovereignty is a political question, the determinaton of which by the political branch or branches of our government, i. e., executive and/or legislative departments, binds the judicial department. Jones v. United States, 137 U. S. 202, 212, 11 Sup. Ct. 80, 34 L. Ed. 691; Pearcy v. Stranahan, 205 U. S. 257, 265, 27 Sup. Ct. 545, 51

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L. Ed. 793; Williams v. Suffolk Ins. Co., 13 Pet. 415, 419, 10 L. Ed. 226; The Hornet, Fed. Cas. No. 6705; Kennett v. Chambers, 55 U. S. (14 How.) 38, 14 L. Ed. 316; Phillips v. Payne, 92 U. S. 130, 23 L. Ed. 649; Oetjen v. Central Leather Co., 246 U. S. 297, 38 Sup. Ct. 309, 62 L. Ed. 726; Ricaud v. American Metal Co., 246 U. S. 304, 38 Sup. Ct. 312, 62 L. Ed. 733.

After the date of the beginning of the transactions and before the settlement in December, 1917, the United States had recognized the Russian government which succeeded that of the Czar. In response to a letter of inquiry by one of the counsel for defendant, Mr. Polk, the counselor to the Department of State, replied:

"I find that this government instructed the American Ambassador, under date of March 20, 1917, to recognize the new government of Russia and to state to the proper Russian authorities that the United States will be pleased to continue intercourse with Russia through the medium of the new government."

Shortly thereafter, viz. on July 5, 1917, Boris Bakhmetieff was recognized as the Russian Ambassador, and that recognition still continues, as evidenced by the following certificate of our Secretary of State:

"To All Whom These Presents Shall Come, Greeting:

"Know ye that I, Robert Lansing, Secretary of State of the United States of America, do hereby certify that Boris Bakhmetieff presented his letter of credence to the President of the United States and was officially received by the President as Ambassador Extraordinary and Plenipotentiary of Russia on the fifth day of July, 1917; and that the said Boris Bakhmetieff has accordingly since that date been recognized by the Department of State as Ambassador of Russia and as entitled to all the rights, privileges and immunities of such status.

"In witness whereof, I have hereunto subscribed my name and caused the Seal of the Department of State to be affixed.

"Done in the city of Washington this eighth day of May, one thousand nine hundred and eighteen. Robert Lansing. [Seal.]"

This certificate is controlling upon the courts (In re Baiz, 135 U. S. 405, 10 Sup. Ct. 854, 34 L. Ed. 222; Jones v. United States, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691), and is preliminary to a certificate from Ambassador Bakhmetieff in connection with this suit.

What happened was that Mr. Murray, of Coudert Bros., attorneys for the Russian government, informed the Russian Ambassador of the pendency of this litigation and of a request made of him (Murray) to testify and he asked for the Ambassador's instructions. As a result of this inquiry, Mr. Murray did testify and produced at the trial a certificate of the Russian Ambassador, setting forth the personnel of the Russian Supply Committee, and certifying:

"That the Russian Supply Committee in the United States was organized in October, 1915, for the purpose of purchasing supplies in the United States for Russia, accepting supplies purchased or manufactured in the United States for Russia, and settling all matters relating to contracts for supplies purchased or manufactured in the said United States for Russia; that said committee's authority continued until the first day of March, 1918; that the said committee had full charge of all matters pertaining to the two contracts between Russia and Canadian Car & Foundry Company, Ltd., for 5,000,000

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rounds of ammunition, also all the relations between Russia and Agency of Canadian Car & Foundry Company, Ltd., arising from the assignment by Canadian Car & Foundry Company to Agency of Canadian Car & Foundry Company of the contracts for 5,000,000 rounds of ammunition, also of all relations with the Recording & Computing Machines Company of Dayton, Ohio, which company was engaged in the manufacture of Russian time fuses; that the said committee had full power and authority between the date of its organization and the first day of March, 1918, to liquidate and close all accounts with Agency of Canadian Car & Foundry Company, Ltd., Canadian Car & Foundry Company, Ltd., and the Recording & Computing Machines Company."

[2] An ambassador, of course, is not subject to process in a foreign court, and there are, perhaps, some matters in respect of which an ambassador's certificate might not be admissible; but, when he certifies to the law of his country or to the personnel and authority of officials of his government, such certificate is clearly admissible as proof of the facts therein set forth. In the Goods of Klingerman, 3 Sw. & Tr. 18; In the Goods of Anne Downey, 3 Hagg. Ecc. Rep. 767; Goods of Prince Oldenburg, L. R. 9 Prob. Div. 234; The Republic of Mexico v. De Arangoiz, 12 N. Y. Super. Ct. 643, 646. See, also, Wigmore, vol. 2, p. 1820 et seq., §§ 1455, 1456; Chamberlayne, vol. 4, p. 3805 et seq., §§ 2769–2775; 16 Cyc. 1217.

The change in the form of Russian government and the fact that in the original papers that government was described as the "Imperial Russian Government," while the settlement papers are executed on behalf of the "Russian Government," are matters of no significance.

[3] Since the notable precedent of The Sapphire, 78 U. S. (11 Wall.) 164, 20 L. Ed. 127, the principle is firmly established in our courts that the rights and liabilities of a state are unaffected by a change either in the form or personnel of its government, however accomplished, whether by revolution or otherwise. No other doctrine is thinkable, at least among nations which have any conception of international honor. See, also, United States of America v. McRea, L. R. 8 Eq. 69; John Bassett Moore's Digest of International Law, vol. 1, p. 249, and also 251, quoting Secretary Bayard's instructions to the then American Minister to Peru (September 23, 1886).

Other grounds could be stated which, so far as concerns the Russian government, fully support the validity of the settlement of December, 1917; but enough has been pointed out to demonstrate that there is no occasion for further timidity on the part of defendant.

It may, however, be added that the officially responsible character of the Russian Supply Committee as evidenced by the many and, in money, enormous transactions confided to it throughout all the dates relevant to this controversy, should assure defendant that no tribunal in this country will ever subject defendant to a second payment—and we have no concern with remote possibilities as to the action of any foreign tribunal.

[4] It may be further added, in passing, that some cables from Russia were received in evidence, where the proof, because of war conditions, was not in accordance with what defendant regarded as orthodox methods of proving communications of this kind. As I under-

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stand, the modern method permits the trier of the facts to determine whether as matter of fact the paper is genuine and was sent as indicated. War exigencies require that the courts shall deal with such situations in a sensible way, not too much fettered by inelastic rules, while at the same time safeguarding against the reception in evidence of fabricated communications.

For the reasons outlined, plaintiffs are entitled to recover.

3. In respect of interest to be allowed, the case should be disposed by the intent of the parties as gathered from the documents and by the situations which developed.

As to the Recording Co.:

Under the agreement of September 14, 1917, Can Co. was required to allow interest from November 1, 1917, at the rate of 2 per cent. per annum "to the date of payment of the amount" or such other rate as the Can Co. would receive from its bankers. Meanwhile Can Co. was to hold the money until Recording Co., Agency Co., and the Russian government arrived at a "final settlement and adjustment of account * * * or until their interests shall be finally determined by law"; "their interests" meaning the interests of the Can Co., Agency Co., and Russian government.

On December 7, 1917, counsel for defendant wrote counsel for Recording Co. that defendant had concluded not to pay the $1,500,000 except "pursuant to the judgment of a court." Under the agreement of September 14, 1917, it was the duty of Can Co. to pay on demand, as soon as it was credibly informed that the parties had "arrived at a final settlement."

Such information was conveyed to Can Co. by a letter of the attorney for Agency Co., dated December 28, 1917. This letter was a demand to pay Agency Co. $713,176.07 with interest and inclosed a copy of the settlement agreement of December 22, 1917, between Agency Co. and Recording Co. and also a copy of the assignment of December 18, 1917, by the Russian Supply Committee to Agency Co. and Recording Co., of all right, title, and interest in and to the $1,500,000.

As defendant had theretofore refused to pay without a lawsuit, further demand was unnecessary, and Recording Co. is entitled to interest at the rate of 6 per cent. per annum from December 28, 1917, and at 2 per cent. per annum (no greater sum having been received from defendant's bankers) from November 1, 1917, to December 28, 1917.

As to Agency Co.:

Agency Co., under the agreement of December 22, 1917, is entitled to half the interest from November 1, 1917, to December 28, 1917, which Can Co. is to pay Recording Co.

Nothwithstanding the argument earnestly pressed by counsel for Agency Co., it seems to me that interest was not payable to Agency Co. until after the December settlement and the Agency Co.'s demand on December 28, 1917. From that date Agency Co. is entitled to interest from Can Co. on its $713,176.07 at the rate of 6 per cent. per annum.

Submit decree in accordance herewith.

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Settle decree on three days' notice. As to costs: Plaintiffs may have one bill of costs, the interadjustment of which should be taken care of in decree. Recording Co. will pay all the taxable costs of the reference.

I note appreciation of the aid of counsel in submitting very helpful briefs, and I am further obliged to Mr. Chrystie for the convenient form in which many of the important exhibits were printed.

Ex parte FISCHER.

(District Court, D. New Jersey. October 28, 1918.)

ARMY AND NAVY ⟸20—SELECTIVE DRAFT ACT—CLASSIFICATION OF REGISTRANTS.

A man inducted into the service under the Selective Draft Act, but who was a few days afterward discharged through error, *held* properly classified in the same position he occupied before the error was committed.

Application by Frederick Fischer for writ of habeas corpus. Writ denied.

Alex. S. Aleinekoff, of New York City, for petitioner.

Andrew J. Steelman, Asst. U. S. Atty., of Jersey City, N. J., for the United States.

HAIGHT, District Judge. This case presents a rather unusual situation. The relator was found qualified and certified for military service in August of 1917 by Local Board, division 164, of New York City. He had presented a claim to that board for discharge, based upon the ground that he was a married man with a wife dependent upon him for support. The local board disallowed the claim. Upon appeal, the district board reversed the local board; but subsequently, after some correspondence between the local board and the district board, the district board reversed its former action, and affirmed the local board. The respondent was thereon, on November 20, 1917, inducted into military service and taken to Camp Upton, in New York state, where he was enrolled as a private in the First Company of the One Hunded and Fifty-Second Depot Brigade of the Seventy-Seventh Division. In the meanwhile he petitioned the adjutant general of New York state to reopen his case and order his discharge from military service on the ground before mentioned. On November 27th his name appeared in Special Orders 96, paragraph 20, issued by the commanding general at Camp Upton on that day, as among those to be discharged from service, because they had been respectively inducted therein "through error." An honorable discharge was thereupon granted to the relator by the commanding officer.

The local board, being advised of the action taken by the commanding officer, endeavored to ascertain from the military authorities the cause of the relator's discharge. The upshot of the investigation which the local board made was that the relator had been discharged through

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error. The relator, after his discharge, filled out and filed the questionnaire required by the regulations promulgated by the President on the 8th of November, 1917. In the questionnaire he asked for deferred classification upon the ground that he was a married man with a wife dependent upon him for support. The local board disallowed the claim and classified him in class 1–I, and on appeal the district board affirmed the action of the local board. The local board's reason for classifying him in 1–I, and presumably the action of the district board in affirming the former's action, was that, although the relator might, under the facts as divulged by the questionnaire and the other facts which were before them, exclusive of the induction into military service and discharge therefrom, be entitled to be classified in 2–B, in view of the fact that he had been inducted into military service under the old regulations, and had been discharged from service through error, that he should be classified in 1–I (which class is not provided for specifically in the regulations, but is found in the questionnaire which was attached to and became part of the regulations), as a person not included in any other division specified in the schedule attached to the questionnaire.

Their action in this respect, I think, was correct. If the relator was discharged from military service through error (and I think that there was ample evidence before the board to justify their conclusion in that respect), manifestly he should be placed in the same position as he occupied before the error was committed, namely, in the position of a person subject to be immediately inducted into military service. If this is not correct, we would have presented a situation where a person who, through error committed by the military authorities, would be placed in a position more advantageous to him (being a person not desiring to perform military service) than other persons of the same class, and without the possibility of rectifying the error thus committed. This follows because, if he cannot be classified in class 1, he would have to be classified in class 2–B under the board's finding of dependency, etc. The placing of him in that class would relieve him from military service for a long time, and possibly for all time. Thus it would be made to appear that an error would be the means whereby this man could be relieved of military service, or, at least, the service could be indefinitely postponed, even though the error was later found out. I cannot bring myself to believe that any such result was ever intended by the regulations, or that it would be in harmony therewith. Furthermore, section 177 of the regulations would seem to be applicable to this situation, as the relator was not classified until that provision of the regulations of November 8, 1917, became effective.

Consequently my conclusion is, upon the whole case, that the writ should not be issued, and that the rule to show cause before issued should be dismissed.

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PITTSBURGH PLATE GLASS CO. v. H. NEUER GLASS CO.

(Circuit Court of Appeals, Sixth Circuit. October 8, 1918.)

No. 3149.

1. CONTRACTS ⟸10(4)—MUTUALITY—SALES.
Contracts to furnish such material as one may need in his business for a specified time are mutual, and binding on the parties, where the nature of the purchaser's business is such as to make the quantity of the article he will need subject to a reasonably accurate estimate.

2. CONTRACTS ⟸10(4)—MUTUALITY—SALES.
A contract by which one party agrees to furnish to the other such goods as the latter may decide to order in its business during a specified time at stated prices, leaving it optional with the purchaser to increase or decrease its orders with the rise and fall of prices, is void for want of mutuality.

3. CONTRACTS ⟸10(4)—MUTUALITY—SALES.
A letter written by defendant to plaintiff, stating, "We have entered your order for polished plate glass, for anything we can furnish from our warehouse, these discounts to apply until June 30, 1916," when accepted, *held*, as against demurrer, to create a valid contract, binding plaintiff to buy and defendant to sell all of the glass of the specified sizes in defendant's warehouse in the normal course of its business up to June 30, 1916.

4. SALES ⟸1(4)—CONTRACT—CERTAINTY AS TO QUANTITY.
A contract for the sale and purchase of all the glass of specified sizes which defendant could furnish from its warehouse until a certain date is not invalid for uncertainty as to the quantity.

5. CONTRACTS ⟸153—CONSTRUCTION—CONSTRUCTION SUSTAINING VALIDITY.
As between two equally reasonable constructions, that should be adopted which would make a contract valid as against that reaching a contrary result.

In Error to the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Action at law by the H. Neuer Glass Company against the Pittsburgh Plate Glass Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Tuttle & Ross and Pogue, Hoffheimer & Pogue, all of Cincinnati, Ohio (Burton B. Tuttle and Province M. Pogue, both of Cincinnati, Ohio, of counsel), for plaintiff in error.

Edw. P. Moulinier and John H. Druffel, both of Cincinnati, Ohio, for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and WESTENHAVER, District Judge.

KNAPPEN, Circuit Judge. Plaintiff in error, whom we shall call defendant, was a manufacturer of glass at Pittsburgh, and had a warehouse at Cincinnati, where it kept on hand for sale quantities of glass of various sizes. Defendant in error, plaintiff below, was a Cincinnati jobber of glass. Plaintiff sued on an alleged contract, dated January 3, 1916, taking the form of a letter to plaintiff from defendant, and signed by it, as follows:

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"In accordance with our personal conversation, we have entered your order for polished plate glass, for anything we can furnish from our warehouse, these discounts to apply until June 30, 1916, as follows: [Sizes and discounts here stated]—all from the current list of May 1, 1914, and subject to 1 per cent. for cash. I am writing this letter in duplicate, and will thank you to sign and return one copy at your earliest convenience."

The letter bears on its face the word "Accepted," followed by plaintiff's signature. The petition avers that plaintiff gave defendant, under the contract, certain orders for glass which were filled, and gave from May 26 to June 29 other orders for glass, "which defendant could furnish from its warehouse, but which it failed and refused to fill." Plaintiff demanded the difference between the aggregate market and contract prices respectively of the glass not furnished. A demurrer to the petition, as not stating a cause of action, was overruled. Defendant then answered issuably. A trial by jury resulted in verdict and judgment for plaintiff. Defendant's motion for new trial was overruled. On this review, the only proposition open to defendant is that the petition fails to state a case. The proceedings on the trial are not brought up.

Defendant's contention is that the contract is void, as unilateral and lacking mutuality or consideration. The argument is that the contract was merely an offer by defendant to sell to plaintiff such glass of the sizes and kinds named as defendant could furnish from its warehouse, but without any obligation on plaintiff's part to take any glass (except such as it might choose from time to time to order), and without the giving of any consideration for defendant's agreement by way of order accompanying the contract, or otherwise.

Plaintiff's contention is two-fold: First that by the contract plaintiff was bound to buy whatever glass of the kinds and sizes in question defendant should have in its warehouse; and, second (as we understand it), that if the writing is held a mere offer by defendant, subject to withdrawal before its acceptance, the offer was a continuing one, and a contract was created as to each order given by plaintiff while the offer was still open and unrevoked by defendant. The court below agreed with plaintiff on the first proposition, and, at least in its practical result, as to the second. It does not appear that any specific order for glass accompanied the contract, nor that there was any consideration for defendant's promise unless in plaintiff's obligation to buy.

[1] Contracts to furnish such material as one may need in his business for a specified time are, by the weight of authority, held mutual and binding on the parties, where the nature of the purchaser's business is such as to make the quantity of the article he will need subject to a reasonably accurate estimate. In support of this general proposition, as tersely stated in note 43 L. R. A. (N. S.) 730, we need refer only to the decisions of this court. Lima Locomotive, etc., Co. v. National, etc., Co., 155 Fed. 77, 83 C. C. A. 593, 11 L. R. A. (N. S.) 713; Loudenback Fertilizer Co. v. Tennessee Phosphate Co., 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402; Inman v. Dudley, etc., Co., 146 Fed. 449, 76 C. C. A. 659; Campfield v. Sauer, 164 Fed. 833, 91

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C. C. A. 304; Marx v. Amer. Malting Co., 169 Fed. 582, 95 C. C. A. 80.

[2] The basis of this rule is that the purchaser's obligation to buy to the extent of his needs supplies mutuality. We assume, however, for the purposes at least of this opinion, that if the contract is to be construed as binding plaintiff to buy such glass only as it should see fit to take, that is to say, so much as it should decide to order for the purposes of its jobbing trade, it would be void for want of mutuality, as leaving it optional with it to increase or decrease its orders with the rise and fall in price. Loudenback Co. v. Phosphate Co., supra, 121 Fed. 301, 58 C. C. A. 220, 61 L. R. A. 402; Crane v. Crane (C. C. A. 7) 105 Fed. 869, 872, 45 C. C. A. 96 (cited by this court with approval in the Fertilizer Company Case, supra, 121 Fed. at pages 301 and 303, 58 C. C. A. 220, 61 L. R. A. 402); the Lima Case, supra, 155 Fed. at page 79, 83 C. C. A. 593, 11 L. R. A. (N. S.) 713; and Campfield v. Sauer, supra, 164 Fed. at pages 834, 835, 91 C. C. A. 304.

[3] We shall accordingly treat the validity and effect of the writing, as a present contract of purchase and sale, as depending on whether plaintiff was thereby *obligated* to buy all the glass of the kinds and sizes in question that defendant should actually and in good faith, and in the normal course of its business, have in its warehouse between the making of the contract and June 30 following. That such was the measure of the *right* which the agreement attempted to give plaintiff is apparent from the language of the writing:

"We have entered your order * * * for anything we can furnish from our warehouse, these discounts to apply until June 30, 1916, as follows."

The entering of the order was prima facie an acceptance of it. Austrian v. Springer, 94 Mich. 343, 347, 54 N. W. 50, 34 Am. St. Rep. 350. Indeed, that such was defendant's construction of the agreement is suggested by the assertion in its answer that it filled plaintiff's specific orders for glass sent in after February 21st (alleged to be the actual date when the contract was executed), "in so far as it had the same in its warehouse in Cincinnati, Ohio," and the District Judge, in his opinion denying motion for new trial, said that—

"The defendant regarded the agreement as binding on it and made deliveries under it. It repudiated its obligations on the sole ground that when the plaintiff made demand the warehouse did not contain the sizes called for."

[4] The pivotal question thus is whether the agreement is to be construed as binding plaintiff to so purchase; for, if so, it would not, in our opinion, be invalid for lack of certainty as to the amount of glass defendant would have in its warehouse, and which plaintiff would be obliged to take. Not only would the amount be susceptible of determination within reasonable limits, but plaintiff's agreement to buy what should be on hand would furish a consideration for defendant's promise. Ramey v. Schroeder (C. C. A. 7) 237 Fed. 39, 43, 150 C. C. A. 241; Burgess Co. v. Broomfield, 180 Mass. 283, 286, 287, 62 N. E. 367; Inman v. Dudley (C. C. A. 6) 146 Fed. 449, 451, 76 C. C. A. 659; and see Caflisch v. Humble (C. C. A. 6) 251 Fed. 1, —— C. C. A. —— (decided May 17, 1918). That under such contract plain-

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tiff would get the benefit of a possible rise in price cuts no figure, for defendant would get a corresponding benefit in case of a decline.

Construing the writing as evidencing merely an offer by defendant to sell, and an acceptance by plaintiff of the offer, it is plain that an express contract resulted, so far as not invalid for indefiniteness in respect of quantity. Lima Co. v. National Co., supra, 155 Fed. at page 79, 83 C. C. A. 593, 11 L. R. A. (N. S.) 713; Ellis v. Dodge (C. C. A. 5) 246 Fed. 764, 766, — C. C. A. —; Dailey v. Clark, 128 Mich. 591, 594, 595, 87 N. W. 761. Had the word "whatever" been used in place of "anything," we think the writing would naturally be construed, even on the theory of a mere offer by defendant accepted by plaintiff, as binding defendant to sell and plaintiff to buy everything defendant should have in its warehouse, during the period named, corresponding to the stated description; and the word "anything" is not infrequently used colloquially in the sense of "whatever." But, as bearing on the extent of plaintiff's agreement, there seems to us much significance in the fact that the contract began, not with an "offer" by defendant to sell, but with an "order" by plaintiff for the purchase of "anything" the former should be able to furnish from its warehouse, thus in terms prima facie indicating an actual order and a complete contract, good as against demurrer, unless plainly appearing to the contrary on the face of the petition. Defendant's admission, in writing, of a verbal "order" from plaintiff, "entered" and so accepted by defendant, is not plainly nullified by the fact that plaintiff attached its signature to the writing at defendant's request. Such signature may well have been desired as a ratification of the verbal order.

[5] Nor is the mere addition by plaintiff of the word "Accepted" sufficient to effect such nullification. As between two equally reasonable constructions, we should adopt the one which makes the contract valid, as against that reaching the contrary result. Lima Co. v. National Co., supra, 155 Fed. at page 79, 83 C. C. A. 593, 11 L. R. A. (N. S) 713. We find nothing in the language of the petition, as distinguished from the writing itself, necessarily negativing such obligation on plaintiff's part; for we cannot construe the averment that by the writing defendant agreed to sell to plaintiff and that the latter accepted "said offer to sell," in connection with the averment that defendant filled certain of plaintiff's orders and failed and refused to fill others, as actually negativing an obligation on plaintiff's part to take any glass, except such as it might from time to time thereafter elect to order. Plaintiff would naturally specify from time to time sizes for which it had immediate use; and even if plaintiff misunderstood the extent of its liability to buy, it would not thereby be denied relief for defendant's breach unless it had itself broken its agreement, and no such defense is made. Moreover, even as indicating a contemporaneous practical construction, a mere failure on plaintiff's part (which does not, however, affirmatively appear) to call for all the glass answering to the description in the writing would not be decisive against a legal obligation to do so; for it does not appear what the market was before May 26, and after that time defendant would naturally not wish plaintiff to take more than it specifically ordered.

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In our opinion, the contract should not be construed, as against demurrer, as lacking mutuality, but as imposing an obligation on plaintiff to buy, commensurate with defendant's obligation to sell. We are the better content with this conclusion from the fact that defendant does not appear to have suffered injustice from its application; for the trial judge states not only (as already said) that defendant regarded the agreement binding on it, but that there was on the trial "sufficient evidence tending to show the warehouse contained, if not as much on each occasion as plaintiff called for, yet sufficient to more than equal the amount of the verdict"—which was in fact less than one-fifth the amount plaintiff sued for.

This conclusion makes it unnecessary to consider the other ground of defendant's liability asserted by plaintiff.

The judgment of the District Court is affirmed.

PHŒNIX IRON & STEEL CO. v. WILKOFF CO.

(Circuit Court of Appeals, Sixth Circuit. August 5, 1918.)

No. 3122.

1. CONTRACTS ⟸23—OFFER AND ACCEPTANCE—CONDITION—"IT BEING UNDERSTOOD"—"AGREED"—"UNDERSTOOD."

The word "understood" in a contract is synonymous with "agreed," and the words "it being understood," in an answer to an offer, mean provided or on condition it is so agreed.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Agreed; It being Understood; First and Second Series, Understood.]

2. CONTRACTS ⟸23—OFFER—CONDITIONAL ACCEPTANCE.

An acceptance of an option making no mention of the optionee's having a certain right, which he would have as a matter of law if the option should be accepted absolutely, but which acceptance is conditional on the optionor's agreeing that he should have such right, is a qualified acceptance, and such as to prevent the creation of a contract unless the optionor thereafter in some way agrees thereto.

3. CONTRACTS ⟸23—OFFER AND ACCEPTANCE—FORM OF CONTRACT.

A difference between the offer and acceptance, as to the form of a contract, is just as effective to prevent the entering into the contract as one as to its substance.

4. SALES ⟸168(2)—RIGHTS OF BUYER—PLACE OF INSPECTION.

A statute providing that, "unless otherwise agreed, when a seller tenders delivery of goods to the buyer he is bound, on request," to afford a reasonable opportunity for inspection, does not give a buyer of goods to be delivered to a carrier an absolute right of inspection at the point of shipment.

5. CUSTOMS AND USAGES ⟸18—PLEADING AND PROOF.

In an action for breach of a contract alleged to have been made by telegrams set out, which were insufficient to create a contract, plaintiff cannot aid his case by proof of a custom not pleaded.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action at law by the Phœnix Iron & Steel Company against the Wilkoff Company. Judgment for defendant, and plaintiff brings error. Affirmed.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Hine, Kennedy & Manchester and Stephen S. Conroy, all of Youngstown, Ohio, for plaintiff in error.

Wilson & Wilson and Harrington, De Ford, Heim & Osborne, all of Youngstown, Ohio, for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. The plaintiff in error was plaintiff and the defendant in error defendant below. The action was to recover $202,500 as damages for breach of contract. The defendant denied the existence of the contract, and this was the sole issue in the case apart from that as to amount of damages. On trial before a jury verdict was rendered for defendant, pursuant to peremptory instruction given, after plaintiff had introduced the evidence on which it relied to establish the contract, and upon the ground that such evidence did not establish it. Judgment dismissing the petition was entered thereon, and it is therefrom that this writ has been sued out. Seven errors are assigned, but each in a different way raises the single question as to the correctness of the peremptory instruction.

The alleged contract related to one of two kinds of discard billets, made in the manufacture of high explosive shells. Such billets are cut-offs from billets rolled from ingots. Two are made from the top of each billet. The first is imperfect, in that it contains pipes and seams caused by the passage from the top of the ingot of gases formed by the hot steel. The second is apparently perfect, i. e., free from pipes and seams, and is made to insure that all imperfect steel has been eliminated. The remaining part of the billet is alone used in the manufacture of the shells. It was the latter kind of discard billets which was the subject-matter of the alleged contract.

The plaintiff and defendant are each engaged in buying and selling iron and steel products, the one in New York City and the other at Youngstown, Ohio. Plaintiff's claim was that the contract sued on arose from a telegram and confirming letter sent Monday evening, August 14, 1916, by defendant to it, granting an option, and a counter telegram sent Wednesday morning, August 16th, by it to defendant, accepting the option. It is not necessary to quote the confirming letter, as it contains nothing additional except a specification of the sizes of the billets, nor the formal parts of the telegrams. Defendant's telegram was as follows:

"For consideration of one dollar, receipt of which is hereby acknowledged, we hereby give you option, providing we receive your acceptance not later than Wednesday evening next, to purchase from us 15,000 tons discard billets free of pipes and seams, price $26.50 gross ton f. o. b. cars Youngstown, size of billets as confirmed by letter this evening."

Plaintiff's counter telegram was as follows:

"We accept option, and hereby purchase from you fifteen thousand tons billets on basis of terms and specifications of option given us, it being understood that we have the right to have our inspector at loading point as material is shipped. Acknowledge receipt of this message."

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These two telegrams and defendant's confirming letter were filed as exhibits with the plaintiff's petition, and no reason occurs why the question as to whether a contract was thereby constituted might not have been raised by, and determined upon, demurrer to the petition. Subsequent telegrams, which passed between the parties down to August 22d, were introduced in evidence by plaintiff. They had no tendency to help out its case. Nor does it claim that they did. On the contrary, defendant claims that they show that the plaintiff as well as defendant did not regard that a contract had resulted from the previous communications. As it is not necessary to determine this, those telegrams, except one sent by defendant to plaintiff Wednesday evening the 16th upon receipt of plaintiff's telegram, are not quoted. That telegram was as follows:

"Billets on hand ready to ship. Your message satisfactory provided you make inspections Thursday or Friday this week. If billets satisfactory will then sign contract. Wire when your inspector will be here."

Inspection was made on Friday of the billets thus referred to and they were rejected.

The question as to the correctness of plaintiff's claim depends on whether its counter telegram was an absolute acceptance of the offer made by defendant's telegram and confirming letter. If it was not—if it was only a qualified acceptance thereof—no contract arose therefrom; for it is trite in the law that, in order for a contract to arise from the acceptance of an offer, the acceptance must be absolute and unqualified. The reason for this is thus stated in Wald's Pollock on Contract (3d Ed., by Williston) p. 43:

"For unless and until there is such an acceptance on the one part of the terms proposed on the other part there is no expression of one and the same common intention of the parties, but at most expression of the more or less different intentions of each party separately; in other words, proposals and counter proposals."

The question, therefore, whether, in any given case, an acceptance of an offer constitutes a contract may be viewed as one of identity. Do the offer and the acceptance each express one and the same intention, i. e., an assent to one and the same thing?

[1] Without doubt plaintiff's telegram on its face was a qualified, and not an absolute, acceptance of defendant's offer. It contained two sentences. The second called for an acknowledgment of its receipt. The first begins, it is true, by stating unqualifiedly that plaintiff accepted the option, and thereby purchased 15,000 tons billets "on the basis of terms and specifications of option"; but this statement was immediately followed by the words "it being understood that we have the right to have our inspectors at loading point as material is shipped," a matter of which defendant's communications made no mention. The word "understood" is synonymous with "agreed." 39 Cyc. 672, n. 90. And the words "it being understood" mean provided or on condition it is so agreed. The plaintiff in error practically concedes this. Its contention is that, even though this is so, yet the acceptance was in reality, an absolute and unqual-

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ified acceptance. It attempts to make this out in this way. It maintains that had its telegram said nothing as to the right of inspection therein specified as defendant's communications did, and hence its telegram been really as well as on its face an absolute acceptance, it would, under the contract thus formed by law, have had such right of inspection. This being so, notwithstanding its acceptance was expressly made conditional on its being so agreed, it was in reality an absolute and unqualified acceptance. It bases its position that in that contingency it would have had such right on subdivision 2 of section 8427 of the General Code of Ohio, a part of which is known as the Williston Sales Act, in force also in New York, which provides as follows, to wit:

"Unless otherwise agreed, when the seller tenders delivery of goods to the buyer he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."

It cites and relies on the cases of Turner v. McCormick, 56 W. Va. 161, 49 S. E. 28, 67 L. R. A. 853, 107 Am. St. Rep. 904, and Horgan v. Russell, 24 N. D. 490, 40 N. W. 99, 43 L. R. A. (N. S.) 1150, in support of its contention that on the basis that in such contingency it would have had such right, its acceptance was in reality absolute and unqualified. These two cases were both option cases. In each the option and the acceptance was in writing. In each also, though the writing of the optionee began with an absolute acceptance, it was not limited thereto. In the Turner Case the acceptance was followed by a request, and in the Horgan Case by a demand of something not within the option, and which therefore the optionee would not have been entitled to had the writing been limited to the absolute acceptance. In other words, the request in the one case, and the demand in the other, went beyond what the optionee would in that contingency have been entitled to. It was held in each case that a contract had been formed notwithstanding such request or demand. It was so held on the ground that the request in the one case, and the demand in the other, though contained in the same writing as the acceptance, had no relation thereto, and hence did not qualify it, but related solely to the matter of performance of the contract formed by the absolute acceptance which the optionor might comply with or not as he saw fit, just as much so as if the request or demand had been made subsequent to and not simultaneous with the acceptance. Possibly the correctness of the decision in the Horgan Case is not so certain as that in the Turner, on the idea that an agreement to do a certain thing and a demand of the contrary are mutually exclusive and not to be conceived of as parts of the same act. It is not entirely clear that plaintiff in error limits these two cases to a support of its contention as thus stated. Possibly it thinks that support therein can be found for the position that its telegram should be interpreted as meaning that it accepted defendant's offer absolutely, and requested, as the statute authorized, that it might make the inspection specified. Of course, if such was the true meaning of the telegram, then those cases are authority for the position that a con-

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tract was thereby formed, and that whether or not plaintiff was entitled to make such inspection—more so, it would seem, if it was so entitled than if it was not. But those cases are no support whatever for the position that such was the true meaning of the telegram. No such meaning can be extracted from it without treating it vilely. The true meaning of the telegram is that the option was accepted provided or on condition that it was agreed that plaintiff should have such right. And this case has to be disposed of on this basis. Nor do they afford any support to the contention that, notwithstanding such was the true meaning of the telegram, it amounted to an absolute and unqualified acceptance of defendant's option on the ground that, had it said nothing as to the right of inspection therein specified, as defendant's communications did, and hence its telegram been on its face as well as in reality an absolute acceptance, it would, under the contract thus formed, have, by law, had such right. A decision that an absolute acceptance of an option followed in the same writing by a request or demand of something not within the option, and to which the optionee is not entitled, creates a contract, is not an authority for holding that one is created when the acceptance is on its face qualified by being made conditional on its being agreed that the optionee shall have a right not mentioned in the option if he would have had such right by virtue of the law had he absolutely accepted the option, on the ground that in such a case the acceptance, though such is its character on its face, is in reality an absolute acceptance. In one particular the question is the same in each instance. It is a question of interpretation. But they differ as to what is the subject-matter of interpretation. In the former instance it is the acceptance. According to its true meaning, is it absolute or qualified? Does the presence of the request or demand in the same writing as the acceptance cut it down from what it is in terms, i. e., an absolute acceptance to a qualified one, whereas, in the latter instance, it is assumed that the acceptance is on its face qualified and the subject of interpretation is the option? According to its true meaning, is it broad enough to include the qualification in the acceptance, so that in reality both, i. e., the option and the acceptance, express one and the same intention, i. e., an assent to one and the same thing? This is made plain by the two illustrations with which plaintiff in error attempts to enforce its contention.

Suppose, it suggests, that it had said in its counter telegram, "it being understood that said discard billets shall be free from pipes or seams," or that the option had been for 15,000 bushels of wheat, and to the acceptance thereof had been added, "it being understood that there shall be sixty pounds in each bushel of wheat." Clearly, in each case there would have been a contract entered into. This because, though the acceptance had been on its face qualified, there was in reality no qualification in that the condition was within the option. What the defendant offered in the one case was "discard billets free from pipes and seams," and what in the other it would have offered was 15,000 times 60 pounds of wheat, for a bushel of wheat consists of 60 pounds thereof. In fact, therefore, each party

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expressed one and the same intention, i. e., an assent to one and the same thing.

But these illustrations, whilst they bring out clearly the question we have here, and make plain that the decisions relied on have no bearing on that question, cannot be said to conclude it. It calls for further consideration. We have given so much space to these two decisions because plaintiff in error is possessed of the idea that they are conclusive of this case, when in fact they have nothing to do with it.

To repeat, then, the question before us is this: If an optionee expressly qualifies his acceptance by making it a condition thereof that it is to be agreed that he is to have a right to which he would have by law been entitled had his acceptance been absolute, there being no reference to such right in the option, is the acceptance in reality absolute in that the option and the acceptance each express one and the same intention, i. e., an assent to one and the same thing, and that therefore a contract has been formed? In determining this question there is a dearth of authority bearing upon it. Counsel's research and our own has yielded none.

The case of Hussey v. Horne-Payne, 4 A. C. 311, is cited on behalf of plaintiff in error as having to do therewith, and it is claimed that it is favorable to its contention. There the subject-matter of the negotiations was certain real estate. In the course thereof the seller by letter offered the property at a certain price. In the answer thereto the buyer accepted the offer, adding, "subject to the title being approved by our solicitors." There had been negotiations preceding the sending of these letters, and in them the subject of how the price should be payable, in case agreement should be had as to the amount of it, had been considered, without any conclusion being reached, and, after their sending, this matter was further considered, with like result. The buyer thereupon brought suit for specific performance, claiming that a contract had resulted from the two letters, under which the price was payable upon performance by the seller. In the court of original jurisdiction, i. e., before the Vice Chancellor, this claim was sustained. On appeal to the Court of Appeals the decree was reversed on the ground that the acceptance was not absolute, but qualified, in that the words, "subject to the title being approved by our solicitors," in the acceptance, added a new term to the contract not contained in the offer. It interpreted these words to mean nothing more than provided a good title is shown, but provided our solicitors so determine, thus making them arbiters of that question. On appeal to the House of Lords this decision was affirmed, but not on this ground. It was affirmed on the ground that the two letters should not be considered apart from the entire negotiations, and, considering the entire negotiations, the parties had never come to a concluded agreement. It differed with the Court of Appeal as to the ground upon which it placed its decision. It construed the added words, though not without some doubt, to mean "provided a good title is shown," and assumed that, so construing them, a contract had been entered into apart from the consideration upon which it based its decision. As to the correctness of this

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assumption there cannot be the slightest doubt. According to a true interpretation of the seller's offer, the qualification of the acceptance was within its meaning. What the seller offered to convey to the purchaser was a good title to the real estate which was the subject-matter of the negotiation, so that the offer and the acceptance expressed one and the same intention, i. e., an assent to one and the same thing. It was as if the purchaser had said, out of abundant caution, "I understand your offer to mean that I am to have a good title to the real estate, and if my understanding is correct I accept your offer." As such was the true meaning of the offer, a contract would have resulted from the acceptance had it not been for the consideration on which the House of Lords based its decision. Possibly this case is authority here for the position that, if the right of inspection specified by plaintiff in its acceptance was one which it would have had by law had it accepted defendant's option absolutely, and if, further, the acceptance had been made on condition simply that plaintiff should have such right, a contract would have been entered into. We are not disposed to say that it is not. If in such contingencies a contract would have been entered into, it must have been on the ground that, according to a true interpretation of defendant's option, such condition was within it, i. e., plaintiff was to have such right; so that it is true to say that the offer and acceptance each expressed one and the same intention, i. e., an assent to one and the same thing, to wit, that plaintiff was to have such right. In other words, it must be worked out in some way that the option expressed the intention that the plaintiff was to have the right of inspection at the loading point as the material was shipped. Possibly it can be worked out in this way. By the option defendant offered to sell plaintiff material of the character therein described. Thereby it expressed the intention that, if the option was accepted, it should be under obligation to deliver material of such description, and that plaintiff should not be under obligation to accept material tendered unless it was, and, as plaintiff could not determine whether such was the case without an inspection, that it should have the right of inspection. As to the place of inspection, it expressed the intention that plaintiff should have such right at such place as the law allowed. This is the extent to which it can be said that the expression of intention as to this matter went. It cannot be said that the option expressed directly the intention that plaintiff should have the right of inspection at the loading point as the material was shipped. This cannot be said on the idea that defendant is presumed to have known the law that it would have the right of inspection at such place. That one is presumed to know the law is a pure fiction, and a fiction has no place in a search for reality.

Whether in the two contingencies named a contract would have been formed on the basis of the reasoning suggested we do not find it necessary to determine. This is so because neither of these contingencies exists in this case. Take the second one first. It is that plaintiff in its counter telegram conditioned its acceptance on its having the right to make the inspection therein specified. Such was not

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the condition set forth in the telegram. It was that it should be agreed that it should have such right. It called for an assent on defendant's part that it should have such right. Plaintiff did not interpret defendant's communications as contemplating that it should have such right, Hence it called for an assent on defendant's part thereto and made its acceptance conditional thereon. The second sentence of plaintiff's telegram is to be accounted for on this basis. An acknowledgment of receipt thereof, without more, would have been an assent on defendant's part to the condition. Had the second sentence been omitted it would not have been otherwise. The telegram would still have called for an assent on defendant's part which possibly would have been given by mere silence.

Defendant so interpreted plaintiff's counter telegram in its response thereto, whereby it postponed the matter of entering into a contract with plaintiff until the inspection should be had.

[2, 3] That an acceptance of an option making no mention of the optionee's having a certain right which he would have as a matter of law, if the option should be accepted absolutely, conditional on the optionor's agreeing that he should have such right, is a qualified acceptance, and such as to prevent the formation of a contract, unless the optionor thereafter in some way agrees thereto, would seem to be clear. By reason thereof it cannot be said that the option and the acceptance express one and the same intention, i. e., an assent to one and the same thing. They differ as to what shall be the form of the contract. It is the intention of the option that the form thereof shall be as therein set forth, whereas it is that of the acceptance that it shall embrace a term expressly giving the optionee such right. Such an acceptance in such a case is in effect a rejection of the option because of its form, i. e., it does not expressly embrace such a term in it. A difference as to the form of a contract is just as effective to prevent the entering into of a contract as one as to substance.

Nor is the right of inspection which plaintiff stipulated for in its acceptance the same right which it would have had had it made no mention thereof and accepted the option absolutely, and that even though the statute relied on by plaintiff in error applies in such a case as we have here. Apart from this statute, how does the matter stand? Had plaintiff so accepted the option, would it have had the absolute right to inspect the material at the loading point, i. e., the point of shippment, as it was shipped? Williston on Sales, § 480, says:

"The place of inspection is prima facie the place where the goods are delivered to the buyer."

He continues:

"The contract may, however, provide for inspection at some other place, and the nature of the contract may be such that, even in the absence of express provision, the law will hold some other place than that of delivery to be the point for inspection."

The reason why in such a case the law will so hold he thus sets forth:

"The chief ground for such an implication seems to be that a reasonable examination cannot readily be made at the place of delivery."

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He then gives an instance where such an implication is made:

"It is on this ground that, where goods are shipped to the buyer, inspection need not be made on delivery to the carrier, though title passes at that moment, and the carrier becomes bailee for the buyer."

In note 69 to section 473 he gives a list of cases where it has been held that in such a case the buyer has the right of inspection on the arrival of the goods at their destination.

In Burdick on Sales, § 198, it is said:

"Although the place of inspection, in the absence of special agreement or custom, is presumably the place of delivery, yet the circumstances may show that such a place would be an unreasonable one, or that the parties did not contemplate an inspection there."

He cites, as an instance where the circumstances show that the place of delivery would be an unreasonable one, or that the parties did not contemplate an inspection there, the case of Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831, which is one of the cases cited by Williston in note to section 470, and was a case of the ordering of goods of a specific quality by a distant purchaser of a manufacturer or dealer, with directions to ship them by a carrier, which is one of the most frequent commercial transactions, and the nature of that involved here.

These extracts from these authors assume that the place of delivery to the carrier on behalf of the buyer is properly characterized as place of delivery to the buyer or place of delivery simply, and lay down that the prima facie or presumptive rule that the place of inspection is at the place of delivery to the buyer has no application to such a delivery to him because of the unreasonableness of such a place of inspection in such a case. In Pope v. Allis, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393, it is said that in such a case the buyer has "no opportunity to inspect the goods" until they reach their destination.

Mechem on Sales sets forth no prima facie or presumptive rule on the subject. In vol. 2, § 1377, he says:

"The place of inspection, in the absence of a contrary intention, must ordinarily be the place at which acceptance is due—as distinguished from the place of receipt where they are separate—the place at which the buyer is finally bound to accept or reject the goods."

This covers a case of delivery to a carrier on behalf of the buyer, and lays down that in such a case the place of inspection "must ordinarily" be at the destination of the goods, which is the place at which acceptance is due. In support of it he cites Pierson v. Crooks, supra, and Holt v. Pie, 120 Pa. 425, 14 Atl. 389, another of the cases cited by Mr. Williston in connection with that of Pierson v. Crooks.

Now, neither one of these authors deals with the question whether the buyer in such a case ever has a right of inspection at any other place than at the destination of the goods, as, for instance, at the place of delivery to the carrier on behalf of the buyer, and, if so, under what circumstances such right can be exercised. In Williston on Sales, § 473, it is said:

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"It is often said in such cases that delivery to the carrier is delivery to the buyer, and it may be urged that the buyer should exercise his right of inspection before such delivery to him, and that, if he fails to do so, he waives his right; but whether or not the buyer is entitled to inspect the goods at the point of shipment, it is clear that the delivery to the carrier, and the transfer of the property thereby to the buyer, do not preclude a right of examination when the goods reach their destination."

He thus refers to the question whether the buyer has the right of inspection at the point of shipment, but passes it by without expressing any opinion on it. In section 480, above quoted, however, he says that inspection need not be made on delivery to the carrier, which implies that, though it need not be so made, it may be. Mechem, in saying that the place of inspection "must ordinarily" be the place at which acceptance is due, i. e., the destination of the goods, would seem to imply that it is not always limited thereto.

In Pierson v. Crooks, supra, Judge Andrews said:

"Where goods are ordered of a specific quality, which the vendor undertakes to deliver to a carrier, to be forwarded to the vendee at a distant place, to be paid for on arrival, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination."

In saying that the right "continues" until then he implies that it exists before then.

In the case of Lawder Co. v. Mackie Grocery Co., 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795, where a seller in Baltimore contracted to sell a buyer in New Orleans a quantity of canned tomatoes "f. o. b. Baltimore," "terms cash," "buyer to give shipping instructions when requested by the seller," it was held that the buyer had no right to refuse payment for the goods until he had received and inspected them to see if they conformed to the contract, because he had agreed to pay cash for them on delivery to the carrier. It was said:

"There was no reason why the goods might not have been inspected at the seller's place of business in Baltimore rather than at the destination of the goods."

In that case, however, opportunity to inspect the goods after they reached their destination was not a condition precedent to the buyer's obligation to pay therefor, because he had agreed to pay cash on delivery to the carrier. And this was so whether or not he had the right to inspect at the seller's place of business in Baltimore.

These are all the references to the right of buyer in such a case to inspect before the goods reach their destination to which our attention has been called or that we have found. The rule that in such a case the buyer has a right of inspection at the place where acceptance is due, i. e., the destination of the goods, views the matter from the standpoint of the buyer. It is unreasonable that he should not have the right of inspection at such place. And this is so, ordinarily at least, because he has no reasonable opportunity of making an inspection at the point of shipment or elsewhere. To a degree it favors the buyer over the seller. The seller incurs the risk of having the goods, if rejected, on his hands at a distance from his

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place of business. Of course he can avoid this by seeing that the goods are of the description called for by the contract. But, in view of this, it is open to claim that the buyer should not also have the right of inspection at the point of shipment if the existence of such right there will be injurious to the seller, particularly if his right of inspection at the place where the goods are destined is a condition precedent both to his obligation to pay for the goods or the freight for their transportation, which it ordinarily is and was, at least as to the price, under the option here. Williston on Sales, §§ 473, 478. An absolute right to inspect the goods at the point of shipment may be injurious to the seller in delaying him in shipping the goods, if not otherwise.

In Pierson v. Crooks, supra, Judge Andrews, in arguing against the seller's right to limit the buyer's right of inspection to the point of shipment said:

"It would be a most embarrassing and inconvenient rule, more injurious even to the dealer or manufacturer than to the purchaser, if delivery to the carrier was held to conclude the party giving the order from rejecting the goods on arrival, if found not to be of the quality ordered."

But at least the right of inspection at the point of shipment, if it exists at all in such a case as we have here, is not an absolute right. The buyer, if he desires to exercise such right, must first notify the seller and request that he be permitted to make such inspection. In the absence thereof, the seller is under no obligation to notify the buyer of his intention to make shipment and to hold it up until the buyer has an opportunity to be present. To this extent, at least, the buyer does not have an absolute right to inspect at the point of shipment.

[4] Coming, then, to the statute on which plaintiff in error relies, it may be a question whether it has any application to the case we have here. It applies "when the seller tenders delivery of goods to the buyer." In a sense, a delivery of goods to a carrier on behalf of a buyer is a delivery to the buyer. In the previous section it is provided that it shall be "deemed to be a delivery of the goods to the buyer." But it is not a delivery to the buyer in the same sense that a delivery to the buyer himself or to his servant is a delivery to him, and in previous sections of this Sales Act we find references to a delivery to the buyer, to a carrier, and to other bailees in the same connection, in which instances, of course, the words "delivery to the buyer" do not include a delivery to the carrier or other bailee on behalf of the buyer. But, assuming that this provision of the statute does apply here, it is not an absolute right of inspection which it confers. The seller is bound to afford the buyer a reasonable opportunity to examine the goods only on request of the buyer that he be permitted to make such inspection. There is the same qualification of the right to make inspection at the point of shipment which we have found is the least qualification thereof in the absence of the statute. What the plaintiff stipulated for in his telegram was not the right on request to make inspection at the loading point as the material was shipped, but the absolute right to do so. Giving the defendant's

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option the broadest interpretation possible, it can be made to mean no more than that the plaintiff should on request have the right to make inspection at the loading point as the material was shipped. The plaintiff, by his counter telegram, in effect rejected this, and stipulated that he should have the right of inspection irrespective of any request from it. This necessitated that defendant before making shipment should notify plaintiff that it was about to do so, and give it a reasonable opportunity to be present and inspect, and would involve delay on defendant's part. If the plaintiff had accepted defendant's option absolutely, and any portion of the material was loaded when the option was sent, and had been started moving immediately on receipt of the acceptance, plaintiff would have lost the opportunity of inspecting it at the loading point without any ground of complaint of defendant. This would not have been the case had a contract been formed by the acceptance as it was. Defendant could not have shipped a pound without first notifying plaintiff and giving him reasonable opportunity to inspect it. It is true that, if his absolute acceptance had been followed by a request that he be permitted to inspect the material at the loading point, he could have prevented shipment of any portion without his first having such opportunity. But plaintiff's acceptance was not followed by such a request. He stipulated for an agreement that he should have the right of inspection absolutely when defendant had made him no such offer. It must be held, therefore, that the lower court did not err in giving the peremptory instruction.

On the trial the plaintiff offered to introduce evidence tending to show that at the time of the negotiations there was an established custom in and about Youngstown that, in a transaction involving the sale of discard billets, the purchaser had the right to have an inspector at the loading point, and that such custom was known to the parties. The court, upon objection by defendant, refused to permit the introduction of such evidence. Plaintiff in error urges that the judgment of the lower court should be reversed because of this refusal. There are two grounds why it should not be. Such refusal is not assigned as error. As heretofore stated, seven errors are assigned, but each in a different way raises the single question as to whether the giving of the peremptory instruction was erroneous. The only error which it can be claimed covered this refusal is the sixth. It is in these words:

"That said court erred in refusing and denying to this plaintiff the right to introduce its complete proof on all the issues in this cause, and in refusing to allow, and not allowing, the jury to determine said issues."

This assignment has no reference to the refusal of the court to permit the plaintiff to introduce such evidence as to custom, but merely to its action in giving the peremptory instruction after the plaintiff had introduced its evidence bearing on the existence of the contract without hearing its evidence as to damages. Usually a court hears all the evidence bearing on both the right of recovery and the amount thereof, and, if it thinks that the defendant is entitled to a

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peremptory instruction, gives it at the close of all such evidence. This course was not pursued in the lower court, and that properly so. After hearing all the evidence introduced by plaintiff bearing on its right of recovery, it gave the peremptory instruction. Plaintiff intended by this assignment to raise the question whether the giving of the instruction was not premature and nothing else. It filed a motion for new trial. It did not urge the refusal to permit the introduction of this evidence as a ground of the motion. The third ground was:

"That the decision of the court in stopping the further trial of said case and directing the jury to bring in a verdict for the defendant is contrary to law."

[5] It is this same question that is raised by the sixth assignment of error.

But the lower court properly refused to permit the introduction of this evidence. If the existence of any such custom would have made a contract out of the communications which passed between the parties, it should have been alleged in plaintiff's petition. It was not. The petition based its claim that there was a contract solely on these communications. As no contract arose out of them, considered apart from any such custom, the petition was bad and subject to demurrer. A fact essential to make a petition good should be alleged.

Perceiving no error, the judgment of the lower court is affirmed.

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NORTHERN PAC. RY. CO. v. THOMPSON, County Treasurer.

THOMPSON, County Treasurer, v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. May 20, 1918.)

No. 3065.

1. TAXATION ⟸179—PUBLIC LANDS—RAILROAD GRANT.
Until approval by the Commissioner of the General Land Office, etc., of plats for the survey of lands granted to a railroad company, such lands are not subject to taxation under Act July 10, 1886; so, where the approval was not had until after March, 1915, Montana lands so granted were not subject to taxation for that year or the year previous, the Montana statutes allowing taxation only of property having a taxable status on the first Monday in March.

2. TAXATION ⟸179—PUBLIC LANDS—RAILROAD GRANT.
Where plats showing the survey of lands granted a railroad company were approved in 1915, and in March, 1916, filed in the local land office for Montana, the lands were subject to state taxes for 1916, for the land must have been identified prior to the first Monday in March, so as to have a taxable status under the Montana statutes, as the plats were required to be in the possession of the land office 30 days before filing.

Ross, Circuit Judge, dissenting in part.

In Error to the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Action by the Northern Pacific Railway Company against J. R. Thompson, as County Treasurer of Flathead County, Mont. There was judgment for plaintiff on two of the three counts, and for defendant on the other, and both parties bring error. Affirmed.

Gunn & Rasch, of Helena, Mont., for plaintiff.

S. C. Ford, Atty. Gen. of Montana, Frank Woody, Asst. Atty. Gen. of Montana, and C. H. Foot and T. H. MacDonald, both of Kalispell, Mont., for defendant.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The Northern Pacific Railway Company brought an action in three counts against the county treasurer of Flathead county, Mont., to recover money paid under protest for taxes on lands of the company for the years 1914, 1915, and 1916. The court below entered a judgment on the pleadings on behalf of the railway company on the first two causes of action, and a judgment for the defendant on the third cause of action, holding that at the time of the assessment of the taxes for 1914 and 1915 the lands of the railway company had not been surveyed, but that they had been surveyed at the time of the assessment for 1916. The railway company by writ of error seeks to review the judgment on the third cause of action, and the county treasurer brings a writ of error to review the judgment on the first two causes of action.

[1] The contention that the court below erred in ruling in favor of the railway company on the first two causes of action cannot be sustained. In consequence of the decision in N. P. Ry. Co. v. Traill

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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County, 115 U. S. 600, 6 Sup. Ct. 201, 29 L. Ed. 477, holding that until the railroad company shall have paid into the treasury of the United States the cost of surveying, locating, and conveying the lands granted to it in aid of railroad construction the lands are exempt from state or territorial taxation, Congress passed Act July 10, 1886, c. 764, 24 Stat. 143 (Comp. St. 1916, § 4883), providing as follows:

"No lands granted to any railroad corporation by any act of Congress shall be exempt from taxation by states, territories, and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting, and conveying the same, or because no patent has been issued therefor; but this provision shall not apply to lands unsurveyed," etc.

By the statutes of Montana it is only property which has a taxable status on 12 o'clock noon on the first Monday in March of each year that may be taxed for that year. It was shown in the pleadings that for all the lands involved the field work for surveying was done prior to the first Monday in March, 1914, but that the plats were not approved by the surveyor general of Montana until June 12, 1915, and that none of the plats of the surveys was approved by the Commissioner of the General Land Office until December 17, 1915, and that the approved plats were not filed in the local land office until March 8 and March 15, 1916. It follows that at the time of the assessments for the years 1914 and 1915 the survey of the lands involved had not been completed, and therefore the lands had not then been identified, so as to be rendered subject to taxation.

[2] The railroad company contends that the surveys had not been completed on the first Monday in March, 1916, for the reason that at that time the approved plats had not been filed in the local land office. The purpose of the act of July 10, 1886, was simply to remove an obstacle to the taxation of railroad lands that had been surveyed. The express exclusion of unsurveyed lands from the operation of the act was unnecessary and superfluous, because of course the United States had no lien for the cost of surveys on unsurveyed lands. In United States v. Morrison, 240 U. S. 192, 210, 36 Sup. Ct. 326, 60 L. Ed. 599, the court discussed the question whether prior to an authorized withdrawal for forestry purposes there had been a survey, and said that the surveying of the public lands is an administrative act, confided to the control of the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, and that it was competent for the Commissioner to direct how surveys should be made, and to require that they should be subject to his examination and approval, "before they were filed as officially complete in the local land office." This was not to say that a survey was not officially complete at any time prior to the filing thereof in the local land office. It may fairly be inferred from other language of the opinion that a survey is officially complete from the time when the last administrative act is done, namely, the approval of the survey by the Commissioner, for on page 211 the court said that:

"The approval of the surveyor general of Oregon did not make the survey complete as an official act. It still remained subject to the examination and approval of the Commissioner."

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It is to be conceded that public lands are not regarded as legally surveyed in such a sense as to open them to selection, location, sale, or other disposition until the approved survey is filed with the local land office; but this is not for the reason that the approval of the Commissioner is insufficient to render the survey complete, but for the reason that the local land office has no jurisdiction to deal with lands as surveyed until it has on file the necessary records.

A different principle is involved in determining whether land granted to a railroad company is vested in the company at the time when its property becomes assessable for taxes. For the purposes of taxation, it should be held that lands are surveyed when they are identified; that is to say, when the survey thereof is finally approved. The grant to the railroad company was a grant in præsenti, but title did not vest in any particular tract of land until the same was identified by a government survey. So far as the decisions have gone, the survey and the approval of the survey have been uniformly recognized as the conditions precedent to the vesting of title so as to render lands subject to taxation. 37 Cyc. 868; Clearwater Timber Co. v. Shoshone County (C. C.) 155 Fed. 612; Robertson v. Sewell, 87 Fed. 536, 31 C. C. A. 107; Bird Timber Co. v. Snohomish County, 81 Wash. 416, 143 Pac. 433; Upshur v. Pace, 15 Tex. 531. Said the court in Wisconsin Railroad Co. v. Price County, 133 U. S. 496, 505, 10 Sup. Ct. 341, 344 (33 L. Ed. 687):

"When the government has ceased to hold any such right or interest in the property as to justify it in withholding a patent from the donee or purchaser, and it does not exclude him from the use of the property, then the donee or purchaser will be treated as the beneficial owner of the land, and the same be held subject to taxation as his property."

There is no force in the suggestion that the filing of the plat of the survey marks the limit of the Commissioner's power to disapprove the survey and order another. He has the same power and to the same extent, both before and after the filing of the plat in the local land office. The filing of the plat does not abridge or affect it. Knight v. United States Land Ass'n, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974.

Two decisions of the Department of the Interior are cited to sustain the contention that a survey is not complete until the plat thereof is actually filed in the local land office. The first is F. A. Hyde & Co., 37 Land Dec. 164. All that was ruled in that case was that the survey of certain school lands granted to the state of California was not complete until the plat of the survey "was approved by the Commissioner of the General Land Office." Said the Assistant Secretary:

"Proceedings for survey of public lands have not been regarded as complete, or public lands as surveyed and subject to disposal, until approval of the plat of survey by the Commissioner of the General Land Office."

The other citation is Anderson v. State of Minnesota, 37 Land Dec. 390, ruling that public lands are not surveyed until the approved plat of survey thereof is officially filed in the local land office. This ruling was made with special reference to the right of an applicant to make homestead entry on the surveyed land, and the circular of the Gen-

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eral Land Office of January 25, 1904, was cited, which provides as follows:

"Hereafter, when an approved plat of the survey of any township is transmitted to the register and received by the surveyor general, they will not regard such plat as officially received and filed in their office until the following regulations have been complied with: (1) They will forthwith post a notice in a conspicuous place in their office specifying the township that has been surveyed, and stating that the plat of survey will be filed in their office on a day to be fixed by them and named in the notice, which shall not be less than thirty days from the date of such notice, and that on and after such day they will be prepared to receive applications for the entry of lands in such township."

On the first Monday in March, 1916, these lands had been identified. The surveys had been made, and the last administrative act had been done to complete them. The only thing that remained to be done was to place the file mark of the local land office on the approved plats. It appears from the circular of January 25, 1904, that the plats thus finally approved must have been in the possession of the local land office 30 days before they were filed, and consequently they were there before the first Monday in March, 1916. Said the court in Wells County v. McHenry, 7 N. D. 246, 252, 74 N. W. 241, 243, referring to the situation before the enactment of the act of 1886:

"The extraordinary spectacle was presented of a recipient of governmental bounty escaping one just obligation to the state because it had failed to discharge another obligation to the general government. The statute passed to wipe out such an inequitable rule should be given a liberal construction—one which will carry out the purpose of Congress to compel the company to pay taxes when they are justly due."

The judgment is affirmed.

ROSS, Circuit Judge (dissenting in part). I dissent from that portion of the opinion respecting the third cause of action set out in the complaint, and am of the opinion that the plaintiff in the case was entitled to a like recovery on that count as on counts 1 and 2, being of the opinion that under the decision of the Supreme Court in the case of United States v. Morrison, 240 U. S. 192, 36 Sup. Ct. 326, 60 L. Ed. 599, the survey of the public lands therein described was not a completed act until the approved plat thereof was filed in the local land office, and that, as the government survey of the lands was not a completed act at the time of the levy of the assessment, the lands involved in the third count were not then segregated from the public domain, which segregation I understand to be essential to any authority of the state to tax them. Northern Pacific Ry. Co. v. Traill County, 115 U. S. 600, 6 Sup. Ct. 201, 29 L. Ed. 477.

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THE GRACIE D. CHAMBERS.

(Circuit Court of Appeals, Second Circuit. May 22, 1918.)

No. 223.

1. SHIPPING ⟸145—CARRIAGE BY WATER—RIGHT TO FREIGHT.
Freight is earned only upon delivery of cargo.

2. SHIPPING ⟸152—REFUNDING FREIGHT.
Unless the bill of lading contains stipulations to the contrary, freight prepaid must be returned, if for any cause the cargo is not delivered.

3. SHIPPING ⟸152—BILLS OF LADING—CONSTRUCTION.
Where a bill of lading recited: "Restraints of princes and rulers excepted." "Freight for the said goods to be prepaid in full without discount retained and irrevocably, ship and/or cargo lost or not lost" freight prepaid might be retained whenever delivery of the cargo was prevented because of a restraint of princes; the meaning being perfectly clear, despite the insertion of the conjunction between the words retained and irrevocably.

4. SHIPPING ⟸152—FREIGHT—RETENTION—"RESTRAINT OF PRINCES."
Where the United States government refused clearance papers to sailing vessels whose voyages would bring them within the submarine danger zone, a shipper who had prepaid freight on goods delivered for transportation on such a sailing vessel cannot recover the same; the act of the government amounting to a "restraint of princes" within the bill of lading, which provided for retention of freight prepaid in case delivery was prevented by such restraint.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Restraints of Kings or Princes.]

5. SHIPPING ⟸105—CARRIERS—FREIGHT.
Goods delivered to a carrier by water, even before actual loading on board, are in his custody, and the maritime engagement is then begun.
Learned Hand, District Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by the International Paper Company against the schooner Gracie D. Chambers, her tackle, etc., claimed by Florence G. Payne. From a decree for libelant, claimant appeals. Reversed.

Robinson Leech, of New York City, for appellant.

Stetson, Jennings & Russell, of New York City (R. L. Von Bernuth, of New York City, and Frederic Cunningham, Jr., of Washington, D. C., of counsel), for appellee.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. September 14, 1917, the schooner Gracie D. Chambers began to load a general cargo in the port of New York, to be delivered at Bordeaux. Between September 27 and 29 the libelant Paper Company shipped 120 tons of print paper. September 28, at 4:25 p. m., the Treasury Department at Washington telegraphed the collector at the port of New York to withhold clearance of all sailing vessels, any part of whose voyages would bring them within

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the danger zone. There was no official publication of this embargo, but it was put into effect, beginning September 29, by the refusal of clearances to such vessels as applied for them. Both the shippers and the shipowners had heard rumors of the embargo as early as October 1.

October 3 the schooner moved out to an anchorage at the Red Hook flats, to save wharfage charges and to await clearance. October 4 the freight was paid against delivery of the bill of lading. October 5 the master applied to the collector for clearance, which was refused. He then applied to the authorities at Washington to except this schooner from the embargo, on the ground that she had begun to load before the order was made. Refusal to allow an exception in her favor was not definitely and finally made until October 10. Subsequently the cargo was discharged and the owners refused to return the prepaid freight.

The bill of lading contained the following provisions:

"Restraints of princes and rulers excepted."

"Freight for the said goods to be prepaid in full without discount retained and irrevocably, ship and/or cargo lost or not lost."

Claimant relies on these clauses for a defense to the libel.

[1, 2] By our law freight is earned only upon delivery of cargo. The ship may have carried the cargo on a voyage of 3,000 miles, and to within 1 mile of destination; but the carrier has earned no freight, and must return any freight prepaid if he has not delivered. The parties, of course, may agree upon a different rule, and for that purpose a clause has been introduced into bills of lading and charter parties from time out of mind that prepaid freight shall not be returned "ship lost or not lost." The clause variously phrased is intended to cover all contingencies. If only the loss of the ship were contemplated, the additional words "or not lost" would be meaningless. What the parties intend is that the carrier shall keep the freight, even if he does not deliver the cargo, unless the failure to deliver be due to the carrier's fault, or to a peril not excepted in the bill of lading or charter party.

[3-5] The clause in this bill of lading is not very artistically drawn, because of the insertion of the conjunction "and" between the words "retained" and "irrevocably." Yet the meaning is perfectly clear; "retained and irrevocably, ship and/or cargo lost or not lost," means retained and irrevocably retained. In the case of The Allanwilde (D. C.) 247 Fed. 236, the words were "retained and irrevocable," but the meaning is exactly the same, to wit, that the prepayment of freight was irrevocable and was to be irrevocably retained. The marine document in each case contained an exception of the restraint of princes. The government's embargo was such a restraint, and an exception covered it exactly as it would cover perils of the sea.

It is to be remembered that goods delivered to the carrier, even before actual loading aboard, are in his custody, and that the maritime engagement is begun; the goods being bound to the ship for the freight and the ship bound to the goods for transportation in accordance with the contract. Bulkley v. Naumkeag Co., 24 How. 386.

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16 L. Ed. 599; Scott v. The Ira Chaffee (D. C.) 2 Fed. 401. The money sought to be recovered in this case was paid as freight against delivery of the bill of lading, whether earned or not.

The apparently inequitable result in this case is a temptation to interfere in a contract made by parties perfectly competent to contract, and contracting in the face of the very emergency which subsequently arose. This is to be especially avoided in construing familiar and long-established provisions in commercial documents. The District Judge, in the case of The Allanwilde, supra, made an additional suggestion to the effect that the carrier was bound to transship the cargo. That, however, is a discretion which is to be properly exercised on behalf of the shipper, when he is not present or cannot be communicated with, which is not this case. It is also a privilege which the law gives the master, as representing the owner, to earn his freight if he will lose it by abandoning the voyage. The District Judge thought that if the ship had broken ground—e. g., if she had sailed a mile—the prepaid freight might be retained. Clearly it could not be retained for that reason, because under our law it is not earned until delivery of the cargo. Only the clause in the bill of lading could authorize the retention.

The case of The Tornado, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747, is not applicable. The voyage in that case was completely frustrated by a fire which rendered the ship unseaworthy and unable to proceed within a reasonable time. The question involved was the right to transship the cargo. The carrier claimed a lien upon the cargo for his freight on the ground that he had been deprived of his right to transship it and so earn his freight. No freight was prepaid or payable, and none had been earned. The court held that the parties had contracted with reference to a particular vessel which no longer existed, and likened the case to that of Taylor v. Caldwell, 3 Best & Smith, 826, in which the owner of a music hall was excused from his contract to let it for a performance because it had been burned down. If the contract in the case of the music hall had contained a provision that the owner was to be liable, even if it burned down, the conclusion would obviously have been different. The House of Lords in the case of Coker v. Limerick S. S. Co., 34 Law Times Rep. 18, lately decided that the shipowner was entitled to recover freight payable on signing bills of lading, although the vessel and cargo were burned during the loading, and before the voyage began, but after bills of lading were signed; the English law on the subject of prepaid freight being the same without any specific contract as our law is when the contract provides that it shall be retained.

Our decision in National Steam Navigation Co. v. International Paper Co., 241 Fed. 861, 154 C. C. A. 563, requires the decree to be reversed, and what was said in Ocean S. S. Co. v. United States Steel Products Co., 239 Fed. 823, 152 C. C. A. 609, as to the retaining of prepaid freight, being concededly obiter, is not controlling.

Decree reversed.

LEARNED HAND, District Judge (dissenting). Under the American rule, prepaid freight, which is not earned till the voyage is com-

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pleted, may be recovered back. Griggs v. Austin, 3 Pick. (Mass.) 20, 15 Am. Dec. 175. Hence under our law the claimants must rely wholly upon the clause in the bill of lading. It must be conceded that in England prepaid freight is now recoverable, even though the ship have never broken ground, but is burned at her pier. Coker v. Limerick S. S. Co., 34 Times Law Reports, 18. We have therefore to determine what meaning to ascribe to language which, like all that used in such documents, is scarcely more than a skeleton of the thought's body.

Much could be said for the libelant's position, had the clause merely read "retained irrevocably"; but it did not. We must take the addition as qualifying the meaning by the conditions which it introduces. The loss of the ship is one condition, and it is urged that the other includes every possible contingency in which the ship is not lost. Read verbally this may be so; yet if one in this way makes the two alternatives logically exhaustive, the result is to give no meaning whatever to the added conditions. They can, I think, hardly have been intended merely as an intensive, and, if they have any qualifying value at all, I see no other so natural as to include contingencies which should frustrate the venture after its inception. At least this, it seems to me, is the most extended meaning which it can have.

So much for mere textual consideration of the language. However, as in all such cases, the meaning of words is best gathered from the purpose that informed them, and that purpose, taken from the standpoint of a fair observer, was to meet the possible difficulties which might arise in the performance of the contract. If a ship breaks ground and is lost, or returns to her port of departure, the shipper has got nothing for his freight. From his view it is an injustice that the ship should hold prepaid freight. Yet the ship has performed part of the service, and from its view the prepayment may be taken at least in part as compensation for the service so far performed. The ship has given a part of her time; her loss is actual. There is, therefore, an entirely understandable reason why the shipper should accept the hazard of the voyage once begun. A nicer justice might, it is true, apportion the prepayment to such time as the ship had in fact lost, if the frustration was partial, but there are obvious practical difficulties in such a course.

This, however, is not the case of frustrating a voyage, but a contract, and, looked at from the time when the contract was made, it can hardly be thought that the shipper was to bear, not only the chance of the voyage, but of the contract. Because, if the contract be frustrated before loading the ship has lost nothing, and if the frustration occurred before breaking ground at most nothing beyond detention while loading and discharging. She remains available for carriage during the same period as before. If one construes the clause as justifying her retention of the prepaid freight, she is in effect given two freights for the same period. Such a conclusion can hardly be within the compass of what the shipper would have conceded or the owner demanded, had they been faced with the possibility at the outset. Therefore I think the result was not within the intention of the parties, when in one way or another some construction must be imposed upon a mere outline of

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intent like this. I conclude, therefore, that the clause applies to the voyage only, and that if the voyage be frustrated in limine—that is, before ground broken—it does not entitle the owner to retain the freight.

The authorities, so far as they go, are at least not to the contrary. In The Tornado, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747, the ship was destroyed at her pier, and the owner sued the cargo, demanding freight, because he had not been allowed to complete the voyage in another bottom. The headnote says that the freight was to be paid upon delivery, but an examination of the record does not bear out the statement. In any event the court decided that the shipper was absolved from further performance on account of the frustration of the voyage in limine. The implication at least was that, had the vessel broken ground, the result might have been different. While it is hard to see how the owner could in any case have recovered more than damages, that point was not raised, and the case seems to me an authority for the proposition that a frustration in limine puts an end altogether to the contract of affreightment. Now, I suppose no one would contend that the result would be different under the clause at bar if the ship had been burnt. If so, I cannot quite see why the owner should be allowed to keep his unearned freight, and yet under The Tornado, supra, not be allowed to sue because he was prevented from earning the freight. The Allanwilde (D. C.) 247 Fed. 236, went further than need be here, further perhaps than I should care to go. I have found no other case in point. Prepayment clauses under our law must be construed as intended for security rather than insurance to the owner. I am disposed, therefore, to look narrowly upon a clause like this, which seeks to impose upon a shipper, not only the risks of a voyage, but a gratuity for a voyage never undertaken.

I dissent.

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DALTON ADDING MACH. CO. et al. v. ROCKFORD MILLING MACH. CO. et al.

(District Court, N. D. Illinois, E. D. October 8, 1918.)

No. 84.

1. PATENTS ⇐=69—VALIDITY—PRIOR PUBLICATION.
A prior patent for a machine, although the machine may not be practically operative, may operate as a prior publication, which will invalidate a subsequent patent to another, which embodies the same principle in an operative machine.

2. PATENTS ⇐=32—IMPROVEMENT—PRESUMPTION FROM GRANT OF SEPARATE PATENTS.
There is a presumption, from the grant of separate letters patent for two improvements on the prior art, that there is a specific difference between the inventions.

3. PATENTS ⇐=49—SUIT FOR INFRINGEMENT—PROOF OF UTILITY OF PRIOR STRUCTURE.
As against complainant in an infringement suit, the presumption of utility of the machine of a prior patent is greatly strengthened by the fact that complainant for many years represented it to be useful.

4. PATENTS ⇐=66—ANTICIPATION—OPERATIVENESS OF PRIOR MACHINES.
The machine of a patent relied on as an anticipation is not to be deemed inoperative, if it can be made to work by a slight alteration.

5. PATENTS ⇐=46—ANTICIPATION—OPERATIVENESS OF PRIOR DEVICE.
The test of operativeness is to ascertain whether the patented device does, even imperfectly, perform the things claimed for it in the methods described.

6. PATENTS ⇐=49—PRESUMPTION OF VALIDITY—PRIMARY INVENTION.
The presumption of validity of a patent for a primary invention, covering a machine absolutely new in the art, is much stronger than in the ordinary case.

7. PATENTS ⇐=328—VALIDITY AND INFRINGEMENT—ADDING MACHINE.
The Hopkins patent, No. 1,039,130, for an adding and writing machine, as to the adding machine claims is valid, but is for an improvement on a prior machine, and limited to the precise structure shown; also *held* not infringed by a machine made under another improvement patent.

In Equity. Suit by the Dalton Adding Machine Company and the Addograph Manufacturing Company against the Rockford Milling Machine Company and others. On final hearing. Decree for defendants.

Banning & Banning, of Chicago, Ill., for plaintiffs.

Miller, Chindahl & Parker, W. Clyde Jones, and Lincoln B. Smith, all of Chicago, Ill., for defendants.

SANBORN, District Judge. This is an infringement suit on patent No. 1,039,130, issued to the Addograph Company September 24, 1912, on application filed January 24, 1903, by Hubert Hopkins, for a patent on an adding and writing machine. The defenses are noninfringement and invalidity in part. A general idea of the invention may be had by consulting Dalton Adding Machine Co. v. Moon-Hopkins Billing M. Co. (D. C.) 223 Fed. 51; Moon-Hopkins Billing

⇐=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Mach. Co. v. Dalton Adding Mach. Co., 236 Fed. 936, 150 C. C. A. 198. The patent contains 284 claims, of which 44 are in suit, relating only to the adding machine feature, and not to the typewriter.

The really important question is whether Hopkins is to have the credit of converting the Burroughs machine, with its 81 keys, into a 10-key machine, which will do the same work, or whether a prior inventor, Helmick (No. 630,053, of August 1, 1899), is entitled to this important advance in the adding machine art. Very briefly stated, this advance consisted in the employment of a movable stop field, by which all but 10 of the Burroughs 81 keys, and all but 10 of the same number of connections between keys and stops, are dispensed with. The question of priority depends on whether Helmick produced an operative machine, or whether the 10-key principle was known to him, or made the subject of a printed publication by him, before Hopkins entered the field.

[1] Rev. St. § 4886, as amended March 3, 1897 (Comp. St. 1916, § 9430), provides that the inventor of a new and useful machine, manufacture, etc., "not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, or more than two years prior to his application," may obtain a patent therefor. Now, it is obvious that the only question in relation to a machine cannot be whether it is practically operative in all its parts as held in Besser v. Merrilat Core Co., 243 Fed. 611, 156 C. C. A. 309 (where the inventor's conception was fundamentally defective), since the very gist of the discovery may be a new subcombination, or an improvement designed to be added to an already established machine. The new conception might be complete in itself, and the patent covering it operate as a prior publication, or as showing prior knowledge or use, although the patentee might make a mistake in combining it with such prior machine, so that the combination would not operate.

This distinction is well illustrated by the Helmick patent referred to. It might fully describe the mechanism by which the 81-key operation of Burroughs was changed into the 10-key operation, and yet fail to make a fully operative adding machine by not correctly describing the old system of carrying wheels or of recording the result. Helmick made a mistake in one of his patent drawings, so that a machine built exactly like the drawing shows the wrong figures. But he still described an operative mechanism by which the use of 81 keys is reduced to 10. Therefore he ought not to be deprived of the credit of having discovered a new principle, and of exhibiting it in a prior publication, because he may not have produced a complete adding machine. In the Besser Case the device could not be made to work by the use of galvanized iron in an expansible and contractible core, because galvanized iron possesses no resiliency, and so was radically defective. If this be the proper conclusion, it is obvious that the novelty of Hopkins, coming later than Helmick, does not reside broadly in a 10-key machine, but merely in his particular development of the 10-key principle.

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"If one inventor precedes all the rest, and strikes out something which includes and underlies all that they produce, he acquires a monopoly, and subjects them to tribute. But if the advance towards the thing desired is gradual, and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs." C. & N. W. Ry. Co. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053.

[2] There is a presumption, from the grant of separate letters patent for two improvements on the prior art, that there is a specific difference between the inventions. Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 23, 23 Sup. Ct. 521, 47 L. Ed. 689.

"If the combination constituting the invention claimed in the subsequent patent was new, or if the ingredient substituted for the one withdrawn was a newly discovered one, or even an old one performing some new function, and was not known at the date of the plaintiff's patent, as a proper substitute for the ingredient withdrawn, it would avoid the infringement, as a new combination or a newly-discovered ingredient substituted for the one omitted." Gould v. Rees, 15 Wall. 187, 21 L. Ed. 39; Ries v. Barth Mfg. Co., 136 Fed. 850, 69 C. C. A. 528 (7th Circuit).

The objection of the inoperativeness of the Helmick machine is presented under quite unusual circumstances. The following facts appear in evidence:

The plaintiffs owned the Helmick patent from 1903 until it expired. After the purchase of the patent in 1903, the plaintiffs caused it to be reissued, with certain amendments to the specification, and with additional and broader claims, thus representing and asserting the patentability of the invention (and the operativeness of the disclosure), and receiving from the United States a grant based upon such representation. From 1906, when the first Hopkins machine was sold, until 1913, when the Hopkins patent issued, the plaintiffs' machine was marked and sold under the Helmick patent. The plaintiffs thereby held out the patent to the public as a valid patent, and gave warning to the public and to any possible competitors that they asserted and claimed a monopoly under that patent. The plaintiff Dalton Adding Machine Company, under its former name of Adding Typewriter Company, was the defendant in a suit brought by the Standard Adding Machine Company for infringement of certain patents, and in that suit defended on the ground that the Hopkins machine was, in general, the machine of the Helmick patent, modified to employ the swinging type segments and the swinging rack segments of the Burroughs patents.

The present plaintiffs brought suit against the Moon-Hopkins Billing Machine Company for an infringement of the Helmick patent. In that suit the plaintiffs alleged that after they had become deeply involved in the enterprise of manufacturing and selling inventions of the said Hubert Hopkins, and had expended in such enterprise a large sum of money, they learned of the existence of the Helmick patent, and found that the inventions and improvements sold to them by the said Hubert Hopkins were subordinate to, and built upon, and embodying the plan and principle of operation described and claimed in, the said Helmick

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patent, and that it was necessary to purchase the said Helmick patent in order to protect their business, and to prevent the loss of the large sums of money that they had already invested and expended. That suit was begun in July, 1911, and was prosecuted until after the issuance of the Hopkins patent, and after the institution of another suit against the same defendants on the Hopkins patent, when the suit on the Helmick patent was voluntarily dismissed by the plaintiffs. During the prosecution of the Hopkins application in the Patent Office the Helmick patent was cited as a reference on many claims, some of which were rejected on such reference; but the applicant made no contention that Helmick was inoperative.

[3] While these facts did not, strictly speaking, create an equitable estoppel in favor of the defendants, because they were not in the same business at the time, and were not misled by the acts of the plaintiffs, yet they do greatly strengthen the presumption of operativeness, and place the plaintiffs in inconsistent positions, from which it is difficult to see how they can be extricated. Rice-Stix Dry Goods Co. v. J. A. Scriven Co., 165 Fed. 639, 91 C. C. A. 475; Stockland v. Russell Grader Mfg. Co., 222 Fed. 906, 138 C. C. A. 386. It is a most pregnant proof of utility that plaintiffs for years represented the Helmick patent to be useful. Works v. Betts Machine Co. (C. C.) 27 Fed. 301.

In addition to the above reasons for believing the Helmick device operative, an actual trial of a machine constructed by a workman not skilled in adding machines shows that the device does correctly make the proper addition. It truly shows the numbers struck by the keys, and the final sum. It is slow, difficult to operate, and easily put out of order; but it will correctly add. This is all that is requisite to show operativeness, in the view of the patent law. The correction of the imperfect drawing was clearly a matter requiring only mechanical skill, as appears from inspection of the patent, and from the fact that a workman unskilled in the adding machine art made an operative machine from the specifications and drawings.

[4] A patent relied on as an anticipation is not to be deemed inoperative, if it can be made to work by a slight alteration. Dashiell v. Grosvenor, 162 U. S. 425, 16 Sup. Ct. 805, 40 L. Ed. 1025. In that decision the question is discussed by Justice Brown, who says:

"It does not seem probable that the patentee would have taken out a patent for a wholly inoperative combination, especially in view of the fact that there were at least half a dozen operative devices already in existence upon which his was claimed to be an improvement. Inoperative devices are frequently set up as anticipations, but they are usually such as have proven to be so far failures that the inventor has not taken out patents for them, and are resuscitated for the purpose of showing that other machines similar to the one patented have been invented before. The very fact that a machine is patented is some evidence of its operativeness, as well as of its utility, and where a model is constructed after the design shown in a patent which is not perfectly operative, but can be made so by a slight alteration, the inference is that there was an error in working out the drawings, and not that the patentee deliberately took out a patent for an inoperative device."

"Persons possessed of the most brilliant conceptions are sometimes the poorest mechanics." Packard v. Lacing Stud Co., 70 Fed. 66, 16 C. C. A. 639.

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[5] Imperfections in a machine, not affecting the substance of the invention, and which are curable by mechanical skill, do not render the patent inoperative. Pickering v. McCullough, 104 U. S. 310, 26 L. Ed. 749; The Telephone Cases, 126 U. S. 1, 8 Sup. Ct. 788, 31 L. Ed. 863.

"The test of operativeness is to ascertain whether the patented device does (even lamely and imperfectly) perform the acts claimed for it in the method described, and (perhaps) for the reasons given." Engineer Co. v. Hotel Astor (D. C.) 226 Fed. 779; Id., 226 Fed. 949, 141 C. C. A. 553.

[6] The Helmick invention meets this test. It describes a machine absolutely new in the art, and is clearly a primary invention. Such an invention should not be held inoperative without ample proof. The presumption of validity is much stronger than in the ordinary case. Von Schmidt v. Bowers, 80 Fed. 121, 25 C. C. A. 323; Scott v. Fisher, 145 Fed. 915, 76 C. C. A. 447. It requires but slight evidence of successful operation to avoid the defense of want of utility of a patent sued on. Thayer v. Wold (C. C.) 142 Fed. 776; Wold v. Thayer & Chandler, 148 Fed. 227, 78 C. C. A. 350. Under the facts shown in evidence, it should require very strong proof to avoid the patent.

[7] The Helmick patent being valid, both Hopkins and Sunstrand (under whose patent the alleged infringing machine is made) are to be deemed improvers on Helmick, and each entitled to his own form, if there is a patentable difference between them. As already seen, Helmick's invention consisted in the use of a movable stop field, by bringing the 10 keys into co-operative relationship with the 81 stops. The chief difference between Hopkins and Sunstrand is that the former employs a direct and immovable series of connecting links between keys and the rows of stops, and a like series between the respective rows of stops and the printing device, while Sunstrand employs in each instance a series of connecting links, which are fixed with relation to the keys, but movable with relation to the field of stops. Each has thus a different mode of operation, a patentable difference which is enough to distinguish the two forms, and to show noninfringement. Being improvers on Helmick, each is entitled to his own construction.

The bill should be dismissed, with costs.

KNAPP v. WILL & BAUMER CO.

(District Court, N. D. New York. October 7, 1918.)

1. PATENTS ⟸828—VALIDITY AND INFRINGEMENT—DESIGN FOR CANDLE.
The Knapp design patent, No. 44,480, for an ornamental design for a candle, shows a new combination of old elements, which discloses invention; also *held* infringed by a candle which has substantially the same structure and design, producing the same general effect on the beholder.

2. PATENTS ⟸41—INVENTION—DESIGN—NOVELTY.
A design, to be patentable, must disclose originality and the exercise of the inventive faculty; but invention may reside in a new combination of old elements, such as to give a new and an ornamental effect.

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3. PATENTS ⊂=174—INFRINGEMENT—PATENT FOR IMPROVEMENT.
If a defendant appropriates a patented invention and improves upon it, and obtains a patent, his patent gives him an exclusive right to the improvement, but no right to use the invention of the prior patent.

4. PATENTS ⊂=252—INFRINGEMENT—DESIGNS.
It is not necessary to constitute infringement of a design patent that the similarity be so precise that every purchaser would be misled, but it is sufficient if ordinarily the ordinary purchaser would be.

In Equity. Suit by Edward J. Knapp against the Will & Baumer Company. On final hearing. Decree for complainant.

Suit in equity to restrain alleged infringement of design United States letters patent of August 12, 1913, to Edward J. Knapp, No. 44,480, and for an accounting.

Harry de Wallace, of Syracuse, N. Y., and Wm. G. Henderson, of Washington, D. C. (W. B. Matterson, of Syracuse, N. Y., of counsel), for plaintiff.

Arthur E. Parsons, of Syracuse, N. Y. (Howard P. Denison, of Syracuse, N. Y., of counsel), for defendant.

RAY, District Judge. [1] The patent in suit, United States letters patent No. 44,480, dated August 12, 1913, and issued to Edward J. Knapp, the complainant, is for a design and the claim reads:

"The ornamental design for a candle as shown and described."

The specification contains the following description:

"The design, as illustrated in the drawing, is a pillar or column, substantially square in cross-section, mounted upon a substantially cylindrical longitudinally fluted pedestal, and surmounted by a bell-shaped cap, with its base lines set back from the square edges of the pillar top."

We have then the following elements *in combination*, which make up the patented design or ornamental candle, and each element must be deemed material, viz.: (1) The pillar or column, square in cross-section; (2) the substantially cylindrical longitudinally fluted pedestal; and (3) the bell-shaped cap, *with its base lines set back from the square edges of the pillar top*. The whole candle is made integral. In this art a bell-shaped cap surmounting the pillar or column of the candle was old. The cylindrical longitudinally fluted pedestal was also old. A *cylindrical* pillar or column was also old, as were pillars or columns of various and many other shapes. It is claimed by complaint that the *square* column was not old. The evidence shows beyond question that the so-called Cleopatra candle was old. The pillar of this candle is square, but not of the same diameter from top to bottom. It slopes and narrows the column gradually and uniformly from base to top. It was not made in the United States, so far as appears, but was imported, and sold and used here long prior to the granting of the patent in suit.

The claim for this patent, as first presented, read: "The ornamental design for a candle *as shown*." The words *"and described"* were added by amendment after rejection by the examiner. The present specification, as above quoted, was put in by amendment in place of the following:

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"Of which the following is a specification, reference being had to the accompanying drawing, forming a part thereof. The figure is a perspective view of the candle, showing my new design."

On appeal, after rejection the applicant said:

"It is submitted that the design, consisting of the square column resting upon a cylindrical pedestal and mounted by a bell-shaped cap, whose base lines are set back from the square edges of the column, thus having an offset between the *flat* sides of the pillar and its cylindrical pedestal, and an offset at the top between the square edges of the column and base line of the cap, is not shown in any of the references cited."

On appeal the examiners in chief said:

"There appears to be a certain unity in design between a rectangular form of the candle and that of the tip, which possesses some degree of novelty and invention."

On this the reversal seems to have been based, and it follows, I think, that the novelty found in this combination consisted, not in the square form of the candle, but in the peculiar and, as found, novel combination of the bell-shaped tip with the square column; that is, the setting back of the base of the bell-shaped cap from the square edges of the square column having flat sides. While, in view of the prior art, it may be doubted whether there is patentable invention in this combination containing this feature, I am inclined to hold the patent valid, as the presumption is in its favor. This candle is certainly attractive and ornamental, and the combination is new. Complainant's candle is not designed for use as a light giver, a burner, but as an ornament. As compared with the round candle, the square candle as a burner, or for lighting purposes, would be and is inferior. The square candle would not show utility or improvement. It would burn down faster at the sides than at the corners, and cause waste and an inferior light.

There is no prior art showing the combination of the patent, but each and every element, standing alone, is substantially old. The coach candle, Defendant's Exhibit T T, shows a bell-shaped cap set back from the rounded top edge of the column, which is cylindrical; but the shoulder is not square, but rounded and curved, forming a sort of trough between the rounded edge of the cylindrical column and the base of the bell-shaped top. Therefore the bell-shaped cap does not have its base lines "set back from the *square edges* of the pillar top." The pillar top, or top of the pillar of this "coach candle," Exhibit T T, does not have square edges or a square shoulder, as does the complainant's candles, but still the edge of the bell-shaped top is set back from the edge of the column. As to patentability I may cite Bush & Lane Piano Co. v. Becker Bros., 222 Fed. 902, 138 C. C. A. 382 (2d Circuit), where the court said:

"The drawing of the design shows an upright piano case in the conventional form. The casual observer, unless his attention were particularly directed to the new features, would hardly be able to distinguish the patented design from many of the designs found in the prior art. However, we agree with Judge Hazel in the statement that: 'On comparison with the prior art, because of the configuration of the colums, the paneling, and the substantiality thereof, it is easily distinguishable from other upright pianos.'

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There are some characteristic features of the design in controversy which distinguish it from those of the prior art, although the general contour of the case is alike in all, and several of the cases of the prior art show designs which, to the ordinary purchaser, whose attention is not called to details, would seem to embody the principal features of the design of the patent. Nevertheless, having in mind the rule applicable to design patents, we cannot say that it is anticipated or void for lack of patentability."

In Grelle v. City of Eugene, Or., 221 Fed. 68, 137 C. C. A. 18, the court held:

"That each separate element in a patented design was old does not negative invention, which may reside in the manner in which they are assembled."

In Ashley v. Weeks-Numan Co., 220 Fed. 899, 136 C. C. A. 465, the same doctrine was expressly held:

"Tested by this rule, the defendant infringes. It is true that there are some differences between the design of the complainants and the design of the defendant. But the differences are differences of detail, and not of substance. The defendant has not made a Chinese copy of the complainants' inkstand, and yet it imparts to the mind the same general appearance, which would deceive an ordinary observer into buying one inkstand believing it to be the other."

[2] It is well settled, if ever there was any question, that a design, to be patentable, must disclose originality and the exercise of the inventive faculty. Smith v. Whitman Saddle Co., 148 U. S. 675, 13 Sup. Ct. 768, 37 L. Ed. 606; Steffens et al. v. Steiner et al., 232 Fed. 864, 147 C. C. A. 56. It is also settled that invention may reside in a *new* combination of old elements, such as to give a new and an ornamental effect. This combination is ornamental, and it is *new*, in that the complainant's candle is made up of the pedestal, old, combined with a square column of equal diameter from pedestal to tip, with plain flat sides, *such* square columns being old, but not in the candle art, forming a new combination of pedestal and square column in so far as the form of the column is concerned; and the combination as a whole is also new, in that the joining of such a pedestal and column, so combined with the tip, in the manner described, is also new. This combination of these elements is a new combination, and it is ornamental. No one had made *this* combination before, or produced this effect. This art of making ornamental candles was old and crowded, and it is some evidence of invention, as distinguished from mere skill, that no one had formed this combination of old elements before. This is not the case of a *mere* choice of old forms, as the substitution of the oval shape for the circular in a lacing hook, but involves change of form of candle, and also the method and form of combining the substituted form of column with other elements. The result was a new form of candle with a distinctive and pleasing effect.

In Strause Gas Iron Co. v. Wm. M. Crane Co., 235 Fed. 126, 131, 148 C. C. A. 620, 625, the court (C. C. A. 2d Circuit), said:

"The test for invention is to be considered the same for designs as for mechanical patents; i. e., was the new combination within the range of the ordinary routine designer? We believe that any one starting to design sadirons, with the art before him, and governed only by considerations of proportion and plan, would have had no difficulty in making the plaintiff's iron."

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In Steffens et al. v. Steiner et al., 232 Fed. 862, 147 C. C. A. 56, the court (C. C. A. 2d Circuit) held:

"To sustain a design patent, the design must involve something more than mere mechanical skill; and whether the assembling of old design elements into one unitary design is patentable depends on whether, in the particular case, such assembling rises to the level of invention and the result possesses originality and beauty."

There is this to be said: That in complainant's candle, as in all candles, the column rests upon the pedestal and the tip upon the column. This is the order of assembly in all candles. Having selected a square form of column of equal diameter from base to top, with plain flat sides and without ornamentation of any kind, it was joined in the old way to the old and well-known pedestal before described. Then came the selection with the aid of the prior art of a tip and also the adoption of a mode or form of combining it with the column. Here we find a departure from the prior art and a new combination in one harmonious, ornamental whole. We find some degree of originality and beauty. This involved more than mere selection and assemblage. All this was not mere mechanical act. A skilled mechanic or candle maker might have hit this combination, and he might not. In a somewhat crowded art, no one had.

Having arrived at the conclusion that the patent is valid, the question is presented: Does the defendant infringe? The defendant's candle has the same cylindrical longitudinally fluted base or pedestal as does complainant's candle. Its pillar or column is square in cross-section, except that a depressed panel is cut out from the pedestal to the top of the column on each of the four otherwise flat sides. The sides of defendant's candle are not flat, because of this depression. This depression occupies about two-thirds of the width of each side. Still the general form of the column is square. Where the column joins the bell-shaped cap, which is substantially identical with complainant's cap, there is no shoulder, except at each of the four corners of the column. There is no setting back of the base lines of the bell-shaped cap from the square edges of the pillar top, except at and adjoining the four corners. There we find this setting back. Place the two candles side by side, or at a short distance from each other, and we perceive this difference in the structural appearance of the two candles; but place them at a considerable distance from each other in the same room, and from the observer, and the general appearance and effect is the same. We would not, under such circumstances, note the difference in appearance or form of the candle, unless examining for a difference. It would make a difference whether the room were brilliantly or dimly lighted in noting this difference. It should also be noted that defendant has cut off the corners of its bell-shaped top, or tip, giving it eight sides (not all of the same width, however), instead of four sides; but this does not change the general appearance.

On the market the horizontally fluted cylindrical pedestal is attractive in the combination. When the candle is in its stick or socket, this is to an extent immaterial, as the pedestal is mostly hidden from

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sight. But it was old, and defendant had the right to use it. The bell-shaped cap was old, and defendant had the right to use it. I think the substantially square candle, as shown in the Cleopatra candle, was old, and that defendant had the right to use that form. "Modern Soaps, Candles and Glycerin," by Lamborn, published in 1906, says (page 526):

"Candles are molded in a great variety of shapes; the most common shape being that of a plain cylinder of varying diameter and length. A great variety of ornamental forms for religious and decorative purposes are molded in numerous prismatic cross-sections, as square, triangular, octagonal, etc. They may also be molded, longitudinally or spirally fluted. The latter form was originally turned in a lathe, but is now made in molds, and in ejecting the candles from such molds the candles are made to rotate. Decorated candles are of every color, shape, and design. Red, green, pink, white, and yellow are the most popular colors. The decorations are made of wax, and put upon the candles by hand. The wax is colored, so as to give the decorator's artistic taste the widest possible range."

The combination of these elements, substantially as shown, except the setting back mentioned, and the plain, square column of equal diameter from its base to its top, was old (see the Cleopatra candle), and defendant had the right to use that combination; but the peculiar formation of the top end, where the bell-shaped tip joins the column in combination with a square column of uniform diameter from base to top, was new. This the defendant, in view of the patent, had no right to appropriate and use. Defendant did appropriate this set-back formation, so far as the four corners of the candle are concerned, but not in its entirety, for it cut away a portion of each of the flat sides of the column, making the depression mentioned, and cut back up to the very base of the bell-shaped cap. Hence, except at the corners, as stated, there is found in defendant's candle no setting back of the base lines of the cap from the square edges of the pillar top. Defendant also appropriated in his combination the square form of equal diameter from base to top of the column, cutting a depressed panel therein on each side.

It is not the case of "a Chinese copy," but still complainant had a new and a novel design, pleasing to the eye, and defendant has copied it, with the changes mentioned, leaving the same general impression on the beholder who sees the two. The resemblance is such as to deceive the ordinary observer and purchaser. It has not used the Cleopatra candle column. The evidence conclusively shows that for a long time defendant purchased these ornamental candles from the complainant, or rather from a company making ornamental candles in accordance with the design of this patent and sold them in its business. The candles so purchased had been marked "Patented" by complainant; but this, after a time, was omitted in the candles furnished defendant for its trade at its request. The defendant finally concluded to make and sell a candle of its own make, which it did, and thereafter made and sold the candle alleged to be an infringement of complainant's patent and candle. Defendant used cartons and labels similar to complainant's; but this not material, as unfair competition is not involved in this case. The defendant created the differences between the two candles intentionally. Can we say it

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was an improvement on the prior art simply (aside from complainant's candle), and not an infringement? Hardly. In defendant's candle we have the same general combination of the same elements which we find in complainant's, with the same general appearance and effect on the eye, but with the change made by cutting out a depression in each of the four flat sides of the candle, and which cutting out of necessity does away with a continuous setting back of the base lines of the bell-shaped cap from the square edges of the pillar top. But still that setting back is present at the four corners and for a little distance to the right and left therefrom.

[3] Defendant says the complainant's candle belongs to the "Mission" age or period in candle making, and that defendant's candle belongs to the "Colonial" style or period in the same art; that the one is distinctive and clearly distinguishable in structure and appearance from the other. This I cannot see. The slight change in the shape of the bell-shaped top has no substantial effect on the general appearance. The defendant has a patent for its design. This is evidence of a possible improvement in design clearly. To it I have called attention. But I think it well settled that, if a defendant appropriates an invention, be it a mechanical apparatus or a design, for which a patent has been granted, and improves upon it and obtains a patent, his patent covers his improvement, to which improvement he has the sole and exclusive right; but this subsequent patent does not impair the rights of the prior patentee, nor does it confer on such subsequent patentee any right to use or appropriate such prior invention duly patented. If he does so appropriate it, and use or make it in connection with his improvement, he infringes. In short, a valid patented invention is in no way annihilated or impaired by an improvement thereon by another and duly patented, and which improvement, in order to be of use, necessarily must be used with the invention of such prior patent. A valid pioneer invention, or an improvement thereon, may be improved upon as matter of course, and the improvement may be patented if it discloses patentable invention; but the improver cannot avail himself of the prior invention and appropriate it, in order to make his patented improvement available and of value to himself, without the consent of the prior inventor. If he does, he is liable as an infringer. Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017. If A. has obtained the right to the use of the original invention, he may also obtain the right to use the improvement, and add it, and thus have the advantages of both. The invention of an ornamental candle, in this day, does not revolutionize the world, nor does an improvement thereon; but it is of value to the inventor of the ornamental design, and, when patented, if patentable invention is disclosed, becomes his property. Improvements are welcome, and, as stated, are patentable, if invention is disclosed.

In this case the difference between the actual design of the pedestal and column of the Cleopatra candle and the pedestal and column of the complainant's candle are not very great, and still are quite marked. This is true of the general appearance of the two. The

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evidence is convincing that complainant's candle met with great favor and large sales. The defendant for a time was a large purchaser and seller of these candles. This is some evidence of invention. I cannot find, however, that the differences between defendant's candle and complainant's candle were intended to be merely colorable, and were made to avoid a claim of infringement. Assume such changes were made in good faith, and with the firm belief defendant's candle does not infringe. This is no defense, if it in fact has substantially all the elements of complainant's candle in the same combination, producing the same result in the same way; that is, the same general appearance to the eye of the beholder. The test of infringement of a design patent is stated in Gorham Mfg. Co. v. White, 14 Wall. 511, 20 L. Ed. 731. It is there said:

"The acts of Congress which authorize the grant of a patent for designs contemplate not so much utility as appearance; and the thing invented or produced, for which a patent is given, is that which gives a peculiar or distinctive appearance to the manufacture or article to which it is applied. It is the appearance to the eye that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense, and identity of appearance, or sameness of effect upon the eye, is the main test of substantial identity of design. It is not essential to identity of design that the appearance should be the same to the eye of an expert. If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same—if the resemblance is such as to deceive such an observer, and sufficient to induce him to purchase one, supposing it to be the other—the one first patented is infringed by the other. * * * We hold, therefore, that if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one, supposing it to be the other, the first one patented is infringed by the other."

Subsequent cases are to the same effect. See quotation from Ashley v. Weeks-Numan Co., supra.

[4] It is not necessary that the similarity be so precise that every purchaser would be misled; but it is sufficient if ordinarily the ordinary purchaser would be. It is not what an expert would say or discover, or what a court may discover, by way of structural differences, but what is the general appearance and the causes thereof. Of course, there is a general resemblance between all candles, and at some little distance most, and possibly all, of the differences between round candles and square candles would not be observed. So of the differences and similarities noted. But no one will contend that infringement of a design patent does not occur because of the fact that at a distance we note no difference in appearance, structural or otherwise. Nor would we say one design patent infringes another for the sole reason the general appearance and effect is the same at a little distance, or at a considerable distance. The design as well as general appearance must be there. Gorham Co. v. White, 14 Wall. p. 526, 20 L. Ed. 731. This defendant, with its candle, has substantially the same structure and design as complainant, producing the same general appearance and effect on the beholder. If the slight structural changes made by defendant had produced a substantially

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different appearance in the two candles, both to purchasers and those seeing them when in use, we could not find infringement.

I have examined and compared quite a number of ornamental candles in evidence, some of which have ornamentation other than the general from and design of the candle itself. Exhibits O, P, and R are candles the general form of which is nearly square in cross-section, but each has rounded corners and a deep, angular groove in each of its otherwise flat sides. The pedestal in each is smooth, as is the tip, and this portion slopes with a slight curve gradually from the sides of the column to the wick. The tip of each may be said to be bell-shaped, but the structural formation and general appearance are quite different from those of complainant's candle. The design is markedly different. Exhibit G is twisted, and has a bell-shaped tip, which is set back from the sides of the column; but it was never square in cross-section (although nearly so), as it has rounded corners, and the sides, otherwise flat, are depressed, made concave. It is of greater diameter at the base than at the top, and has no pedestal.

I am constrained to the opinion that complainant's patent is valid, and infringed by defendant, giving to his patent the limitations we should, in view of the prior art.

There will be a decree accordingly.

UNITED STATES v. SIX BARRELS OF GROUND PEPPER.

(District Court, S. D. New York. February 27, 1917.)

FOOD ⇐24—FOOD AND DRUG ACT—ADULTERATION OF GROUND PEPPER.

Ground black pepper, although conforming to the standard fixed by the Agricultural Department for pure pepper, as to its properties and their proportions, *held*, on the evidence, to have been adulterated by the addition to the natural berry, when ground, of foreign pepper shells.

Libel by the United States for condemnation of six barrels of ground pepper. Decree for libelant.

On May 24, 1916, the United States attorney for the Southern District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of six barrels of ground pepper, remaining unsold in the original unbroken packages at New York, N. Y., alleging that the article had been shipped on or about April 18, 1916, by McCormick & Co., Baltimore, Md., and transported from the state of Maryland into the state of New York, and charging adulteration and misbranding in violation of Food and Drug Act June 30, 1906, c. 3915, 34 Stat. 768 (Comp. St. 1916, §§ 8717–8728). The article was labeled in part: "Pure Ground Black Pepper. McCormick & Co. * * * Baltimore, Md." Adulteration of the article was alleged, in substance, in the libel, for the reason that added pepper shells had been mixed and packed therewith, so as to reduce and lower and injuriously affect its quality and strength, and had been substituted wholly or in part for the article. Misbranding was alleged in the libel (as amended during the trial) for the reason that the statement, to wit, "Pure Ground Black Pepper," was false and misleading, in that said article was an imitation of, and was offered for sale

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under the distinctive name of, another article, to wit, black pepper, when it was not, and for the further reason that it was labeled and branded so as to deceive and mislead a purchaser in that it purported to be another article.

On September 16, 1916, the said McCormick & Co., claimant, filed its answer denying the allegations of the libel. On December 20, 21, 22, 27, and 29, 1916, the case came on to be heard before the court, trial by jury having been waived by stipulation, and after the introduction of evidence and arguments by counsel, the case was taken under advisement by the court. On February 10, 1917, final arguments were made by respective counsel and briefs filed. On February 27, 1917, a finding was made sustaining the contentions of the government, as will more fully appear from the opinion of the court.

H. Snowden Marshall, U. S. Atty., and Ben A. Matthews, Asst. U. S. Atty., both of New York City, for libelant.

Charles Wesley Dunn and Samuel J. Reid, Jr., both of New York City, for claimant.

MANTON, District Judge. On the 17th of April, 1916, ten barrels of pepper were sold by the claimant to Samuel Wildes Sons Co. under an order calling for "10 barrels pure ground black pepper." The shipment was so marked, and it was conceded by the claimant—indeed, so claimed—that the pepper sold and shipped was pure ground black pepper. On the 24th of February, 1916, six barrels were seized by the marshal, and on the 27th of May, 1916, they were sampled by the libelant and thereafter experimentation with the samples was made as hereafter stated. The samples were taken by the government inspector at the house of Wildes, a hole was bored about a quarter of an inch in bore through one of the staves of each of the barrels by a brace and bit. The samples so taken were from various parts of each barrel. Care was taken in the preservation of these samples, and they were given to the government chemist, Seeker, for analysis in his laboratory. He, together with an assistant, Cummings, conducted the experimentation with the results herein stated. The claimant contends that this pepper was Lampong pepper, a high grade of black pepper grown in the southeastern end of the island of Sumatra, and commonly used in this country. The claimants, McCormick & Co., are large importers of pepper, perhaps the largest in this country, and have been engaged in business in Baltimore for a long period of years.

Pure ground black pepper is defined in Circular 19, issued by the Department of Agriculture on June 26, 1916, as follows:

"*Pepper.*—Black pepper is the dried immature berry of Pipernigrum (L.) and contains not less than six (6) per cent. of nonvolatile ether extract, not less than twenty-five (25) per cent. of starch, not more than seven (7) per cent. of total ash, not more than two (2) per cent. of ash insoluble in hydrochloric acid, and not more than fifteen (15) per cent. of crude fiber. One hundred parts of the nonvolatile ether extract contain not less than three and one-quarter (3.25) parts of nitrogen. Ground black pepper is the product made by grinding the entire berry and contains the several parts of the berry in their normal proportions."

The Department of Agriculture officially advised McCormick & Co. on August 1, 1916, that:

"Ground peppers will be regarded as adulterated and misbranded if, upon examination, they are found not to comply with the standards in Circular 19, office of the Secretary of Agriculture."

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The government has taken the position generally, in the enforcement of the federal Food and Drugs Act of June 30, 1906, that a ground black pepper conforming to the standard above mentioned, defined in Circular 19, is not a violation of the act. A product not made solely by grinding the entire black pepper berries and containing the several parts of the berry in their normal proportions, but containing also some added foreign substance, is not a pure ground black pepper, and if shipped in interstate commerce is in violation of the federal Food and Drugs Act. The government's claim is that McCormick & Co., in order to gain an advantage in competition, adulterated its black pepper with foreign pepper shells, and it contends that this adulteration was carried on only to such an extent that an analysis made of the product would find that such adulterated and misbranded pepper would come within the limits of Circular 19.

In Lampong pepper the ash and fiber are comparatively high, due to excess sand, twigs, and trash. Hence, to make room in Lampong pepper for the addition of a larger quantity of shells, all of this excess trash, twigs, and mineral matter is taken out. If, from 100 pounds of pepper, there is removed 3 per cent. or 3 pounds of sand or gravel, leaving 97 pounds of pepper, there would be practically a negligible quantity of ash. By taking shells containing 8.21 per cent. of ash, 25 pounds can be added to the 97 pounds of clean pepper, and the result, 122 pounds mixture, would give 95 pounds less ash than the original 100 pounds contained. This 25 pounds is, of course, in addition to the shells that might safely have been mixed in the pepper before the excess mineral matter was removed. Control of crude fiber could be illustrated in exactly the same way and with substantially the same result. It is claimed by the government that by some such method of scientific control this pepper was standardized and kept as near uniform as possible. In other words, to each grind as much shell was added as could be put in with safety. After the grind, customarily analyses were made, as Shoul testified, to ascertain whether the pepper, as sold, came up to the requirements of Circular 19. Both the government and the claimant concede that, if foreign pepper shells were added to the natural pepper berry, such a mixture would be an adulteration and a violation of the act.

The sole inquiry, therefore, is one of fact, whether under the proof in this case this pepper sold to Wildes and subsequently sampled contained pepper shells as charged in the libel. This question of fact the court is called upon to decide. It may readily be conceded that, with the possibility of mixing pepper shells and the pepper berry, the mix can be so arranged that it will contain the essential properties required under Circular 19. Therefore a chemical analysis alone is not sufficient as a method of detection. Apparently the government recognized this, for it conceived a method of detection and carried out its plan. It experimented, prior to endeavoring to carry out its plan of detection, and found that quinine alkaloid was no part of the properties of pepper or pepper shells. Such experiments were had that it was scientifically determined by the experimenting chemist that, if

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quinine alkaloid were mixed with pepper and pepper shells, it could be subsequently detected in the laboratory on analysis.

Two well-known tests of obtaining such result are known to science. One is the so-called modified Thalleioquin test, and the other the hereapathite and fluorescence tests. With this knowledge, after learning that McCormick & Co. were the consignee of 199 bags of pepper shells then at a dock in Baltimore, the government inspectors, on May 27, 1916, proceeded to the dock, and there, with the use of a syringe, mixed quinine alkaloid with each of the bags of pepper shells, putting an equal quantity, 1 ounce, of quinine alkaloid in each bag. After the samples were obtained from the barrels seized at Wildes' house, the government analysts, Seeker and Cummings, examined 19 separate samples from 7 different barrels of the shipment of pepper in issue, to determine the presence of quinine alkaloid. The modified Thalleioquin test was employed. Of the 19 samples so tested, 13 returned a negative and 6 returned a positive reaction. Of the first series of samples 4 returned a negative and 3 a positive reaction. Of the second series of samples, 4 returned a negative and 2 a positive reaction. Of the third and final series of samples, 5 returned a negative and 1 a positive reaction. Three barrels returned a negative reaction upon every test. One barrel returned a positive reaction throughout. One barrel returned 2 positive and 1 negative reaction, and another barrel returned 2 negative and 1 positive reaction.

The examining chemist explains that positive reaction refers to the red color obtained by the application of the test, and alleges that this demonstrates the presence of quinine alkaloid. In addition, the chemist, Seeker, testified that he applied the hereapathite and fluorescence tests on a composite sample of 400 grams of mixture, two samples from barrels A and B, and a third sample from barrel A. These last two tests returned a positive reaction. These tests were those applied by the chemist, Seeker, in his experiments prior to syringing quinine alkaloid into the pepper shells. From his previous experience, Chemist Seeker learned that a minimum of 2 mm. of quinine in 200 gms. of pepper sample would invariably return the positive red color reaction. Approximately 30 cc. of quinine solution was injected into each of the 199 bags of pepper shells as previously described, and Seeker estimates that he can detect the presence of 6 per cent. at a minimum of the treated shells in this pepper, and concludes, upon the result of his examination, that this pepper contains from 10 to 28 per cent. of quinine-treated shells.

The inquiry, therefore, is whether this conclusion is positive and accurate. Cummings, the assistant to Seeker, gives corroborative testimony as to the findings. The entire consignment of 6 barrels is all part of the same grind or mix, and the claimant concedes that, if quinine alkaloid was found in 3 barrels, and that this indicates a mixing of pepper and pepper shells, the 6 barrels should be condemned. Learned counsel for the claimant argues that, assuming that the presence of quinine alkaloid in a part of this pepper has been conclusively established, it follows that, before such evidence can be accepted as

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sufficient proof of the addition of quinine alkaloid treated shells to this pepper, the government must show the absence of any other reasonable possibility of quinine alkaloid finding its way into this pepper. In view of the concession that quinine alkaloid is not one of the properties of pepper, and that McCormick & Co. were concededly using pepper shells, I cannot agree with counsel that it is incumbent upon the government to show the absence of any reasonable possibility of quinine alkaloid finding its way into the pepper in any other manner.

The examination made of this pepper by Seeker is attacked as insufficient and inconclusive, because it is said that the examination as made does not demonstrate the presence of quinine alkaloid with the certainty required. I cannot find that any of the experts called by the defense, and they were many, had ever actually experimented in detecting quinine alkaloid where it has been mixed with pepper shells. A very general and severe attack is made, however, upon the sufficiency of the tests used by Dr. Seeker; but when the testimony is examined with care it will demonstrate that it resolves itself largely into a matter of opinion—opinion expressed by men learned in the science, but men who have not experimented. Drs. Pond and Winton gave no testimony at all upon quinine tests. Dr. Penniman stated that the proof was not sufficiently conclusive, and further that "you could not determine the presence of quinine with certainty, unless you had pure quinine to test." But he did admit that if the Thalleioquin test were applied, and the result obtained as claimed by Dr. Seeker, it would be some evidence of the presence of quinine and that positive reaction from the hereapathite test would be evidence of the presence of quinine, and that the fluorescence test would also give some evidence of the presence of quinine, and admitted generally that the three tests were of value in detecting the presence of quinine. He says that the density of the color obtained upon the positive reaction would be indicative of the quantity of quinine present, and that the density would have some relation to the quantity. He then describes a method of making this test, which upon comparison with Dr. Seeker's, I find to be precisely what he did. This materially weakens the opinion evidence of Dr. Penniman.

Dr. Deghuee, another expert, on direct examination, expressed grave doubt of the sufficiency of the tests made by Dr. Seeker, but says that, if both the hereapathite and Thalleioquin tests were made, both together would "make out a little stronger case." Dr. Fuller admits that the three tests used by Dr. Seeker, if the observations of Dr. Seeker are correct, would be some evidence of the presence of quinine alkaloid. Dr. Winton's testimony is not at variance with this method of detection. Dr. Winton further testified that a microscopical examination "in itself" is not sufficient, except in cases where a foreign ingredient, such as almond or cocoanut shells or olive stones are used, and further that "if it were a carefully selected Lampong pepper, which had been cleaned and scoured and some of the natural elements removed, and those were afterwards replaced by pepper shells," he would not expect to find from 10 to 28 per cent. of shells on a microscopical ex-

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amination. Such quibbling of experts, expressing but opinion testimony, in the absence of similar experimentation to that of Dr. Seeker, cannot be said to overcome the observations of Dr. Seeker, after his study, research, and labor, which obtained a positive reaction indicating the presence of the detector which was used by the government inspectors.

But it is said that the test of the microscope, as applied by Dr. Rusby, submitted by him, negatives the claim made here. Dr. Winston's doubt of the sufficiency of the microscopical examination "in itself," for the purposes of detection, creates grave doubt as to its sufficiency. He admits that he cannot distinguish the shell of Lampong pepper from Acheen pepper. The latter, Acheen pepper, is a lower grade pepper than Lampong, and it is hard to conceive of how the difference between the lower grade of Lampong pepper and a mixture of shells and the higher grade pepper can be determined by the microscope. This witness produced slides in court, and gave the court an opportunity to observe his various specimens. I do not think that this testimony overcomes that offered by the government, which, I believe, shows by a fair preponderance of the evidence that quinine alkaloid was found in the pepper seized. Quinine alkaloid could not accidentally have found its way into the 6 barrels seized. Mr. Shoul testified that no chemicals of any kind or foreign drugs could possibly get mixed in the pepper or pepper shells, nor can I infer that by some possibility empty cinchona bark barrels might have been used for packing the 6 barrels of pepper. Each of the barrels seized were lined with a heavy grade of paper and there is no evidence in the record that the barrels were used for cinchona bark at any time. Shoul, who had charge of the grinding department, testified that no pepper shells could have accidentally found their way into this lot of pepper, and that, if the pepper did contain added shells, they must have been put in deliberately.

R. A. McCormick seems to have charge of the spice department of the claimant, while M. McCormick is in charge of the drug department. Shoul has been the sole head of the spice department. Large quantities of pepper shells were received within the preceding year of the date of the seizure, which are not satisfactorily accounted for by the evidence of the claimant. The original records produced did not show the disposition of the pepper shells and particularly of the quinine alkaloid marked pepper shells received in this lot of 199 bags. The only record produced of a shipment of pepper and pepper shells, properly marked, was to one Goldberg.

This, with the other testimony in the record, leads to the conclusion that the pepper in question was adulterated, and I will accordingly give a decree for the libelant.

Thereafter, on March 20, 1917, a formal decree of condemnation and forfeiture was entered in conformity with the foregoing decision, and it was ordered by the court that the product should be sold by the United States marshal after having been labeled "Ground black pepper containing from 10 per cent. to 28 per cent. of added pepper shells," and that the costs of the proceedings should be paid by McCormick & Co.

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BARRETT v. MACOMBER & NICKERSON CO.

(District Court, D. Rhode Island. September 26, 1918.)

No. 1283.

ADMIRALTY ⟸20—ACTION FOR INJURY TO SERVANT—LAW GOVERNING.

A state Workmen's Compensation Act, which in actions against an employer who has not accepted its terms provides a different measure of compensation from that of the maritime law, does not apply to a seaman injured while employed on a vessel on the navigable waters of the United States.

At Law. Action by Maurice Barrett against the Macomber & Nickerson Company. On demurrer to declaration. Sustained.

Cooney & Cahill, of Providence, R. I., for plaintiff.
Frank Healy, of Providence, R. I., for defendant.

BROWN, District Judge. The declaration states that the plaintiff was employed by the defendant, a corporation of Rhode Island, upon its fishing boat the Macomber, in Portsmouth Bay, a part of Narragansett Bay, and that other servants of the defendant were—

"engaged in handling or swinging aloft a certain hook attached to a net, which hook and net were of great weight, and through the negligent manner in which said net and hook were then and there being handled by the said servants or agents of the defendant corporation, the same fell with great violence upon and against the person of the plaintiff, as he was then and there in said boat engaged in pursuing such duties as were assigned to him."

It is alleged that the defendant corporation had wholly failed to accept the provisions of the Workmen's Compensation Act of the state of Rhode Island then in force; that is, chapter 831 of the Public Laws of Rhode Island, approved April 29, 1912, entitled:

"An act relative to payments to employees for personal injuries received in the course of their employment, and to the prevention of such injuries."

Section 7 of this act provides:

"The right to compensation for an injury, and the remedy therefor granted by this act, shall be in lieu of all rights and remedies as to such injury now existing, either at common law or otherwise; and such rights and remedies shall not accrue to employees entitled to compensation under this act while it is in effect."

The following provisions of section 1 apply to an employer who does not elect to accept the provisions of the act:

"It shall not be a defense: (a) That the employee was negligent; (b) that the injury was caused by the negligence of a fellow employee; (c) that the employee has assumed the risk of the injury."

Upon behalf of the defendant it is contended that this act does not apply to a seaman engaged on board a vessel upon the navigable waters of the United States; that the state of Rhode Island is without power to make the remedy given in such act exclusive, or to abridge or enlarge the responsibilities or duties of the maritime law.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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The plaintiff contends that by sections 24, par. 3, and 256, par. 3, of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091, 1160 [Comp. St. 1916, §§ 991, 1233]), the clause "saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it," entitles him to maintain a suit which shall be governed both in questions of right and of damages by the law of Rhode Island and by the statute of Rhode Island applicable to employers who have not elected to become subject to the provisions of the Workmen's Compensation Act (chapter 831).

The defendant relies principally upon Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900. The plaintiff contends that that case is not controlling, and can be distinguished on the ground that the vessel in question in that case was engaged in interstate commerce, while the boat in this case was not, and that in the Jensen Case the New York state court had granted affirmative relief according to the New York Compensation Act (Consol. Laws, c. 67), whereas in this case the plaintiff does not rely upon any affirmative right created by statute, but upon its common-law right of action as modified by the state statute abolishing the defenses of contributory negligence, the negligence of a fellow employé, and the assumption of risk.

The opinion of the Supreme Court in Chelentis v. Luckenbach S. S. Co., Inc., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171, considers directly the effect of the clause "saving to suitors, in all cases the right of a common-law remedy where the common law is competent to give it," saying:

> "Plainly, we think, under the saving clause, a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea."

The opinion cites the rules laid down in The Osceola, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. Ed. 760, and applies the doctrine approved in Southern Pacific Co. v. Jensen:

> "No state has power to abolish the well-recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law."

It is apparent, therefore, that upon the facts alleged in the present declaration the extent of the obligation of the defendant was fixed by the maritime law, which controlled, not only any suit in the admiralty court, but any action in a common-law court; the right being the same in both courts. See Chelentis v. Luckenbach S. S. Co., 243 Fed. 536, 156 C. C. A. 234, affirmed by Supreme Court June 3, 1918, 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171; The City of Alexandria (D. C.) 17 Fed. 390.

Upon an examination of the authorities cited it will appear that by the maritime law the ordinary negligence of the seaman or of oth-

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ers of the ship's company, and the doctrine of the assumption of risk, do not debar him from the rights given by the maritime law to be cured at the ship's expense and to his wages.

Upon the question of the principle of liability there would seem to be little difference between rights afforded by the maritime law and those afforded by section 1 of the Workmen's Compensation Act of Rhode Island. In respect to the extent of recovery, however, the rules are substantially different, being limited by the maritime law to wages and to being cured at the ship's expense, using the term "cured," not in an absolute sense, but as the term is applied in the authorities cited in The City of Alexandria (D. C.) 17 Fed. 393 et seq. As the injuries were received and the action brought before the amendment of sections 24 and 256 of the Judicial Code, the effect of such amendments need not be considered on this demurrer.

In view of the reasoning of the court in Chelentis v. Luckenbach S. S. Co. and Southern Pacific Co. v. Jensen, it is not apparent that the distinction which plaintiff seeks to make between an "interstate vessel" and a fishing vessel is material. Though the declaration describes the vessel only as a "fishing boat" it was stated at the argument that she is a fishing steamer.

The plaintiff's employment was maritime, and the facts alleged show a case clearly within the admiralty jurisdiction.

In the dissenting opinion by Mr. Justice Pitney, in Southern Pacific Co. v. Jensen, 244 U. S. 252, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, it is pointed out that the decision of the majority cannot logically be confined to cases that arise in interstate or foreign commerce, and that in cases ex delicto the admiralty jurisdiction is dependent upon locality, and that if a cause of action arise upon navigable waters of the United States, even though it be upon a vessel engaged in commerce wholly intrastate, or upon one not engaged in commerce at all, the maritime courts have jurisdiction. There is a well-recognized rule concerning measure of recovery in such cases, and it seems to follow from the decisions that the state is without power to deprive either the seaman or the vessel owner of the respective rights under the maritime law.

I am of the opinion, therefore, that the Rhode Island statute is inapplicable to the facts alleged.

As the plaintiff's declaration seeks full indemnity under the law of the state of Rhode Island, and does not set forth merely a claim for any wages unpaid or for the expense of cure and maintenance for a reasonable time, according to the rule stated in The Osceola, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. Ed. 760, the demurrer must be sustained.

Demurrer sustained.

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Ex parte HENRY.

(District Court, E. D. Wisconsin. August 10, 1918.)

1. ARMY AND NAVY ⟸20—SELECTIVE DRAFT ACT—EFFECT ON CIVIL AUTHORITY OF STATES.
Selective Draft Act May 18, 1917, does not in itself change the status of persons of draft age, but recognizes the continued existence of the civil authority of the states over them until actually called for service.

2. ARMY AND NAVY ⟸20—SELECTIVE DRAFT ACT—STATUS OF PERSONS CALLED.
A person of draft age and registered, but who had pleaded guilty to a felony under the law of the state, and was in custody awaiting sentence, was not, while having such status, subject to call for service.

Application by Robert Henry for writ of habeas corpus. Denied.

W. J. Kershaw, of Milwaukee, Wis., for petitioner.
H. A. Sawyer, U. S. Atty., of Milwaukee, Wis.

GEIGER, District Judge. The facts as presented by the petition in this matter are in brief these: The applicant, a registrant under the Selective Service Law (Act May 18, 1917, c. 15, 40 Stat. 76), was informed against in the criminal court for Milwaukee county, charged, I believe, with the crime of grand larceny. He was taken into custody, and thereafter such proceedings were had in such court, resulting in his offer and its acceptance of a plea of guilty. On the day of the reception of the plea the municipal judge deferred sentence, I believe, until the second day thereafter. At the time, or shortly after reception of the plea, the local board having jurisdiction over the petitioner served him with a notice, in the ordinary form, requiring him to report for military duty, I believe, on the following day; fixing the hour for his report under the law prior to the time to which the court had deferred the matter of sentencing him. On the following day the petitioner appeared in court, and, in connection with the further proceedings to which the case had been adjourned, advised the court of what had transpired in the meantime, necessarily thereby advising the court of the status which he claimed to have received by virtue of the occurrences in the interim. The court thereupon imposed a sentence, I believe, of two years' imprisonment, which being done, a motion in arrest of judgment was made, which was denied. Thereupon application is made to this court for a writ of habeas corpus, seeking to discharge the custody which necessarily ensues upon the enforcement of the conviction in the criminal court of Milwaukee county.

Petitioner takes the broad view—asserts, rather—that because of the happening of the contingency under the Selective Service Law, through which he is inducted into the military service, the criminal court lost power to impose sentence. Counsel for the petitioner thus states the contention in a brief, after quoting from service law and its regulations, namely:

From and after the hour just named [quoting from the notice served] you will be a soldier in the military service of the United States. This order of

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induction [says counsel] is to be found on page 177, section 301, of the selective service regulations and is a part of the law.

The contention is further thus stated:

The chapter on mobilization, section 157, provides with reference to this matter as follows: "From and after the day and hour thus specified each such registrant shall be in the military service of the United States." Further, section 140, page 72, of the selective service rules, provides as follows: "Persons inducted into military service who absent themselves therefrom with the intent to evade military service are deserters"—and further points out the steps to be taken in cases where such registrants fail to report.

Whereupon it is asserted on behalf of the petitioner:

From these provisions it is apparent that the military jurisdiction attaches wholly, completely, and entirely from the date named in this order, if not from the date of the making of this order. No other or subsequent time is named as fixing or establishing his status as a soldier. If this be true, then petitioner's personal right to his liberty within this new status as a soldier and under the military jurisdiction is absolute, subject, of course, to military law. In addition to this there is also involved the right of the federal government to the jurisdiction of his person, because that jurisdiction has never been surrendered to the civil authorities of the state.

Counsel proceeds:

It seems to me that in a broad sense there can be no conflict between state and national jurisdiction in cases of this kind, because, immediately upon declaring a state of war, all states and municipalities within the state, and all sworn officers of such organizations, become agencies and instrumentalities of the national government in the prosecution of such war and the marshaling of all of our resources for the purpose.

It may be said that, if the premise advanced is conceded, if the Selective Service Law be given the effect claimed for it in what I have read, the conclusion is or may be quite inescapable. I am unwilling to accept the premise. The Selective Service Law is just what it professes to be, a law to enable the raising of an army; and, as I shall say in another case to be determined this morning, the law in and of itself does not effect a change of status. There will be no disagreement upon that point. And, certainly, it is the duty of every agency of the state and of the National government and of every municipality to give the fullest possible force and effect to that law in order to accomplish the broad purpose. But that is quite a different proposition from giving it an effect which must ascribe to Congress an absurd intention. The mere fact that Congress has stated in the law that certain persons within certain ages shall be liable to be called does not lead to the result upon the terms of this law that every one of an age within prescribed limits, merely by virtue of the possession of an age between those limits, must go.

[1] Now, that is said for the purpose of getting to this point: That the law contemplates continued existence of civil authority in all of the states until such time when it shall unmistakably be indicated that ordinary civil authority is superseded. And it is not incumbent upon the courts to ascribe to Congress an intention by this law to supersede a status which attached to an individual prior to the time of its attempted application to that individual, which status

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involved his incarceration for a violation of the public law of the state. Putting it in a more homely way, it is not fair, at this time, at least, to ascribe to Congress an intention to allow the Selective Service Law to operate as a jail delivery measure. In that connection counsel for the applicant was asked a question, during the presentation of the matter, whether, if a man who is incarcerated in a state or federal penitentiary for a long term had that status at the time of his call, it would be the duty of the warden of the penitentiary, as custodian, to surrender him? I think counsel made the only answer possible consistently with his contention in this case—namely, in the affirmative. I am unwilling to give the law that effect, because it ascribes to Congress an intention which it would have effectuated other than through legislation disclosing merely the ranges of ages and the additional direction that those within those ages shall be liable to be drawn.

[2] Congress intended to recognize the continued existence of the civil authority of the states and the nation, and, necessarily, to recognize the continued status which individuals might have acquired by virtue of the exertion of such continued civil authority; and when it appears, as it appears here, that the individual called was lawfully in the custody of the state, in the exercise of its civil authority to prevent or to vindicate infractions of its criminal law, it should not be said that Congress intended that that status should be superseded; and the courts ought to say, as I do in this case, that in view of the relations subsisting between the federal and the state government, each recognizing the continued existence of the civil authority of the other, a person having this sort of a status under the state authority is not a person liable to be called.

And the application for a writ will be denied.

UNITED STATES v. GIN ONG.

(District Court, S. D. California, S. D. September 21, 1918.)

No. 946.

ALIENS ⊜23(2)—DEPORTATION OF CHINESE—LAWFUL ENTRY AS STUDENT.

A Chinese person entering the United States in good faith as a minor child of a member of the exempt class and for the purpose of study, and who is still a student, although obliged to work a part of each day to earn living expenses, is not subject to deportation.

Proceeding by the United States for the deportation of Gin Ong. On review of order of deportation. Reversed.

Robert O'Connor, U. S. Atty., and Clyde R. Moody and L. L. Young, Asst. U. S. Attys., all of Los Angeles, Cal.

Frank Stewart, of Los Angeles, Cal., for defendant.

BLEDSOE, District Judge. In this case, "it is the contention of the government that defendant's entry was fraudulent, and that, as he

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has not a section 6 certificate, he is illegally within the United States and should be deported to China."

The evidence was that the appellant came to this country when he was about 14 years of age, and was admitted as the minor son of a merchant and member of the diplomatic service. He came here to study the English language; but, as above stated, he came and was admitted as the minor son of one entitled to be and remain here. Under such circumstances, no certificate under section 6 of the act of May 6, 1882, was necessary. United States v. Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544; In re Chung Toy Ho and Wong Choy Sin (C. C.) 42 Fed. 398, 9 L. R. A. 204; United States v. Foo Duck, 172 Fed. 856, 97 C. C. A. 204. No certificate having been demanded at the time of his admission, it must be held as conclusively established thereby that his entry was as the minor child of one entitled to remain, and not as a student on his own account. So far as the record discloses, in my judgment, his entry as such minor child was in entire good faith. The fact that his father returned to China within two years after his entry is not of itself any proof of a fraudulent disposition upon his part either at the time of entry or thereafter.

Diligently, and to the exclusion of everything else, seemingly, he pursued his studies from the time of his entry until nearly a year after his father returned to China and then still continued, but, because of an absence of further funds wherewith to support himself, was compelled to engage himself for a portion of his time in house service. He is still a student primarily, but still, as heretofore, owing to the necessity of the case, is engaged in the performance of house service a part of each day in order that he may live.

I do not understand the government to contend, nor do I understand it to be the law, that conceding his entry into the United States to have been blameless, i. e., devoid of fraudulent intent, and conceding his subsequent conduct to have been lawful, i. e., that he continued to be a student, he may now be deported solely because his father has heretofore returned to China. On this theory, if his father had remained here after the attainment of his majority, he would thereafter have been subject to deportation because of the fact that he had lost his previous and lawful status as "a minor child." I understand, however, the contrary to be the holding. United States v. Foo Duck, 172 Fed. 856, 97 C. C. A. 204; United States v. Foo Duck (D. C.) 163 Fed. 440; United States v. Chin Sing (D. C.) 153 Fed. 590; United States v. Lim Yuen et al. (D. C.) 211 Fed. 1001.

It was said by the Circuit Court of Appeals of this circuit, in a case not dissimilar to this (172 Fed. 856, 858, 97 C. C. A. 204):

"We know of no law providing for the deportation of a Chinese person who has lawfully obtained admission into the United States, and has not become subject to deportation under the general immigration laws."

Whether, if hereafter defendant should change his status from that of a student to that of a laborer, he would be entitled to remain (United States v. Joe Dick [D. C.] 134 Fed. 988), need not now be considered upon the present case. My conclusion is that having come into this country in good faith as the minor child of a member of the exempt

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class and for the purpose of study, and being still a student in the substantial aspect of the term, there is no law which justifies his deportation at this time.

The order of deportation heretofore made by the commissioner is therefore reversed.

UNITED STATES v. SCHENCK et al.

(District Court, E. D. Pennsylvania. September 9, 1918.)

No. 111.

1. CRIMINAL LAW ⊂=423(3)—ACTS OF CONSPIRATORS—EVIDENCE.
In a prosecution for conspiracy to obstruct the draft, minutes of meetings of an executive committee kept by one of defendants, a committee member, showing passage of resolutions pursuant to which the other defendant caused circulars to be printed and mailed to persons drafted, *held* admissible against both defendants.

2. CONSPIRACY ⊂=24—CRIMINAL CONSPIRACY.
It is immaterial at what time a defendant joined a criminal conspiracy, where it is shown that he joined with others in carrying out the common design.

Criminal prosecution by the United States against Charles T. Schenck, Elizabeth Baer, and others. On motion by defendants named for new trial. Denied.

Francis Fisher Kane and T. Henry Walnut, both of Philadelphia, Pa., for the United States.

Henry J. Gibbons and Henry John Nelson, both of Philadelphia, Pa., for defendants.

THOMPSON, District Judge. The jury was directed to acquit the defendants Sehl, Root, and Higgins, because there was not sufficient evidence to connect them with the charge in the indictment.

The motion for a new trial as to Charles T. Schenck and Dr. Elizabeth Baer is based upon the claim that there was not sufficient evidence to establish a conspiracy between them.

[1, 2] The principal ground of error urged is the action of the court in admitting in evidence the minutes of the meetings of the executive committee of the Socialist party on August 13 and August 20, 1917. The evidence showed that Schenck was general secretary of the Socialist party; that the typewritten minutes and the notes in longhand were found in his office at the headquarters of the Socialist party, of which he was in charge, and were identified by him as such, and the longhand notes were stated by him to be those of the secretary. There was testimony to show that Schenck ordered the circulars printed and that they were distributed from the headquarters. There was testimony that the minutes were admitted by Dr. Baer to be hers. In the minutes her name appears as secretary of the meeting. It was further shown by the mouth of the defendants' own witness that she was a member of the executive committee. The minutes were therefore evidence, at least, against her as admissions by her of acts done with others "to the grand inquest unknown" and relevant and material to show her connection with the alleged conspiracy and overt acts in its accomplishment. There was evidence

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that what was proposed in the minutes was carried out by Schenck as general secretary of the Socialist party, that the plan adopted by the resolution of August 13th was ratified and further instructions given to Schenck at the following meeting on August 20th after the preparation and printing of the circulars, and that thereafter the circulars were distributed at the office under his charge and were sent through the mails to men who had been accepted in the draft. The minutes were therefore clearly admissible against him as declarations and acts showing a common design in the transaction and in and of themselves forming part of the circumstances in which the alleged conspiracy was formed and carried out. The minutes therefore not only affected Dr. Baer, but her associate in the common enterprise, Schenck. And it is immaterial at what time Schenck joined the conspiracy, or whether he was present at the meetings, provided he and Dr. Baer were joined in carrying out the common design. United States v. Logan (C. C.) 45 Fed. 872; United States v. Cassidy (D. C.) 67 Fed. 698; United States v. Cole, Fed. Cas. No. 14,832; Sommer v. Gilmore, 160 Pa. 129, 28 Atl. 654; Palmer v. Gilmore, 148 Pa. 48, 23 Atl. 1041; McCabe v. Burns, 66 Pa. 356; Stewart v. Johnson, 18 N. J. Law, 87; McCaskey v. Graff, 23 Pa. 321, 62 Am. Dec. 336.

I am of the opinion that the minutes were evidence, not only against Dr. Baer, but against Schenck, and that there was sufficient evidence from which the jury could find the conspiracy and overt acts in furtherance thereof. Motion denied.

UNITED STATES v. JIN FUEY MOY.

(District Court, W. D. Pennsylvania. January 19, 1918.)

No. 89.

1. POISONS ⇐2—HARRISON ANTE-NARCOTIC ACT—CONSTITUTIONALITY.
Harrison Anti-Narcotic Act Dec. 17, 1914 (Comp. St. 1916, §§ 6287g-6287q), was within the constitutional powers of Congress, and is valid.

2. POISONS ⇐9—VIOLATION OF ANTI-NARCOTIC ACT—INDICTMENT.
Indictment under Harrison Anti-Narcotic Act Dec. 17, 1914, § 2 (Comp. St. 1916, § 6287h), charging that defendant did sell, barter, exchange, and give away narcotic drugs, contrary to its provisions, *held* sufficient.

3. POISONS ⇐4—ANTI-NARCOTIC ACT—CONSTRUCTION—"SELL, BARTER, EXCHANGE, OR GIVE AWAY."
The provision of Harrison Anti-Narcotic Act Dec. 17, 1914, § 2 (Comp. St. 1916, § 6287h), making it a criminal offense to "sell, barter, exchange, or give away" certain narcotic drugs, except on orders on prescribed forms, does not include only cases where title to the prescribed drug was in him who undertook to dispense it.

Criminal prosecution by the United States against Jin Fuey Moy. On motion in arrest of judgment. Overruled.

E. Lowry Humes, U. S. Atty., and John M. Henry, Asst. U. S. Atty., both of Pittsburgh, Pa. John W. Dunkle and N. S. Williams, both of Pittsburgh, Pa., for defendant. Joseph Stadtfeld and R. P. Marshall, both of Pittsburgh, Pa., for Jos. Fleming & Son Co.

THOMSON, District Judge. The defendant was indicted under section 2 of the Harrison Anti-Narcotic Act (Act Dec. 17, 1914, c. 1,

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38 Stat. 786 [Comp. St. 1916, § 6287h]), wherein it is charged that he did unlawfully sell, barter, exchange, and give away certain drams of morphine sulphate to different persons therein named. The indictment contains 20 counts, in form all the same, differing only in the names of the persons to whom the drugs were distributed and the amount dispensed. A motion to quash the indictment was made, alleging the unconstitutionality of the Harrison Act, and that the indictment as drawn does not charge the defendant with the commission of any offense prohibited by the act. The motion to quash was overruled, and the defendant tried and convicted on eight counts. The case is now before the court on a motion in arrest of judgment.

The reasons assigned in support of this motion are: First, the so-called Harrison Anti-Narcotic Act is unconstitutional and void; second, the so-called Harrison Anti-Narcotic Act is unconstitutional and void, so far as it does or attempts to control and regulate the practice of a physician; third, the indictment as a whole does not charge the defendant with the commission of any offense prohibited by the so-called Harrison Anti-Narcotic Act, or with the commission of an offense prohibited by any other law of the United States; fourth, there was no competent evidence submitted upon the part of the United States to sustain the verdict rendered by the jury.

[1] First, as to the constitutionality of the Harrison Act. It seems to me that this act should be read in the light of the previous legislation of Congress in restraint of the traffic in opium. The act approved February 9, 1909 (35 Stat. 614, c. 100, § 1 [Comp. St. 1916, § 8800]), provides:

"That after the first day of April, 1909, it shall be unlawful to import into the United States Opium in any form or any preparation or derivative thereof: Provided, that opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law."

The second section (section 8801) provides a maximum punishment of two years' imprisonment and $5,000 fine, of any person who shall fraudulently or knowingly import or assist in doing so, any opium or derivative thereof contrary to law, or who shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such drug after importation, knowing the same to have been imported contrary to law. It further provides that the drug shall be forfeited and destroyed, and that possession of such drug shall be deemed sufficient evidence, if unexplained, to authorize conviction of the person in possession thereof.

It is plain that Congress had the power to prohibit altogether the importation from foreign shores of this deadly narcotic, or they had the right to admit it under such restrictions as to its use, in protection of the public, as they might see fit to impose. And having done so, they may prescribe such regulations, penal or otherwise, as will effect the purpose intended; that is, to restrict its use to that for which alone it was admitted.

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Every provision of the Harrison Act which deals with the use of the drugs in question shows that its use is restricted and intended to be confined to medicinal purposes only. This is in harmony with the law prohibiting its importation or use for any other purpose. It is a matter of common knowledge that no opium is produced in the United States; but this can perhaps not be assumed, when the act undertakes to deal with those who produce it. In the case of the United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, the Supreme Court said:

"A statute must be construed, if fairly possible, so as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

In the same opinion the court said:

"It may be assumed that the statute [the Harrison Act] has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right."

I am not convinced that the Congress in enacting the Harrison law exceeded its constitutional powers, and the motion in arrest of judgment on this ground cannot be sustained.

[2] Again, it is urged that the indictment as a whole does not charge the defendant with the commission of any offense prohibited by the Harrison Act. All the counts of the indictment, which are the same in form, are drawn under the second section of the act, and charge that the defendant was a practicing physician, and did unlawfully, willfully, etc., sell, barter, exchange, and give away certain drams of morphine sulphate to the person therein named, not in pursuance of a written order from such person on a form issued in blank for that purpose by the Commissioner of Internal Revenue. There is no possible question that the indictment thus far distinctly charges an offense under section 2, but the pleader, instead of stopping here, undertook to negative the exception of that section in relation to the distribution of drugs by a physician. It was not necessary for the pleader to do so, as the exception is entirely separated from the words of the section defining the offense. The rule of pleading in such case is clearly set forth in United States v. Cook, 17 Wall. 168, 21 L. Ed. 538. The first exception to section 2 is in these words:

"Nothing contained in this section shall apply (a) to the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon, registered under this act, in the course of his professional practice only"

—with certain requirements as to the keeping of records. As it was not necessary in this case for the pleader to negative the exception, the only question is: Is there anything in the subsequent words of the indictment that destroys the legal effect of the previous words, wherein the charge is specifically and legally made? After charging the offense as above quoted, the indictment proceeds:

"That is to say, that at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully and willfully, knowingly and feloniously sell, barter, ex-

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change, give away, dispense and distribute to the party named twelve drams of morphine sulphate in manner following, to wit, that the said Jin Fuey Moy at the time and place aforesaid, did issue and dispense to the said party a certain prescription, a copy of which is as follows: [Then follows a copy of the prescription signed by the defendant, wherein the morphine sulphate is prescribed to be used as directed]—and the said party [naming him] was not then and there a patient of the said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only, contrary to the form of the act," etc.

The offense under section 2 is to sell, barter, exchange, or give away any of the prescribed drugs, except in pursuance of an order on the designated order form. The registered physician may successfully defend on the ground that he did not dispense or distribute the drug in question except to a patient in the course of his professional practice only. But this is a defense which must be set up by the physician, in order to escape the general requirements prescribed in section 2. The words in which exception (a) are negatived in the indictment must be read in the light of the words in which the offense is charged under the general provisions of section 2. It is alleged under the videlicet that the defendant "did unlawfully, willfully, knowingly, and feloniously sell, barter, exchange, and give away," with the additional words "dispense and distribute" to the party the drug in question. This is followed by giving the manner of the disposition of the drug, by the issuing of the prescription therein set forth. To this there can be but one meaning; that is, that the drugs were disposed of by means of the prescriptions. Then follow the words which take the physician out of the exception, namely, that the party was not a patient of the physician and the drug was dispensed and distributed by the physician not in the course of his professional practice only. It cannot be complained that the words "dispensed and distributed" are not used in the enacting clause of section 2. In order to escape the effect of the words "sell, barter, exchange, or give away," used in the enacting clause of section 2, the physician must show that the drugs so disposed of were dispensed or distributed by him to a patient in the course of his professional practice. I held before, and still hold, that the indictment sufficiently charges a violation of section 2 of the Harrison Act.

[3] It is insisted that to dispense or distribute the drugs on a prescription is not to sell, barter, exchange, or give them away. It is held in United States v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555, that statutes enacted to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore, although they may impose penalties or forfeitures, are to be fairly and reasonably construed so as to carry out the intention of the Legislature. It could hardly be said that words of so broad import as "sell, barter, exchange, or give away," when standing together, were intended by Congress to be so narrowly and strictly construed as to include only those cases where title to the prescribed drug was in him who undertook to dispense or distribute it. The lawmakers were not concerned with the ownership of the drug, but with its unlawful distribution. It could matter

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nothing to the poor victim in the fatal clutches of the drug habit, where title was to the narcotic which was thus dispensed to him, every grain of which brought him nearer to the grave. Whether the victim procured the drug from the hand of the physician, or through the druggist on an order or prescription of the physician, can matter nothing, unless we look blindly at the letter of the act, wholly forgetting its spirit and purpose.

In the last place, it is claimed that there was no competent evidence submitted on the part of the government to sustain the verdict of the jury. On the contrary, there was a superabundance of such evidence. Unless this section of the act is a dead letter, it would be hard to conceive a more flagrant case of its violation. The defendant seems to have obtained an extended and unenviable reputation as a dispenser of morphine sulphate. From Brooklyn to Chicago, from all the Lake cities, the victims of the drug habit came to Dr. Moy and procured the drugs. When we remember that the testimony showed that morphine sulphate is at least eight times as powerful and deadly as opium; that one-half grain is a large dose, and a grain a fatal dose to the nonuser; that there are 60 grains in one dram, and that the defendant time and again issued prescriptions for as much as 16 drams to one person, or 960 grains, enough to kill an entire regiment; that he issued, in the two years preceding the indictment, 11,687 prescriptions, calling for 15,796 drams, and in addition 43,200 one-half grain morphine tablets and 30,600 one-quarter grain tablets, we can have some conception of the magnitude of the defendant's unlawful business in the distribution of narcotics; and when we consider that for every dram prescribed he received $1, the commercial feature of the unlawful business becomes painfully and alarmingly apparent.

The motion in arrest of judgment is overruled.

KNOXVILLE GAS CO. v. CITY OF KNOXVILLE et al.

(District Court, E. D. Tennessee, N. D. September 23, 1918.)

No. 27.

1. GAS ⟸14(1)—GAS COMPANIES—CHARGES—FRANCHISE ORDINANCE—CONTRACT.

The voluntary acceptance by a gas company of an ordinance granting it a franchise on condition that it should never charge more than a stated price for gas to consumers created a contract which, if within the powers of the city, is binding on the company during its term.

2. GAS ⟸14(1)—CONTRACT FIXING RATES—CONSTITUTIONALITY.

A contract between a gas company and a city, fixing a maximum price to be charged by the company for gas, if reasonable and valid when made, cannot be set aside by a court of equity as confiscatory and unconstitutional, because subsequent conditions have made such rate unremunerative.

3. GAS ⟸14(2)—GAS COMPANIES—POWER OF CITY TO FIX RATES—CONDITIONAL FRANCHISE.

Under Shannon's Code Tenn. 1896, § 2208, providing that a gas company shall not use the streets of a city "until the consent of the

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municipal authorities shall have been first obtained, and an ordinance shall have been passed prescribing the terms on which the same may be done," a city has authority in such ordinance to fix maximum rates to be charged by the company.

4. Gas ⊂=14(2)—Gas Companies—Regulation of Rates.

A statute providing that gas companies shall charge reasonable rates, not exceeding a rate named, does not impair the right of a city, authorized by another statute to prescribe terms on which a gas company may use its streets, to prescribe a maximum rate as one of such terms.

In Equity. Suit by the Knoxville Gas Company against the City of Knoxville and others. On motion by complainant for restraining order. Denied.

Lindsay, Young & Young, of Knoxville, Tenn., for plaintiff.

J. Pike Powers, Jr., City Atty., and Cates & Price, all of Knoxville, Tenn., for defendant city of Knoxville.

McCALL, District Judge. Several weeks ago this case was before me on application for temporary injunction upon the bill and affidavits thereto and affidavit of the defendants. After consideration, the application for temporary injunction was denied. Since that time there have been filed a sworn answer and an additional affidavit in support of the bill. The case is before me again, first, for an order setting a date for the hearing of the case; second, for a restraining order; and, third, for a reference to a special master.

There is nothing new presented on this hearing by the plaintiff affecting the merits of the application for an injunction, other than the additional affidavit of Mr. Young, which brings the financial showing of the company down to July, 1918, and tends to intensify the present financial stress of the plaintiff. The application at this time for a temporary restraining order, in view of the fact that the court had recently denied a temporary injunction, is rather an unusual proceeding. The court sees no sufficient reason to change its views in regard to the injunctive features of the case, and the application for temporary restraining order is denied.

It appearing that the bill and answer present questions of law about which no evidence need be taken, it was suggested that the court at this time pass upon the questions of law and its action upon them to determine the order to be made on the application for reference. It was agreed at the hearing that it was a useless and expensive proceeding to send the case to reference, unless the court should be of opinion that the plaintiff upon the record as now presented, assuming that the issues of fact raised by the bill and answer were decided in its favor, is as a matter of law entitled to the redress it seeks.

[1] The undisputed facts on which the questions of law arise are as follows: In about 1854 the Knoxville Gaslight Company (hereafter called the Light Company) was organized and chartered under the laws of Tennessee. It was granted a franchise to furnish the city of Knoxville with gas for a period of 50 years, and for that purpose it was permitted by the city to occupy its streets and alleys with pipes, conduits, and other equipment necessary for the production and distribu-

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tion of gas to consumers. In 1903 certain parties acquired the stock of the Light Company and obtained a charter from the state under the name of the Knoxville Gas Company. It was the intention and purpose of the Gas Company to acquire the property, rights, and franchises of the Light Company. This it did after having obtained the consent of the city by ordinance so to do. See section 2, Exhibit A to the bill, and chapter 70, Acts of Tennessee 1889; Shannon's Code of Tennessee 1896, § 2047.

The Gas Company thereafter made application for and was granted a franchise to run for 50 years to operate its plant over and along the streets of said city by ordinance passed September 8, 1903, as amended by ordinance approved September 28, 1903. Section 11 of this ordinance provides that, unless the Gas Company shall, within 20 days from and after the passage and approval of the ordinance, accept the same and the terms thereof, and notify the city of Knoxville of such acceptance in writing, all rights, privileges, and franchises granted to said city should be absolutely forfeited. Within the 20 days so allowed the Gas Company in writing accepted the franchise, together with its terms and conditions, in language as follows:

"To the Mayor and Aldermen of the City of Knoxville: You are hereby notified that the undersigned, Knoxville Gas Company, has accepted and does hereby accept the ordinance passed and approved by you on September 8, 1903, granting it certain rights, privileges, and franchises, as amended by the ordinance passed and approved September 28, 1903, and the terms and provisions of said original ordinance as amended aforesaid."

The Gas Company thereupon entered upon the manufacture and supplying of gas to the city of Knoxville under the terms and conditions of said ordinance as previously accepted by it, and has so continued from that time without complaint, so far as this record shows, until after the entrance of the United States into the war with Germany. On the 5th day of March, 1918, the city of Knoxville passed an ordinance making it unlawful for any person, firm, or corporation supplying any article of public utility within the corporate limits of the city of Knoxville to any consumer or patron intentionally to demand, accept, or charge any unlawful rate or charge for the public utility article or service rendered or required to be rendered under its contract or franchise with the city of Knoxville to a consumer or patron.

Upon this state of fact, the bill is filed to have its contract with the city, made under the ordinance of September 8, 1903, declared ultra vires and void, and to enjoin the city from enforcing as against it the ordinance of March 5, 1918, on the grounds that said two ordinances are in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States, in that they deprive the plaintiff of its property without due process of law and without just compensation. A paragraph of section 7 of the ordinance of September 8, 1903, provides as follows:

"And said Gas Company shall at all times furnish to the consumers of gas within the limits of the city of Knoxville gas of not less than fifteen candle power and shall never charge for the same more than $1.10 per thousand cubic

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feet, less 10 cents per thousand cubic feet if paid on or before the 10th day of the succeeding month."

It is alleged in the bill, notwithstanding the Gas Company accepted the franchise as provided in the ordinance, on the terms and conditions that it would never charge more for gas than the maximum rate named in the ordinance, that its acceptance of the franchise in writing is not binding upon it, by virtue of the Fifth and Fourteenth Amendments of Constitution of the United States, and that upon a sufficient showing that it is not earning a reasonable return upon its investment, a court of equity has the power to relieve it from its contract so made, and permit it to charge such a price per thousand cubic feet of gas as will afford it a reasonable net return on the investment.

The city by ordinance said to the company:

"You may occupy my streets and alleys for 50 years with your pipes and conduits and other things necessary to the manufacture and distribution of gas, upon condition that you will never charge more than $1.10 per thousand cubic feet therefor."

The company replied in writing that it accepted the franchise with that condition. I think that constitutes a contract between the city and the Gas Company. Vicksburg v. Vicksburg Water Co., 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253; Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 27 Sup. Ct. 762, 51 L. Ed. 1155; Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; Cunningham v. City of Cleveland, 98 Fed. 657, 39 C. C. A. 211; Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; Omaha Water Co. v. Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614.

[2] The contract, having been made by the Gas Company before it acquired the gas plant in Knoxville, and, indeed, prior to having any investment there, was made, as I think, at arm's length with the city. The city did not have to grant to the Gas Company this or any other franchise. The Gas Company did not have to accept this or any other franchise not to its liking. It is not alleged in the bill that the city was guilty of deceit, fraud, or duress, or that the plaintiff was in any way overreached in the premises. Hence it must be that the Gas Company entered into the contract freely, voluntarily, and understandingly. That conditions have radically changed within the last year must be admitted. The war with Germany has brought about a great scarcity of labor on the one hand, and largely increased its cost on the other. The cost of all material entering into the making and distributing of gas has also greatly advanced.

Under such circumstances, has a court of equity power to relieve the Gas Company from a contract it voluntarily and understandingly made, and permit it to make another more to its liking, upon the ground that subsequent events have so changed conditions that the contract made by the plaintiff is no longer remunerative? In Blake v. Pine Mountain Iron & Coal Co., 76 Fed. 624, 22 C. C. A. 430, the Circuit Court of Appeals of the Sixth Circuit said:

"It is just these hardships which a court of equity cannot relieve by rescinding contracts, or making new ones by construction, through the process of

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balancing blame for nonperformance, and going into parol proof of other or different conditions than those expressed in the contracts themselves, intentions relative to failures not anticipated at the time the contracts were made, or not provided for by the terms of the agreements, as they would have been if the parties had not been improvident in neglecting such protection as was open to them against possible failure and change of conditions. The reasonableness of a contract, its fairness and justice, are to be determined as of the time when the parties entered into it, and so of the intentions involved in the construction of their agreements, and none of these are to be influenced by the force of subsequent changes in events or circumstances."

The Blake Case was cited and followed by the Circuit Court of Appeals for the Sixth Circuit in Ruggles v. Buckley, 158 Fed. 950, 86 C. C. A. 154. So that it would seem to follow that, unless plaintiff can bring itself without that general rule, a court of equity has no power to relieve it, notwithstanding, under the new conditions that have arisen, the contract has become a hardship on the plaintiff, and it cannot be performed without loss.

[3] It is insisted, however, that the city had no power to incorporate into the ordinance a maximum price which the company should charge for gas, because the power to do so had not been delegated to it by the state. Upon this assumption it is argued that the contract made is unenforceable and void as to the plaintiff. By Acts of Tennessee 1887, c. 176, the General Assembly amended Acts of 1875, c. 142, and also the charters of gas companies incorporated under the latter act, by providing, immediately following the clause permitting the use of municipal streets, the following:

"And provided further, that no one of the streets or alleys of said city shall be entered upon or used by said company for laying pipes, conductors, or otherwise, until the consent of the municipal authorities shall have been first obtained, and an ordinance shall have been passed prescribing the terms on which the same may be done." Shannon's Code of Tennessee 1896, § 2208.

The plaintiff was incorporated six years subsequent to the passage of the act of 1887, and is subject to the provisions of that act. In the case of City of Knoxville v. Africa, 77 Fed. 507, 23 C. C. A. 258, the Circuit Court of Appeals for the Sixth Circuit had under consideration section 1921 of Milliken & Vertrees' Code of Tennessee, a provision relating to street railways similar in terms to the provisions, supra, relating to gas companies, as follows:

"No one of the streets of said city shall be used by said company, nor shall any rails be laid down, until the consent of the city authorities has been first obtained, and an ordinance shall have been passed, prescribing the terms upon which the same may be done."

In discussing this provision, Judge Lurton, speaking for the court, said, among other things:

"As we have already seen, the power to grant a right of way upon the public streets resides primarily in the Legislature of the state. This power may be, and is, by provision of the street railroad law, delegated to the municipal government of the city in which the proposed railroad is to be operated. This delegated authority is a trust, to be exercised for the public benefit by ordinance duly passed, and subject to the limitations and for the purposes intended by the statute. What is the extent of the power intrusted to the city government? The answer is plain. 'It is to consent' to the occu-

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pation of such of the streets of the city between the termini named in the charter, and within the general route designated therein, as shall be deemed in the interest of the public. * * * The power to 'consent,' and the power to prescribe the 'terms' upon which it will consent, implies the power to refuse consent, or to consent only upon terms and conditions deemed wise"—citing authorities.

While the Africa Case related to street railway franchises, I think by analogy it applied with full force to the act of 1887, supra, relating to gas companies. In McQuillin, Municipal Corporations, § 1644, it is said, if the consent of the municipality is necessary to the use of streets by a public service company, the municipality, upon granting the right to use the streets, may impose conditions on the company which would be binding on the company if it accepts the right to use the streets. In Boerth v. Detroit City Gas Co., 152 Mich. 654, 116 N. W. 628, 18 L. R. A. (N. S.) 1197, the court said:

"Where a gas company is given the right to occupy city streets only with the consent of the municipality, the city is under no compulsion to grant such right, and as to the price thereof may impose such restrictions as to rates as it sees fit."

The ordinance under consideration having been duly enacted under statutory authority, and the terms and conditions thereof having been voluntarily and understandingly accepted by the Gas Company in writing, constitutes a contract from which the plaintiff cannot be relieved without the consent of the city. Cleveland v. City Ry. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102; Cleveland v. Cleveland Elec. Ry. Co., 194 U. S. 538, 24 Sup. Ct. 764, 48 L. Ed. 1109; Detroit v. Detroit Citizens' Ry. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592.

Per contra, Home Telephone Co. v. Los Angeles, 211 U. S. 270, 29 Sup. Ct. 50, 53 L. Ed. 176, is cited and relied on by the plaintiff. I think that case is clearly distinguished from the instant case. There it is held that a municipality may not enter into a contract fixing unalterably during the term of franchise the charges for telephone service, and thus disable itself from exercising the power of regulation, under a charter authority to regulate telephone services, and to fix and determine the charges therefor, in the absence of clear and affirmative legislative expression granting such power, or from which such power may be necessarily implied. That is not the question before the court. The clause of the contract under consideration undertakes to bind the Gas Company to only one thing, to wit, that the Gas Company during the life of the franchise will never charge for gas more than the rate named. The city has not undertaken to nor has it contracted away its charter right of "prescribing the terms" on which the Gas Company may occupy its streets. It may yet permit the Gas Company to increase or under proper showing require it to decrease charges for its service. In the Telephone Case, supra, Mr. Justice Moody said:

"It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for another, for differences, slight in themselves may through their relation with other facts turn the balance one way or the other."

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Other cases cited and relied on by the plaintiff in support of its contention are not in point, as I think, and for that reason it is unnecessary to comment on them.

It is further insisted that the ordinance is not binding on the city, and hence could not be on the Gas Company, since the present or any succeeding law-making power of the city may change or repeal the ordinance outright. In other words, the contract made by virtue of the ordinance is unilateral, and hence voidable by either party. This contention I think is met and refuted in Omaha Water Co. v. City of Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614, where it is pointed out that municipal corporations have two classes of powers, the one governmental, in the exercise of which their officers may not bind the municipalities beyond their terms of office; the other business or proprietary, in the exercise of which they are governed by the rules as individuals or private corporations. The contract here is ordinancial in form, in the making of which I think the city officials were in the exercise of their business or proprietary functions. Under Knoxville Water Co. v. Knoxville, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887, it may be, if it appeared that by charging the maximum rate the Gas Company was realizing more than a reasonable return, the city might require the Gas Company to charge less than the maximum rate named in the ordinance, since the contract only provides that the Gas Company shall never charge more than the rate named, and does not provide that it may not be required to charge less if the lesser rate appeared to be reasonable. That case is not authority for the insistence that the Gas Company, without the consent of the city, may charge more than the maximum rate, for which it contracted to furnish its patrons with gas.

[4] Section 2209, Shannon's Code of Tennessee (1896), provides that gas companies shall have the privilege of erecting, establishing and constructing gasworks, and manufacturing and furnishing gas in towns, cities, and villages by means of public works; the gas companies being authorized to charge a reasonable price for gas not higher than the price allowed by existing charters to gas companies heretofore chartered in this state, provided that said companies shall never charge more than one cent for every cubic foot of gas used, etc. Chapter 142, Acts of Tennessee of 1875, as amended by chapter 176 of the Acts of Tennessee of 1887.

This section is made a basis for the argument that under its charter the gas company has a right to charge one cent for every cubic foot of gas, if it appeared such charge was reasonable. This probably would be true, but for the provision of section 2208 of Shannon's Code, which provides that the streets and alleys shall not be entered or used by a gas company for laying pipes, conductors, or otherwise, until consent of the municipal authorities shall have been obtained, and an ordinance shall have been passed prescribing the terms under which the same may be done. Under this section the city of Knoxville by ordinance prescribed, as one of the terms on which the Gas Company might use its streets and alleys, that it

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would never charge more than $1.10 per 1,000 cubic feet for gas. The Gas Company accepted this franchise, with this limitation, and by so doing it would seem to have waived whatever rights it might otherwise have had under section 2209, supra, and thus during the life of the present contract cut itself off from the benefit of any rights it may otherwise have had under said section.

My conclusions are: (1) The ordinances of which complaint is made are neither violations of the Constitution of the United States or of the state of Tennessee. (2) The municipality of Knoxville, in passing them, was acting within its delegated powers. (3) The ordinance of September 8, 1903, as amended by ordinance of September 28, 1903, conditionally granting to the Gas Company a franchise on certain terms, when accepted by the Gas Company in writing, constituted a valid contract between the city and Gas Company. (4) In the absence of a showing of deceit, fraud, duress, or that plaintiff was overreached in the premises, a court of equity has no power to grant the relief sought by the bill.

The parties may, if they be so advised, treat this as a final holding on the law questions presented, and enter a final decree dismissing the bill, with costs; or, if they be so advised, they may treat this merely as a denial of the application for restraining order, and refer the case to a master, to take proof and report upon such issues of fact as counsel may deem necessary in relation to the capital invested in the enterprise, its running expenses, the amount of its earnings annually, and the net earnings of the company, if any, and any other issues of fact that appear material—the special master to be agreed upon by counsel, or, failing in this, the court will appoint one.

JOHN E. McCALL, Judge of the United States District Court, Western District of Tennessee, sat herein by designation for the judge of the United States District Court, Eastern District of Tennessee.

UNITED STATES v. McHUGH et al.

(District Court, W. D. Washington, N. D. November 23, 1917.)

No. 3780.

1. CONSPIRACY ⇐23—OFFENSE—NATURE OF.

A conspiracy may be defined as a combination of two or more persons by concerted action to do an unlawful thing, or to do a lawful thing in an unlawful manner, and while the gravamen of the offense is the conspiracy, some overt act by one or more of the conspirators is necessary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

2. CONSPIRACY ⇐47—SELECTIVE SERVICE ACT—PROOF.

In a prosecution for conspiracy to violate Selective Service Act May 18, 1917, the common design is the essence of the charge, and proof that the alleged conspirators knowingly worked together for a common illegal

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purpose will establish a conspiracy; it not being necessary to show a formal explicit agreement or undertaking.

3. ARMY AND NAVY ⟸20—SELECTIVE SERVICE ACT—EXEMPTIONS.
Under the Selective Service Act and regulations making all male citizens of certain ages liable to military duty, registrants having dependent parents may be exempted.

4. ARMY AND NAVY ⟸20—SELECTIVE SERVICE ACT—"DEPENDENT."
A "dependent" is a person who is not self-sustaining and relies on another for support, and under the Selective Service Act and regulations, providing for exemptions to registrants having dependent parents the exemption should not be granted if the parent is able to maintain himself, either from property which he owns or from his labor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dependent.]

5. CRIMINAL LAW ⟸651—EVIDENCE—APPEARANCE OF DEFENDANT.
In a prosecution for conspiracy to violate Selective Service Act, by falsely claiming exemption on the ground that registrant's father was dependent on him for support, the jury could determine the physical condition of the father from their observation of him while on the stand, etc., and his physical infirmities need not be established by medical expert testimony.

6. CRIMINAL LAW ⟸369(1)—TRIAL—OTHER OFFENSES.
In a prosecution for conspiracy to violate the Selective Service Act, where it was asserted that a registrant and his father falsely represented that the father was dependent on the registrant, the jury cannot consider whether the father was guilty of misapplication of funds in his possession which he claimed did not belong to him, but were trust funds.

7. CRIMINAL LAW ⟸561(1)—"REASONABLE DOUBT."
A "reasonable doubt" is such a doubt as would make a man of ordinary prudence and sensibility and decision, in determining an issue of like concern to himself, pause or hesitate in arriving at his conclusion; and that is the criterion for the jury in a criminal prosecution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Doubt.]

John Edward McHugh, James A. McHugh, and James Gordon were indicted for conspiracy to commit an offense against the United States by violating the Selective Service Act of May 18, 1917. Verdict directed for the last-named defendant, and the case against the other defendants submitted to the jury.

Clay Allen, U. S. Atty., and Ben L. Moore, Asst. U. S. Atty., both of Seattle, Wash.

Beeler & Sullivan and Winter S. Martin, all of Seattle, Wash., for defendants.

NETERER, District Judge. The issue in this case is raised by the indictment which has been returned by the grand jury, to which each of the defendants have entered a plea of not guilty, and that places in issue every material allegation in the several counts of the indictment. While the indictment has two counts, it in fact charges only one offense. It is a different statement of the same charge against the defendants, and it will be considered only as one count; and

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when I refer to the indictment, or to any count in the indictment, it will simply be to the one offense. Count 2 completely states the charge with the reference therein made to count 1.

It is charged that the defendants did unlawfully and feloniously combine, conspire, confederate, and agree together, and one with the other, to commit an offense against the United States; that is, to violate the act of Congress approved May 18, 1917 (40 Stat. 76, c. 15) entitled "An act to authorize the President to increase temporarily the military establishment of the United States," and the regulations prescribed by the President, the object and purpose of the conspiracy being to obtain the discharge of John Edward McHugh from the Selective Service Act upon false, fraudulent, and fictitious grounds, and to which the said John Edward McHugh was not lawfully entitled; that each of the defendants knew that the said John Edward McHugh was at that time not entitled, and would not thereafter be entitled, to such exemption from the said act and regulations, it being the intent and purpose of the defendants to make and file a false, fraudulent, and fictitious claim for exemption from said act and the regulations made by the President, by asserting that he is the son of an aged and infirm father, dependent for support upon the labor of the said John Edward McHugh, and each and all defendants, knowing the said assertion and claim to be false, made certificates and affidavits in support of such claim, and that said affidavits and claim were false, as fully set out in the indictment, and then states the doing of certain overt acts to carry out the objects of the conspiracy as set out. In the indictment, likewise, is set out the charge that the statements with relation to the income were false, and known to be false by the defendants.

[1, 2] A conspiracy may be defined as a combination of two or more persons by concerted action to do an unlawful thing, or to do a lawful thing in an unlawful manner. The gravamen of the offense charged is conspiracy, but some overt act in furtherance of the conspiracy must be done by some one of the conspirators in order to give life to the conspiracy. To make the statute clearer, if possible, I will call your attention to its three essential elements: First, the act of conspiring together of two or more persons; second, to commit the offense charged in the indictment, which is a violation of the Selective Service Act, as charged; and, third, the doing of what is termed as an overt act, or the element of one or more of such parties doing one or more acts to effectuate the object of the conspiracy.

The common design is the essence of the charge, and, while it is not necessary, to establish a conspiracy, to prove that two or more persons met together and entered into a formal and explicit agreement or understanding, or that they should directly or by words or in writing state what the unlawful scheme was to be, or the general understanding or detail of the plan or means by which an unlawful combination was to be made effective, if they knowingly work together for a common purpose, and that purpose is the illegal act charged as their object, and if the acts of the parties so dovetail and

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fit together that the conclusion is inevitable that there was an understanding between them as to the thing to be done, as charged, it would establish a conspiracy. In other words, where an unlawful object is sought to be effectuated, and two or more persons, actuated by a common purpose of accomplishing that object, work together in any way in furtherance of the unlawful scheme, every such person is a party to the conspiracy, no matter what part he may take in carrying out the general plan; and where several persons are proven to have combined together for the same illegal purpose, any act done by one of the parties in furtherance of the original concerted plan, and with reference to the common object, is, in contemplation of the law, the act of the whole party, and any statement or declaration made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties, who, when the combination is proven, are as much responsible for such declaration, and acts to which they relate, as if made or committed by themselves.

In this case evidence was received of a statement claimed to have been made by the defendant James A. McHugh, the father, in the absence of the other defendants, John Edward McHugh and Gordon. So far as Mr. Gordon is concerned in this case, the action will be dismissed. In other words, you will be directed to return a verdict of not guilty as to him. There is no evidence before the court that would justify the court in submitting to you the claim of the government, charging him with being a party to the conspiracy in this case, if one did exist. This statement of the defendant James A. McHugh cannot be received against John Edward McHugh, unless it is established by the evidence that the conspiracy was entered into.

[3] You are instructed that, under the Selective Service Act referred to, all male citizens of the United States, and others enumerated, and which is not material here, are liable to military duty; and the law provides the manner of selecting the persons within military ages for services in the National Army. It also provides that certain men who are eligible may be exempted from military duty under certain conditions, and that a person selected may at the time of registration, or later, when actually called, make his claim for exemption, and, if he comes within the class of persons provided, it may be granted. One of the classes exempted are those who have persons designated by the act dependent upon them for support. It is sufficient for the purpose of this case to say that a man having a father or mother dependent upon him for support may be exempt. In this case it is charged that the defendants conspired, as I have already stated, to have John Edward McHugh make a false claim for exemption, asserting that his father is dependent upon him for support, and that this claim was supported by affidavits made by the defendants James A. McHugh and James Gordon which have been filed in this case.

The government contends that the claim made by the defendant John Edward McHugh was false, that the defendants knew it was false, and that it was the intent and purpose of the defendants to

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evade the law in the manner charged; while the defendants contend that the claims made by John Edward McHugh were true, or at any rate they believed them to be true, and they acted honestly with relation to the claim made. The issue before you is not complicated. It is simply to determine whether the defendants did conspire as charged in this indictment, and did the acts which it is charged, or some of the acts charged in the indictment as having been performed by them. The claims made by the defendants for exemption might be untrue, and yet the defendants might not be guilty of the crime charged. It is also contended on the part of the defendants that, if the statements made by the defendants were understatements of income or overstatements of the physical condition of James A. McHugh, the father, these statements were merely errors of judgment, and were made from honest motives, and not purposely or intentionally to mislead the officers of the government, whose duty, under the Selective Service Act and the rules promulgated for carrying it out, it was to determine between these conditions. You have the story from both sides and you must determine where the truth in the case lies, and what the fact therefore, is.

You are instructed that intent is an element of the offense charged, and it must be established by the same degree of proof as any of the other elements that enter into the completed offense. It is psychologically impossible to enter into a man's mind and determine by testimony what the actual intent was. So that you must conclude with relation to the element of intent from the facts disclosed by the evidence in this case, taking into consideration the conduct of the parties with relation to the matter charged, and every circumstance which bears upon the issue, bearing in mind that a man intends the natural consequences of his act intentionally or knowingly done; and when you have considered all of the acts of the parties, their relation to each other, the object to be attained, the things that were done, the circumstances under which they moved, and the motives that prompted the various acts so far as disclosed from the evidence, from all these you will determine what the intention of the parties really was.

[4, 5] You are instructed that a dependent is one who is sustained by another; one who relies upon another for support; a person who is not self-sustaining. In order for the defendant James A. McHugh to be dependent for support upon the defendant John Edward McHugh, every other source of support or sustenance would have to be eliminated. If the defendant James A. McHugh had money or means from which he could get support, or had property which could be converted into means of support, then he would not be dependent, or if the defendant James A. McHugh was able to support himself by physical labor, irrespective of means or money. Suppose he had no lands and no money; is he physically in such a condition that he could support himself and family, together with the help of other members of the family, without John Edward McHugh's support—such members of the family as the testimony discloses?

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The exemption provision made in this statute is for the purpose of not depriving an indigent person of means of support, not the particular means of any person; and in considering the dependency of the defendant James A. McHugh you will take into consideration all the testimony which has been offered and admitted with relation to his status and what he owns. The government's witnesses have testified that he owns several different tracts of land—you will bear in mind what the testimony was—and have placed values upon the respective tracts. Those values you will recall from the evidence. It is also admitted in evidence that the defendant James A. McHugh owns 28 cows, 4 horses, and some farming implements and utensils; the value, I believe, admitted to be $2,460, or in excess of $2,400. The amount you will take from the admission that was made or from the evidence. The defendant James A. McHugh admits that he has on deposit money amounting to something over $7,000, I believe. You will remember what the testimony discloses. But he states that this is all held by him in trust—$7,000 in trust for his little boy Peter, $300 as guardian for one party, and $600, I believe, as guardian for another party. He says he is entitled to receive the income from the $7,000; but, of course, he is not entitled to receive any income from any trust funds held by him as guardian. Now, if you believe, or if it raises a reasonable doubt in your minds, as to whether he holds this money in trust, then you cannot consider the amount held in trust in arriving at his means of support. You can only consider the income upon the $7,000, whatever that may be, as disclosed by the evidence. In determining whether these funds are trust funds, you will take into consideration all the evidence which has been received, and weigh that evidence by the same rule that you will weigh the other testimony in the case, and to which I will refer later in these instructions.

[6] You are instructed further, with reference to the trust funds referred to, that the defendant James A. McHugh is not on trial for the misuse or misapplication of trust funds in this case. Such liability would only arise and could only be presented in a state court, and after demand had been made for the money; and you will not consider this matter of trust funds in any relation of accounting, or as a matter of default in the performance of duty as a guardian of public funds, as stated, and you will only consider the trust funds matter with relation to the matters bearing upon the income.

You are further instructed that, as to the income from the lands, cows, and horses which he owns, you must determine from the evidence; but you are instructed that the law does not contemplate that a man can hold property which he does not use himself, and the value of which can be utilized for the support of himself and family, and not use it for that purpose, and claim that he is dependent. Before the defendant James A. McHugh can be dependent for support upon John Edward McHugh, he must exhaust his own resources. By that I mean his property in excess of what he needs to properly house his family, and such as his family can cultivate for their own use and for the purpose of pasturing such cows as may give milk for his family and supply the family with butter for their home consumption. He cannot

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operate a dairy ranch at a loss, and claim the son's labor as exempt to pay the expenses of such ranch, or for his support, when he has other property of value which can be utilized for his support.

Much evidence has been received and comment made with relation to income for the year previous to the time of the charge made. That was permitted to go before you, so that you would have all of the facts and circumstances before you. If you find that the defendant James A. McHugh was dependent upon John Edward McHugh for support, and believe or have any reasonable doubt as to whether this statement was made ignorantly as to income, even though you believe it was wrong, then, of course, the defendants would not be guilty upon that charge.

Evidence was likewise received upon the physical infirmities of the defendant James A. McHugh, and that condition is a fact to be established by the evidence in the case, and need not be established by medical expert or physician testimony, where the facts presented to the jury are convincing or sufficient to raise a reasonable doubt in the minds of the jury; but when the defendant had consulted a doctor with relation to the illness complained of, and has not consulted him for six years, the jury must consider such fact in connection with all the evidence bearing upon the matter of physical infirmity. The jury also has the right to take into consideration their observation of the defendant before the jury—his appearance—and consider that with his testimony, and all other testimony presented, and conclude with relation to his physical infirmity. Upon this phase of the case you are instructed, however, that if you are convinced by the evidence that the defendant is not dependent, and that he has means of support of his own, then his infirmities would not be material.

You are further instructed that evidence has been presented in this case of reputation as to truth and veracity in the community in which he resides, and likewise as to being a law-abiding citizen. You are instructed that such evidence is competent in a criminal case. It is the only instance where hearsay testimony can be received. Character or reputation testimony is necessarily hearsay. It is testimony as to what the people—the man's neighbors or the people residing in the community where he lives—think about him or say about him with relation to his truthfulness or with relation to his being law-abiding; and it is based upon the presumption that, when a man has lived in a community a long time and has earned a reputation, he is entitled to it, and that what his neighbors, what people in the community, say about him, should be considered by the jury. You will give consideration to this testimony that was presented, for it was presented on both sides. Now, this evidence is only valuable when the witnesses disclose to you that they have a basis upon which to base their conclusion; and you will approach that testimony from that viewpoint, and give the weight to those witnesses who you believe are the better qualified to testify with relation to reputation for truth and veracity and for being law-abiding. You will weigh that testimony by the same rule as you will all of the other evidence in the case.

You will try this case fairly and impartially, bearing in mind that

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you are the sole judges of the facts. The responsibility of finding what the fact in this case is rests solely upon you, and you will appreciate that the United States does not want an innocent man convicted, nor does it want a guilty man to escape after he has been proven guilty beyond a reasonable doubt. The issue in this case is of great importance to the government and to the defendants. The government can only be maintained by the enforcement of law. You, as jurors, are not concerned with the policy of the law. You are simply concerned with the facts in this case as applicable to the law which has been passed by Congress. You may personally believe the law to be bad, and one which should be repealed; but that is not a matter of your concern, nor mine. That is a matter for the Congress of the United States, and it is the lawmaking body provided by the Constitution; and if officers neglect to enforce the law, or jurors decline to fairly and honestly discharge their duty, and law enforcement should thereby fail, it would be only a short time until a condition of anarchy would obtain, and no stable government could be maintained.

The defendants are clothed with the presumption of innocence, which prevails throughout the trial and until it is overcome by evidence in this case which shows to your satisfaction beyond every reasonable doubt that both of the defendants are guilty. In this case you cannot find one of the defendants guilty and the other not guilty. One man cannot conspire with himself. It takes two to conspire; and the testimony, as I told you a moment ago, does not show that Mr. Gordon knew anything about this, except as he was requested by the defendant James A. McHugh to come in and sign an affidavit. Now, what he did there was wrong. He signed something which he says that he knew nothing about. Of course, if he knew nothing about it, he could not have conspired, and the testimony of the witnesses on the part of the government is not of such a character as to overcome the presumption of innocence, and not enough to connect him with a conspiracy, more than the act of signing the affidavit. The defendants James A. McHugh and John Edward McHugh, therefore, are either both guilty or both innocent of this offense.

[7] Now, a reasonable doubt is just such a doubt as the term implies. It is a doubt for which you can give a reason. It is such a doubt as would make a man of ordinary prudence and sensibility and decision, in determining an issue of like concern to himself as that before the jury to the defendants, pause or hesitate in arriving at his conclusion. It is such a doubt as would be created only by the want of evidence or a doubt which is raised by the evidence itself, and must not be merely speculative, imaginary, or conjectural. A juror is satisfied beyond a reasonable doubt if, from a candid consideration of all the evidence, he has an abiding conviction of the truthfulness of the charge. When a juror is satisfied to a moral certainty of the truthfulness of the charge made, then he is satisfied beyond every reasonable doubt.

In this case each party has examined you with relation to prejudice, or preconceived notions of the issue, or knowledge of the facts, and you have convinced both sides that you are free from any prejudices

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or opinions, and can determine this issue solely upon the evidence which has been presented. Both sides have a right to rely upon this conception of your qualifications, and I have no doubt you will eliminate from your minds every influence which would have a tendency to detract from the issue, and will concentrate your thought alone upon the determination to do justice and right as your quickened conscience, aroused by the serious duty before you, may dictate your every thought and effort, being divorced from passion, prejudice, or sense of relation to things which might detract your thought from the real issue in this case, and that is the guilt or innocence of these defendants, and by a fair and honest consideration conclude, so that the government and the defendants may feel that a fair, honest, and conscientious consideration has been given to the matter in hand.

As I have intimated a moment ago, you are the sole judges of the facts in this case, and you must determine what they are. Any reference that I may have made to any fact in this case, or expressions used to convey to you some idea, was not done with the purpose of expressing any opinion which I may have of a fact; and I desire you to eliminate from your mind and from your consideration any such thought that you may have received as to any opinion of mine with relation to any fact, and determine this yourself solely upon the evidence which has been presented.

You are likewise the sole judges of the credibility of the witnesses who have testified before you, and in determining the weight or credit you desire to attach to the testimony of any witness you will consider the demeanor of the witness upon the witness stand, the opportunity of the witness for knowing the things about which he has testified, his interest or lack of interest in the result of this controversy, and the reasonableness or unreasonableness of the story of the witness, and from all of these determine where the weight of the evidence is, and where the truth in the case lies. You will attach to the testimony of every witness who has testified before you the same test that you would apply to any other person in the ordinary affairs of life whose truthfulness or falsity may be under consideration by you. From your conclusions there is no appeal. I merely suggest this, so that you may be impressed with the responsibility that rests upon you. If you find that any witness has willfully testified falsely concerning any material fact in this case, you have a right to disregard the testimony of such witness entirely, except in so far as it may be corroborated by other credible evidence or circumstances developed upon the trial of the case.

It will require your entire number to agree upon a verdict, and when you have concluded you will cause the verdict to be signed by your foreman, whom you will elect immediately upon retiring to the jury room. The form of the verdict will be: "We, the jury in the above-entitled cause, find the defendants John Edward McHugh and James A. McHugh ——— guilty." If you find them guilty, you will write in the word "are." If you find them not guilty, you will write in the word "not." The other form will be: "We, the jury in the above-entitled cause, find the defendant James Gordon not guilty." You will have these three with you.

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After numerous exceptions taken by counsel for defendants, the court added the following:

Where there are two inferences possible, one of guilt and one of innocence, that of innocence should be adopted by the jury, and that every reasonable doubt upon any fact disclosed in the testimony should likewise be resolved in favor of the defendants.

UNITED STATES v. OLSON.

SAME v. SURANSKY.

(District Court, W. D. Washington, N. D. November, 1917.)

No. 3785.

1. ARMY AND NAVY ⟸20—SELECTIVE SERVICE ACT—INDICTMENT—SUFFICIENCY.
An indictment alleging a failure to register as required by the Selective Service Act, etc., is not faulty because failing to set out in full the President's proclamation as to registration, where the statement with reference to the proclamation was sufficient to furnish the defendant notice and information required for every purpose.

2. WITNESSES ⟸293—PRIVILEGES—BEARING WITNESS AGAINST SELF.
Those provisions of the Selective Draft Act which require registrants to exhibit registration cards, etc., are not invalid, as violating Const. Amend. 5, providing that no person shall be compelled to be a witness against himself.

3. ARMY AND NAVY ⟸20—SELECTIVE SERVICE ACT—VALIDITY.
In view of the revolutionary practice of raising armies by draft, and of the provisions found in Const. art. 2, § 2, etc., and despite Amendments 5 and 13, *held*, that the Selective Service Act is valid; the government having power to raise armies by draft.

4. CONSTITUTIONAL LAW ⟸275(1)—INHIBITIONS—DEPRIVATION OF PROPERTY.
The Selective Service Act, providing for the drafting of registrants into the National Army, is not in violation of Const. Amend. 5, forbidding the deprivation of property without due process of law, for no one has, in a just sense, a property right in his office or employment.

5. CONSTITUTIONAL LAW ⟸62—SELECTIVE SERVICE ACT—DELEGATION OF LEGISLATIVE POWERS.
The Selective Service Act is not invalid, as delegating legislative powers to the President, for it merely grants power to him to regulate the execution of the law.

Peter Olson and Abraham Suransky were indicted for failing to register as required by the Selective Service Act, and for failing to exhibit their registration certificates when called upon by a police officer. On demurrer to the indictment. Demurrer overruled.

Clay Allen, U. S. Atty., and Ben. L. Moore, Asst. U. S. Atty., both of Seattle, Wash.

Mark M. Litchman, of Seattle, Wash., for defendant Olson.

Jacob Kalina, of Seattle, Wash., for defendant Suransky.

NETERER, District Judge. Indictments were returned against each of the above-named defendants in three counts: First, charging that defendant refused to present himself for registration, being

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within the ages of 21 and 31 years; second, charging that defendant "did willfully * * * fail * * * to present himself for registration and submit thereto as provided in the said act * * *"; and, third, charging that the defendant "did willfully * * * fail * * * to perform a duty required of him * * * in the execution of said act," by failing to exhibit his registration certificate when called upon by a police officer. Demurrers were filed to each count in the indictment: First, "that they do not state facts sufficient to constitute a crime;" second, "that the act is unconstitutional, contrary to the Constitution and Amendments 1, 2, 5, and 13." With the consent of all parties, the issues thus raised, being the same in both cases, were submitted together.

[1] The technical objection raised in argument that the indictment is faulty, because the President's proclamation provided for in Selective Service Act May 18, 1917, c. 15, 40 Stat. 76, is not set out in full in the indictment, is overruled. The statement in the indictment with reference to the proclamation is sufficient to give the defendant all the notice and information required for every purpose.

[2] Nor is the contention that the provisions of the act requiring a person to exhibit his registration card, as charged in count 3, in contravention of the Fifth Amendment, which provides that "no person shall be compelled to be a witness against himself." This provision is analogous with section 3239, Revised Statutes, Internal Revenue Act, as amended February 27, 1877, c. 69, 19 Stat. 248 (Comp. Stat. § 5962), which requires that all persons liable to a special tax "* * * shall place and keep conspicuously in his establishment or place of business all stamps denoting the payment of said special tax. * * *" This has long been recognized as within the sphere of proper legislation. Justice Field, in Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366, sustains the doctrine that Congress can undoubtedly prescribe rules for civil conduct to which persons within the jurisdiction must conform. This case, while cited by defendants, cannot afford comfort to them. The issues in that case and this are not analogous. The court, in that case, at pages 379, 380 of 4 Wall. (18 L. Ed. 366), said:

"The Legislature may undoubtedly prescribe the qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution. That this result cannot be effected indirectly by a state under the form of creating qualifications we have held in the case of Cummings v. State of Missouri, 4 Wall. 277, 71 U. S. 356 [18 L. Ed. 356]; and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress."

The issue in Cummings v. Missouri, supra, was whether, under the form of creating a qualification or attaching a condition, a state can in effect inflict punishment for a past act which was not punishable at the time it was committed, and it was held that it could not be done. Again, at page 380 of 4 Wall. (18 L. Ed. 366), the court, in Ex parte Garland, said:

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"This view is strengthened by a consideration of the effect of the pardon produced by the petitioner, and the nature of the pardoning power of the President. The Constitution provides that the President 'shall have the power to grant reprieves and pardons for offenses against the United States except in cases of impeachment. * * *' The power thus conferred is unlimited, with the exception stated. It extends to every offense known to law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions. Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities, consequent upon conviction, from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."

It will thus be seen that this case has no application.

[3] The next contention, that the Selective Service Act of May 18, 1917, is unconstitutional, is equally unfounded. The contention that the President has not power to raise and support an army by the selective method cannot be sustained. For the purpose of creating a strong national government, instead of a weak and ineffective confederation of states, the Constitution conferred upon the Congress the power:

"To provide for the common defense and general welfare," "to declare war," "to raise and support armies," "to provide and maintain a navy," "to make rules for the government and regulation of land and naval forces," "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by the Congress."

Article 2, § 2: "The President shall be commander-in-chief of the army of the United States, and of the militia of the several states, when called into the actual service of the United States."

Amendment 5: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger."

The distinction between the National Army and state militia is pointed out by Attorney General Wickersham, in his opinion of February 17, 1912 (29 Op. Attys. Gen. 322), in which he said:

"When the Constitution gives to Congress the power 'to raise and support armies,' and 'to provide for calling of the militia to execute the laws of the Union, * * *' and makes the 'President the commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into actual service of the United States,' it is speaking of two different bodies—the one the Regular Army, in the continuous service of the government, and liable to be called into actual service at any time, or in any place where an armed force is required; and the other a body for domestic service, and liable to be called into the service of the government only upon the particular occasions named in the Constitution."

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It is not contended that power to draft an army is expressly withheld, but that it is not expressly conferred. The liability of all inhabitants of the United States to be drafted into military service in time of war, it appears, cannot be questioned. It results from the sovereignty of the nation, and the power conferred upon Congress must carry with it the necessary means of carrying out the power. The validity of the draft acts of the Civil War in the North and the South was contested in the courts and sustained.[1]

Nowhere in the Constitution is there a limitation as to the means by which Congress shall raise an army, and, guided by the history of the times, the draft method of raising an army was not foreign to the Constitution makers or the "fathers of our country." The General Assembly of Virginia in May, 1777, passed a conscription act which had been drafted by Thomas Jefferson. Writings of Thomas Jefferson, vol. 2, page 123 (Ford's edition). In 1777 New York adopted a Constitution which declared:

"It is the duty of every man who enjoys the protection of society to be prepared, and willing, to defend it."

The Continental Congress, of February 26, 1778:

"Resolved, that the several states hereafter named are required forthwith to fill up by drafts from their militia, or any other way that may be effectual, their respective battalions of continental troops, according to the following arrangement, viz. [naming 11 states]. * * * That all persons drafted shall serve in the continental battalions * * * for the space of nine months; * * * and

"Resolved, that no prisoners of war or deserters from any alien army be enlisted, drafted, or returned to serve in the continental army."

2 Journals of Congress, 458–495.

At the session of August 31, 1778, appears the following:

"Letters of the 27th, from the Committee on Arrangements, that camp was ready, informing that a great spirit of enlistment had taken place among the soldiers who were brought into the army as drafts. * * *" 3 Journals of Congress, 38: 45 Wash. Law Rep. No. 25, June 22, 1917.

On November 15, 1777, delegates of the United States of America did agree to certain articles of confederation. These were approved by Congress July 9, 1778, and signed on behalf of nearly all the states during that year; the last to sign being Maryland, March 1, 1781. On September 17, 1787, by unanimous consent all states present adopted the Constitution. 1 U. S. Stat. at Large, 1–20. Into the very fabric of the Constitution of the United States was woven the sentiment of draft with relation to armies, and, no intimation against draft being expressed in the Constitution, the power is as plainly implied as though expressly given.

[1] McCall's Case, 5 Phila. 268, Fed. Cas. No. 8,669; Kneedler v. Lane, 45 Pa. 238; In re Spangler, 11 Mich. 298; In re Griner, 16 Wis. 423; Jeffers v. Fair, 33 Ga. 347; Barber v. Irwin, 34 Ga. 29; Ex parte Hill, 38 Ala. 429; Burroughs v. Peyton, 57 Va. 470; Lanahan v. Birge, 30 Conn. 438; Ex parte Coupland, 26 Tex. 386; Druecker v. Salomon, 21 Wis. 621, 94 Am. Dec. 571; Allen v. Colby, 47 N. H. 544; Parker v. Kaughman, 34 Ga. 136; Ex parte Bolling, 39 Ala. 609.

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Chief Justice Marshall, in McCulloch v. State, 4 Wheat. 406, at page 421 (4 L. Ed. 579), in discussing the power of incorporating a Bank of the United States (Act April 10, 1816, c. 44, 3 Stat. 266), said:

"Among the enumerated powers, we do not find that of establishing a bank or creating a corporation, but there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers and which requires that everything granted shall be expressly and minutely described."

At page 407 of 4 Wheat. (4 L. Ed. 579), he said:

"The Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind."

And again, on the same page:

"It is also in some degree warranted by their having omitted to use any restricted term which might prevent its receiving a fair and just interpretation."

Again:

"But it may, with great reason, be contended that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is to the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.

At page 409 of 4 Wheat. (4 L. Ed. 579), he said:

"*The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.*" (Italics are ours.)

All that was said in that case can with equal force and propriety be applied to the instant case. Mr. Justice Field, in Tarble's Case, 13 Wall. 397–408, 20 L. Ed. 597, said:

"The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any state authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, * * * the compensation he shall be allowed, and the service to which he shall be assigned."

In Jacobson v. Massachusetts, 197 U. S. 11, at page 29, 25 Sup. Ct. 358, at page 362 (49 L. Ed. 643, 3 Ann. Cas. 765), the court, in discussing the freedom or restraint of the individual on the part of the government, said:

"He may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense. Is it not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constituted authorities

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under the sanction of the state, for the purpose of protecting the public collectively against such danger?"

Nor can the Thirteenth Amendment give to the defendants any consolation. The defendants have called our attention to the Slaughter-house Cases, 16 Wall. 36, 21 L. Ed. 394, and quote from the opinion as follows:

"That a personal servitude was meant is proved by the use of the word 'involuntary,' which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word 'servitude' is of larger meaning than 'slavery.'"

On page 72 of 16 Wall. (21 L. Ed. 394) Mr. Justice Miller said:

"But what we do say, and what we wish to be understood, is that in any fair and just construction of any section or phrase of these amendments it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it."

The Supreme Court, in Butler v. Perry, 240 U. S. 328, 36 Sup. Ct. 258, 60 L. Ed. 672, in passing upon the validity of an amendment to a state law requiring able-bodied male persons between certain ages, resident in the state for a fixed time, to work on the roads and bridges a prescribed time each year, said:

"This amendment was adopted with reference to conditions existing since the foundation of our government, and the term 'involuntary servitude' was intended to cover those forms of compulsory labor akin to African slavery, which in practical operation would tend to produce like undesirable results. It introduced no novel doctrine with respect to services always treated as exceptional, and certainly was not intended to interdict the enforcement of those duties which individuals owe to the state, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, and not the destruction of the latter by depriving it of the essential powers."

[4] Nor are the defendants deprived of any rights granted by the Fifth Amendment. In Taylor v. Kercheval (C. C.) 82 Fed. 499, the court said:

"* * * And it is clear that complainant has in no just sense a property right in his office or employment. * * *"

[5] Nor does the Selective Service Act delegate legislative power to the President. It merely grants power to regulate the execution of the law, and is therefore not open to attack. In re Kollock, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813. The Circuit Court of Appeals of the Second Circuit, in Angelus v. Sullivan et al., 246 Fed. 54, 158 C. C. A. 280, sustained the constitutionality of the Selective Service Act.

What has been said disposes of all contentions raised, and an order may be taken overruling the demurrers.

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UNITED STATES v. GOULED et al.

(District Court, S. D. New York. August 31, 1918.)

1. INDICTMENT AND INFORMATION ⟸121(5)—"BILL OF PARTICULARS."
The office of a "bill of particulars" is to advise the court, and more particularly the defendant, of what facts he will be required to meet; and when a bill of particulars is made and served, it concludes the rights of all parties, and the prosecution must be confined to the particulars specified.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill of Particulars.]

2. INDICTMENT AND INFORMATION ⟸121(2)—BILL OF PARTICULARS—GRANT OF MOTION FOR.
Motion for a bill of particulars should be allowed only where charges are so general that they do not advise defendant of specific acts of which he is accused, and a bill of particulars should never be granted where it will unduly limit the evidence of the prosecution.

3. INDICTMENT AND INFORMATION ⟸71—PARTICULARITY.
While the rules of criminal procedure require that one accused shall be fully apprised of the charge against him, yet the object is to convict the guilty, as well as to shield the innocent, and no impracticable standard of particularity should be set up.

4. INDICTMENT AND INFORMATION ⟸121(2)—BILL OF PARTICULARS—RIGHT TO.
It is a settled rule that, while an indictment may be sufficient in itself, if it charges an offense in the words of the statute, it is not sufficient as against a motion for bill of particulars, but the court, upon motion, may in its discretion require the pleader in such case to descend to particulars.

5. CONSPIRACY ⟸43(1)—INDICTMENT—PARTICULARITY OF ALLEGATIONS.
There is a distinction between the particularity required in the allegation of a conspiracy and that where a substantive offense is charged; less being required in the first case.

6. CONSPIRACY ⟸43(10)—INDICTMENT.
Indictment charging a conspiracy to defraud the United States, between an army officer, defendant, and another, averring that conspiracy contemplated contracts should be submitted to and passed on by the army officer, etc., *held* to sufficiently inform the defendant of the facts.

Felix Gouled and others were indicted for conspiracy to defraud the United States. On motion by defendant Gouled for a bill of particulars. Motion denied.

See, also, 253 Fed. 242.

Francis G. Caffey, U. S. Atty., and Joseph A. Burdeau, Asst. U. S. Atty., both of New York City.

Martin W. Littleton, of New York City, for defendant Gouled.

Max Steuer, of New York City, for defendant Podell.

HUTCHESON, District Judge. The defendant Felix Gouled has moved for an order for a bill of particulars. The government insisting on the first count only, this opinion is based on that count alone.

[1] "The office of a bill of particulars is to advise the court, and more particularly the defendant, of what facts, more or less in detail, the defendant will be required to meet, and the court will limit the government in its evidence to those facts, so set forth." United States

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v. Adams Express Co. (D. C.) 119 Fed. 240. When a bill of particulars is once made and served, "it concludes the rights of all parties to be affected by it, and he who has furnished the bill of particulars under it must be confined to the particulars he has specified as closely and effectually as if they constituted essential allegations in a special declaration." Commonwealth v. Giles, 1 Gray (Mass.) 466, cited and approved in Dunlop v. United States, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799. Refusal of bill of particulars rests in the sound discretion of the court. Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Dunlop v. United States, supra; Knauer v. United States, 237 Fed. 13, 150 C. C. A. 210 (C. C. A.).

[2] This being the purpose and scope of the bill prayed for, and the duty and function of the court, it is clear that the motion should only be allowed where the charges of an indictment are so general that they do not advise the defendant of the specific acts of which he is accused, and the court feels that the bill should be furnished him, so that he may properly prepare his defense. Kettenbach v. United States, 202 Fed. 377, 120 C. C. A. 505. It is equally clear that the bill of particulars should never be granted where its result would be to limit the government unduly, by confining its evidence so narrowly as that it may shut out proper and material evidence of which the government may not now be advised.

[3] Whatever may now be the rule in other courts, or whatever may have been the rule in the courts of the United States, it is certainly the present rule that the trial of a criminal case is not a play of thrust and parry, but is the functioning of the machinery of justice to fairly determine the guilt or innocence of an accused, and only those requirements should be made of prosecution and of defense which fairly and properly, in a reasonable and common-sense way, will produce in a court of justice a full and complete disclosure of the facts upon which guilt or innocence rests, with as little as possible of the technicalities and the dry rules which hamper and impede the course of justice. As was well said by Mr. Justice Brown in Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830:

"While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty, as well as to shield the innocent, and no impracticable standards of particularity should be set up, whereby the government may be entrapped into making allegations which it would be impossible to prove."

Again, in Mark Yick Hee v. United States, 223 Fed. 733, 139 C. C. A. 262 (C. C. A. 2d Circ.), Rogers, J., speaking for the court, says:

"Under the Constitution of the United States a person accused of a criminal offense is entitled to be informed of the nature and cause of the accusation against him. There must therefore be such particularity of allegation in an indictment as will enable the accused to understand the charge which is preferred and to prepare his defense. But the principle is well established that, while all the elements of the crime charged, or facts necessary to make out the offense, must be fully and clearly set out, it is not necessary to allege matters in the nature of evidence, or to set out the means by which the crime is accomplished, unless the act is one which may be criminal or not according to the circumstances under which it is done."

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[4-6] In what has been said or will be said there is not the slightest intention to avoid the force of the settled rule that it is not sufficient to charge the commission of an offense in the words of the statute, but that the pleader must descend to particulars. This is conceded without in any manner diminishing the force of the fact that the indictment in this case is of itself sufficient, and that no bill of particulars is necessary to apprise the defendant, so as to enable him properly to meet the government's case and prepare his own defense. The indictment is not only not wanting in specification, but is in reality fuller and in more detail than was required of the government, and, if subject to any criticism, it is that of much greater fullness than the nature of the offense charged requires. As was said by Thomson, D. J., in United States v. United States Brewers' Ass'n (D. C.) 239 Fed. 165, ruling on demurrers to an indictment:

"It must be borne in mind that the government has not charged as a substantive offense that the defendants actually within the time set forth made money contributions in connection with the elections set forth in said indictments. On the contrary, they are charged only with conspiracy to commit that offense. In such case, the authorities all show that the offense which is intended to be committed as a result of the conspiracy need not be described with the particularity required in an indictment in which such matter was charged as a substantive crime. * * * The decisions agree that certainty to a common intent is all that is necessary. The conspiracy or unlawful combination is the gist of the offense, and certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy. Williamson v. U. S., 207 U. S. 425 [28 Sup. Ct. 163, 52 L. Ed. 278]. The indictment is sufficient if it advise the defendants of the nature and cause of the accusations against them, with such particularity as to enable them to prepare the defense. The elements which constitute the crime are facts which must be fully and clearly set out. But matters in the nature of evidence need not be alleged, nor the means by which the crime was to be accomplished, unless the act is one which may or may not be criminal according to the circumstances under which it is done."

In the case of Crawford v. United States, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392, a conspiracy case, the court held that it was not necessary to set out the particular manner in which the defendants were to commit fraud upon the government, but that the indictment was sufficient where it set out an agreement to defraud the United States, and facts showing that the parties charged were in a position (in that case as in this in the employ of the government), to commit fraud, followed, of course, by the allegation of the overt act or acts.

There is another element which always enters into the consideration of motions for bills of particulars in matters of this kind, and that is, where the offense charged is one which is grounded upon the acts and the conversations of the party charged, and with and of which he must be in position to have as much information as anybody could have as to whether they did or did not occur, it is never essential to set out with particularity the things which he is supposed to have said or done. As was said in the Pierce Case (D. C.) 245 Fed. 890, on motion for bill of particulars:

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"It is not to be presumed the United States would offer false or perjured testimony on the trial, and, in view of the nature of the case and of the charges made, it may be assumed the defendants know when and where they made speeches, if any, solicitations, if any, and the nature and character thereof, and also the names of the persons solicited, if any particular person was solicited."

The offense charged in this case being conspiracy to defraud the United States government, entered into between an officer in the United States army, the defendant Felix Gouled, and another, and the allegations of the indictment charging specifically that the conspiracy provided for its accomplishment the procuring of contracts which were to be submitted to and passed upon by Vaughan, the defendant officer, he at the time having a pecuniary interest in the same through the arrangements to be made in pursuance of the conspiracy, and the indictment further charging that the said Vaughan was to receive money "with the intent of influencing his decision and action, and that of other officers in question, in the consideration and acceptance, the letting and awarding contracts for the manufacture of garments for the United States army," the criticism to which the indictment is subject is not that of too little, but perhaps of too great, particularity. Certainly it would have been a sufficient indictment, had it merely alleged an agreement that Vaughan was to obtain an interest in garment contracts which it was his duty to pass upon as a representative of the government. The fact that the indictment, in much greater detail than the law requires, sets up the procedure which the conspirators agreed to adopt, and with far greater minutiæ than necessary sets out the series of overt acts by which the conspiracy was to be effected, cannot enlarge the rights of the defendant.

Certainly it cannot be claimed that, because the government has been more liberal than necessary in laying its indictment, it must therefore disclose its entire evidence in advance of the trial; but this would be in effect what the court would be holding, if the motion for the bill were sustained.

The motion will be in all things denied.

UNITED STATES v. GOULED et al.

SAME v. GOULED.

(District Court, S. D. New York. September 16, 1918.)

1. INDICTMENT AND INFORMATION ⟸196(1)—MOTION TO QUASH—WAIVER.
After a defendant has pleaded to the indictment, subsequently moved for a bill of particulars, and the case has been set for trial, the court will not entertain a motion to quash on grounds personally known to defendant from the first.

2. CRIMINAL LAW ⟸627½—INSPECTION OF MINUTES OF GRAND JURY.
Examination by the court of grand jury minutes of proceedings upon which an indictment was returned is justified only in extreme cases, where it is shown by positive allegation that the indictment was the result of fraud or corruption, or of caprice, and was not the expression of a fair judgment on the facts.

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3. INDICTMENT AND INFORMATION ⇐137(3)—MOTION TO QUASH—GROUNDS—REGULARITY OF PROCEEDINGS OF GRAND JURY.
The use in evidence before the grand jury of papers seized under a valid search warrant is not ground for quashing the indictment.

4. SEARCHES AND SEIZURES ⇐7—EXEMPTIONS—WAIVER.
The purpose of the constitutional provision against unreasonable searches and seizures is to protect the citizen against arbitrary and tyrannical power, and a defendant may waive the manner and method of acquisition of his papers, and thereupon the constitutional objection is removed.

Criminal prosecutions by the United States against Felix Gouled, Aubrey W. Vaughan, and David Podell, and against Felix Gouled. On motion to quash indictments. Denied.
See, also, 253 Fed. 239.

Francis G. Caffey, U. S. Atty., and Joseph A. Burdeau, Asst. U. S. Atty., both of New York City.
Martin W. Littleton, of New York City, for defendant Gouled.
Max Steuer, of New York City, for defendant Podell.

HUTCHESON, District Judge. This is a motion that the court examine the stenographer's minutes of the evidence taken before the grand jury which returned the indictments in this cause, and that said indictments be quashed, on the ground that, as claimed by affidavit on information and belief supporting the motion, certain private papers belonging to the defendant had been unlawfully seized and detained by the United States district attorney, and had formed the main, if not the sole, basis of the action of the grand jury. Of the truth of this charge the court is asked to satisfy itself by an examination of the minutes, and, upon becoming so satisfied, to quash the indictments. On the part of the United States it is urged that the motion should be denied, because not timely, and with this view of the matter I concur.

[1] Action upon a motion to quash rests in the sound discretion of the court, and this case is clearly one in which that discretion should be exercised against the motion. The record in this case shows that the papers, the use of which is made the basis of this motion, were seized as the result of two separate seizures. Both of these seizures were made under search warrants lawfully and properly issued and executed. See the opinion of Judge Manton in United States of America v. Felix Gouled et al., 253 Fed. 770. On July 22, after the papers had been seized, the defendant admitted that he knew the government was in possession of his books and papers, and further stated:

"If there is anything the government wishes to know, my papers are all here. After my search in my business two days later, I came to see Dr. De Mund with my papers (Dr. De Mund being special agent). My package of papers to show Dr. De Mund, to show him all the details; my books and all my papers are open to the government."

The grand jury returned indictments on July 30, and on July 31 defendant, being represented by counsel, pleaded to the indictments, entering the plea of not guilty, and reserving 10 days to withdraw

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his plea should he be so advised. The time for such action expired on August 10, 1918, but neither at that time, nor at any later time, was it sought by him to withdraw his plea. On the contrary, on September 3, 1918, a motion for bill of particulars was filed, and neither in this motion, nor in any argument upon it, was it suggested that there was any fault to be found with the indictment, or the proceedings out of which it grew, or that the constitutional rights of the defendant had been invaded, though at that time the facts now alleged were all within the personal knowledge of the defendant. It is further a pertinent fact that at the time of the argument on the motion for bill of particulars, this case was in open court set for trial for the 17th of September, and, though the motion for bill of particulars was shortly thereafter overruled, no suggestion was made at that time, nor until this the 16th day of September, the day before the trial, that any other relief in the matter of the indictment was sought or asked than that included in the request for bill of particulars, which request accepted the basic indictment and merely asked an elaboration of the particulars of its charges. Under these circumstances, that the right of the defendant, if it existed, to move to quash the indictment, has been waived, and that the motion should be held too late, needs citation of but few authorities. Matters v. United States, 244 Fed. 736, 157 C. C. A. 184; United States v. Perlman (D. C.) 247 Fed. 158, and cases cited.

[2] While these considerations serve to dispose of the motion, I think it not inappropriate to say that it seems clear that, had the motion been timely presented, it should also have been overruled. As to that request in it that the court cause the minutes of the grand jury to be examined, I think it clear that Judge Manton, in United States v. Perlman (D. C.) 247 Fed. 158, certainly goes far enough in setting the limits to the exercise of the right of judicial review of the action of the grand jury, and I have no disposition to extend them. While I have no difficulty in declaring that in extreme cases of positive allegations or fraud or corruption, or positive allegations that no evidence of any kind had been admitted, and therefore the indictment was the result of caprice, and not the expression of a fair judgment on the facts, it would not only be proper, but incumbent upon the court, to examine the grand jury minutes, so as to protect the citizen from oppression, I think the policy of the law is unalterably opposed to fishing expeditions into grand jury minutes, conducted by the court at the request of defendants on affidavits upon information and belief, and there is no reason shown in this case why such an expedition should be entered on.

[3] Should, however, it be admitted that the grand jury did consider some of the papers seized, there would still be no ground for quashing the indictments, first, because the record made on the hearing of the motion before Judge Manton showed that there were many papers seized which could not in any event have a claim of privilege asserted for them, and it does not appear in any way that the grand jury did not have before it ample competent matter. Further, the papers having been seized under a valid search warrant, their

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use could not be made the basis of an attack upon the grand jury indictment, unless the fundamental point is conceded that a search warrant could not issue in such cases. I think the contrary is clearly established by the authorities and upon reason.

With reference to the claim on the motion of the constitutional right of the defendant, which protects him against being compelled to give evidence against himself, it is sufficient to say that that question will be decided when reached, as no invasion of that right could occur until the defendant was put upon the stand on the trial of the cause, or until some use was attempted to be made on the trial which clearly contravened the Constitution.

[4] There is still another ground on which this motion should be overruled, and that is the ground of consent and acquiescence. While it is of the highest importance that the right of the individual guaranteed by the Constitution should be in no manner invaded, it is of equal importance that the claim for constitutional protection be viewed in the light of reason and so applied. As was said by Judge Batts, in Whitehead v. United States, 245 Fed. 392, 157 C. C. A. 554:

> The defendants "are entitled to be tried in accordance with law. They are entitled, however, to no more than a trial by law as the law is. They cannot invoke the law as it might have been, if the tendency to permit absurd technicalities to defeat the purposes of the law had not been checked by persistent public protest and stopped by tardy, but wise, legislation."

The purpose of the constitutional provision invoked was to protect the citizen against arbitrary and tyrannical power, and not to furnish him a shield with which to shift according to the different aspect in which his case presented itself to his mind as time went on. And so it is recognized clearly that, while the law protects against unlawful seizures and searches, the defendant may waive, if he thinks it to his advantage, or for any reason, the manner and method of the acquisition of his papers, and thereupon the constitutional objection is removed. In Linn v. United States, 234 Fed. 543, 148 C. C. A. 309 (opinion by Circuit Court of Appeals for the Seventh Circuit), the papers had been seized by a post office inspector in violation of the right of Linn to protection against unlawful search and seizure. The court said:

> "It appears from the uncontradicted testimony of witness [the inspector] that he showed these letters to Linn and asked him if he * * * might have them, and that Linn said he might. Under these circumstances, no question of improper search and seizure can be said to arise."

It is familiar law that a man waives even his protection against incrimination by voluntarily testifying, and this whether he knew of the principle or not. See United States v. Bryant (D. C.) 245 Fed. 682.

For all of the above reasons, the motion should be in all things denied.

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EVERGLADES DRAINAGE LEAGUE et al. v. NAPOLEON B. BROWARD DRAINAGE DIST. et al.

(District Court, S. D. Florida. July 29, 1918.)

1. COURTS ⟸299—FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION—PLEADING.
Although bill to restrain collection of drainage tax, imposed pursuant to Laws Fla. 1917, c. 7430, § 7, did not specifically attack section 7, where it contained allegations that said section deprived complainants of their property, without due process of law, it raised a federal question, vesting federal court with jurisdiction, provided matter in controversy exceeded $3,000, exclusive of interest and costs.

2. COURTS ⟸329—FEDERAL COURTS—JURISDICTION—AMOUNT—PLEADING.
In suit to restrain collection of drainage tax, complaint alleging generally that amount exceeds $3,000, and making Exhibit A, attached to bill, a part of the same, and praying reference, *held* to sufficiently show that amount in controversy was over $3,000, exclusive of interest and costs, so that federal court had jurisdiction.

3. EQUITY ⟸152—EXHIBITS—INCORPORATION BY REFERENCE.
Making exhibit attached to bill a part thereof, and praying reference, had the same effect as though the facts set out in the exhibit were alleged in the body of the bill.

4. COURTS ⟸326—FEDERAL COURTS—JURISDICTION.
Where bill showed jurisdictional amount in controversy in B. county, between one of complainants and all defendants, except tax collector of D. county, joinder of other parties complainant and said tax collector defendant ceases to be a jurisdictional question, and bill will not be dismissed for want of jurisdiction of federal court.

5. COURTS ⟸347—EQUITY RULES—MULTIFARIOUSNESS.
In suit by voluntary association of landowners against a drainage district and the respective tax collectors of two counties, to restrain collection of drainage tax imposed pursuant to Laws Fla. 1917, c. 7430, contention being that act is in violation of Const. U. S. Amend. 14, bill *held* not multifarious, in view of equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix), as to one or more of a class suing or defending for the whole; each complainant being interested in the subject-matter, but in different amounts, and each defendant being connected, though differently, with the whole dispute.

6. EQUITY ⟸147—MULTIFARIOUSNESS.
That complainants prayed for relief to which they were not entitled, or alleged facts not material to relief, would not make bill multifarious.

7. STATUTES ⟸3—ENACTMENT—LEGISLATURE DE FACTO.
That there had been no compliance with Const. Fla. art. 7, §§ 3–5, which requires Legislature every 10 years to apportion representation, would not make invalid laws passed by a subsequent Legislature; a Legislature regularly organized and recognized as the existing Legislature being the "Legislature de facto."

8. DRAINS ⟸13—RECLAMATION—SUBDISTRICTS—AUTHORITY TO CREATE.
It is within the authority of the Legislature to create a subdistrict for reclamation of a larger district theretofore created.

9. COURTS ⟸351½—FEDERAL PROCEDURE—MOTION TO DISMISS—FUNCTIONS.
A motion to dismiss under equity rules takes place of a demurrer, and admits the facts alleged.

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10. DRAINS ⟸2(1)—STATUTE—VALIDITY.
Laws Fla. 1917, c. 7430, does not violate Const. Fla. art. 6, § 7; it not creating the office of drainage supervisors for a greater period than four years.

11. DRAINS ⟸88—COLLECTION OF TAXES—FAILURE TO MAKE DELINQUENT RETURNS.
That drainage supervisors, instead of having tax collectors return books as delinquent, authorized books to be retained and tax continued to be collected, would not invalidate tax, although such action was unauthorized.

12. DRAINS ⟸69—TAXES—VALIDITY.
That uniform acreage tax of 25 cents per acre, instead of 24½ cents, imposed by drainage board, pursuant to Laws Fla. 1917, c. 7430, § 7, would produce a surplus over estimated expense, would not invalidate tax.

13. EQUITY ⟸264—MOTION TO STRIKE—SUFFICIENCY.
Motion, undertaking to reach certain parts of bill by setting out effect of portions to which it refers, will not be considered, as court cannot be required to go through the entire pleading to find what portion is attacked by motion to strike.

In Equity. Bill by the Everglades Drainage League and others against the Napoleon B. Broward Drainage District, and A. B. Lowe and others, as supervisors thereof, W. O. Berryhill, Tax Collector of Broward County, and R. B. McLendon, Tax Collector of Dade County. On motion to dismiss bill and to dismiss certain portions of the bill. Motion to dismiss bill denied, and motion to dismiss portions of the bill granted in part and denied in part.

Clair D. Vallette, of Washington, D. C., for complainants.

Glenn Terrell, of Tallahassee, Fla., special counsel for Internal Improvement Board.

Atkinson & Burdine, of Miami, Fla., for defendants.

CALL, District Judge. This cause came on to be heard before Circuit Judge WALKER, and District Judges CALL and CLAYTON, at Birmingham, Ala., on the application of the complainants for an interlocutory injunction under section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, § 1243]), restraining the board of drainage commissioners of the Napoleon B. Broward drainage district and the tax collectors of Broward and Dade counties from collecting the uniform acreage tax of 25 cents per acre imposed by the board of drainage commissioners of said drainage district, pursuant to section 7 of chapter 7430 of the Acts of the Florida Legislature, approved May 26, 1917.

The bill was filed by the Everglades Drainage League, a voluntary association claiming more than 1,000 members, owning lands in the Everglades Drainage District, a certain Florida corporation, for themselves and all others in like interest. They claim to own lands included in Everglades patent No. 137, issued by the United States to the state of Florida, pursuant to the grant of the swamp and overflowed lands act of 1850. which lands are included in the Everglades drainage district, established by the Legislature of said state, for the pur-

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pose of reclaiming them, and also within the limits of the Napoleon B. Broward drainage district; that a majority of the members of the league acquired their lands prior to 1911, by purchase for value.

The bill then sets out the substance of chapter 7430, Acts of the Florida Legislature, and the fact that the board of drainage commissioners of the Broward drainage district met and organized by the election of one of its members as chairman and levied an acreage tax of 25 cents per acre on the lands within the district. It then proceeds to set out certain provisions of the Constitution of Florida, as to the apportionment of the Senate and House of Representatives, and alleges a failure of the Legislature to obey these provisions, and that such failure constitutes such Legislature an illegal body, whose acts are not entitled to respect and obedience, except in such matters where the court decides them to be just and equitable, and that taxes levied by such illegal body is a denial of equal protection of the laws, and a deprivation of property without due process of law.

It further alleges that the uniform tax of 25 cents per acre was levied before any estimate of the expenses of survey, etc., provided for by the act, which expenses were to be paid by said levy; that subsequent to said levy an estimate was made, and thereafter a resolution was adopted by said board, ratifying and approving said levy, and books containing the description of the lands in said Broward drainage district were prepared and certified according to the act, and filed with the tax collectors of Dade and Broward counties for the collection of said acreage tax, and that said tax collectors are proceeding to collect the same; that persons owning lands in said district have paid said tax, some under protest and some without protest; that under said chapter 7430 said tax is made a lien upon the lands upon which it is assessed.

Thereupon the bill sets out certain proceedings of the board of commissioners in the levy of the uniform acreage tax of 25 cents per acre, and extensions of the time for payment of the same, and claims all such actions illegal and the tax void.

The bill next claims that the term of office created by the Legislature for Kyle, chairman of the board, is longer than four years, and therefore Kyle is not a member of the board, and the attempted organization of June 15, 1917, was illegal and void, and, the time having passed for such organization, no legal board exists, and the levy of the tax is illegal.

Section III of the bill alleges the passage of the swamp and overflowed lands act by Congress (Act Sept. 28, 1850, c. 84, 9 Stat. 519 [Comp. St. 1916, §§ 4958–4960]); that the Legislature by appropriate legislation vested the title to said lands in the trustees of the internal improvement fund in trust, for the purposes of reclaiming said lands; that in 1905 the trustees, for the purpose of selling said lands, adopted a map or plat of the same, by projecting the township and section lines from the surveyed lands surrounding the Everglades, and had the same recorded in the counties of Dade and Palm Beach; that in 1911, upon actual survey of the lands, a different location was given to the lands, although the same numbers and descriptions were re-

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tained; that complainants bought lands by the first maps and by the adoption of the maps of 1911 they are unable to pay taxes on the lands owned by them.

Section III then proceeds to allege the adoption of legislation creating the Everglades drainage district for the purpose of reclaiming the entire body of the Everglades lands, the creation of the board of commissioners of the Everglades drainage district, and enumeration of their duties and powers, and the right to levy taxes for the purpose of carrying out the purposes and duties imposed; that all the lands included in the Napoleon B. Broward drainage district are included within the boundaries of said Everglades drainage district; that the taxes levied by reason of the acts prior to chapter 7430 are made liens on all of said lands; that in all deeds made by the trustees to purchasers, between 1907 and 1911, reservations for rights of way, canals, and other works necessary for the reclamation of said lands were contained; that the taxes assessed under chapter 7430 are in part to pay damages and costs of rights of way already reserved, and are therefore the taking of property under the guise of taxation—a taking of property without just compensation, within the Fourteenth Amendment of the Constitution of the United States, and this denies to the owners of the lands within the Broward drainage district the equal protection of laws, and deprives them of property without due process of law; that said Everglades were appropriated to drainage purposes by the United States and state of Florida, and was a trust, and that 1,500,000 acres of said lands are still held by the trustees; that the trust property is not exhausted; that the levy and assessment of the drainage taxes and liens created as provided in the acts creating the Everglades district constitute a second appropriation, nullifying the first appropriation, although the first is not exhausted; that by chapter 7430 there is a third appropriation for the same purpose; that this act is an unwarranted abuse of legislative power, and is not due process of law, etc.

Section IV then proceeds to set out that the trustees, under the act establishing the Everglades drainage district and acts amendatory thereof, were carrying out the reclamation of said lands, and that by reason of the sale of lands by the trustees after undertaking their reclamation, and the purchase of said lands by persons between 1905 and 1911, and the payment of purchase money applicable to such project, said purchasers and their grantees acquired a vested right in and to the application of said lands and proceeds of sale to the drainage and reclamation of their lands.

Section V alleges that the board of supervisors have incurred debts and liabilities to a large amount, and have received large amounts of said uniform tax paid under protest, and other large amounts paid not under protest, which amounts ought in justice to be returned to the parties paying same, because said uniform tax is illegal; that the board has no means of paying the liabilities, except this uniform tax, and therefore a receiver ought to be appointed to pay the liabilities and return the balance to the parties paying said tax in the proportion the same was paid.

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Then follows the prayer, section VI, praying for 11 specific reliefs: That Kyle was not a member of the board; that said board was illegally organized, and all proceedings had under the attempted organization are void; that the levy of the uniform tax before the estimate of the amount necessary was void; that the assessment of said uniform tax was excessive, without warrant of law, and void; that the uniform tax was assessed upon lands wrongfully described, and is void; that the uniform tax was levied for the same purposes as the Everglades drainage district taxes, and is void; that sufficient funds are on hand and available to carry out the purposes for which the uniform tax is assessed, and said tax is void; that the levy of all Broward drainage district taxes are illegal and void; that all forfeitures of lands within said last-named district by reason of the nonpayment of said taxes are void; that all deeds, tax certificates, and other evidences of unpaid district taxes are void; and, lastly, that the matters complained of in the bill deny the landowners in said district the equal protection of the laws and deprive them of property without due process of law.

Section VII prays in addition that said chapter 7430, and the taxes and liens authorized thereby, and the proceedings of the board of supervisors, may be by the order of this court declared null and void, and the defendants be enjoined from proceeding to levy and collect all taxes against the complainants, and others similarly situated; that the uniform taxes paid under protest be restored to the persons paying the same; that the legal debts of said district and the board be paid, and the balance, if any, be distributed to persons who paid same without protest; that a receiver be appointed for all moneys and property of said board and account for the same to this court; that each of the defendants be restrained from collecting the uniform tax; that the defendants be restrained from forfeiting or selling lands within the district or issuing tax certificates, etc., for the nonpayment of taxes; that a temporary restraining order be issued against the defendants, enjoining them from executing any of the provisions of chapter 7430, and upon final hearing said injunction shall be made permanent.

April 26th application was made for a temporary restraining order. May 1st a motion to dismiss the bill was made by the defendants on various grounds. They may be succinctly stated as follows: (1) This court is without jurisdiction, because the jurisdiction is based upon a federal question being involved, and the bill shows no federal question. (2) That the bill is multifarious, in seeking relief against the defendants for distinct matters and causes of action.

The motion seeks dismissal of certain portions of the bill: (1) That portion of the bill which seeks to have the court declare a part of the uniform acreage tax void, because no part of the tax was tendered, and does not offer to do equity. (2) That part of the bill seeking to have this court declare W. C. Kyle not a member of the board, and praying to have him removed from office. (3) That part of the bill seeking to have a receiver appointed for the said drainage district. (4) That part of the bill assailing the act, because the Bro-

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ward drainage district is contained within the Everglades drainage district, and that sufficient funds are on hand to complete the work outlined by the prior acts. (5) Paragraph II of the bill, because complainants seek to have a law declared invalid because of irregularities in proceedings of the board. (6) Paragraph III of the bill, because no federal question is involved, and complainants cannot be heard to complain of the matters therein set out. (7) Paragraph IV of the bill, because the Legislature acted within its powers in the creation of the drainage district. (8) Certain portions of the bill, setting out the constitutional provisions of the state of Florida, bearing upon the representation and apportionment of the Senate and House of Representatives.

As to the application of the complainants for a temporary restraining order, what was said on the application for an interlocutory injunction in this case applies to and disposes of the application. Equity rule 73 (198 Fed. xxxix, 115 C. C. A. xxxix).

[1] I now come to the motion to dismiss the bill. Is there a federal question raised? The bill, while voluminous, containing many matters, still a careful study of it shows that, while the pleader's main idea was to have the court declare the entire act unconstitutional, without any specific attack upon section 7, under which the tax was levied, does contain allegations that said section of the act deprives them of their property without due process of law. The Supreme Court of Florida, in a recent case, decided that said section was unconstitutional and the taxes levied thereunder void. A. C. Redman v. W. C. Kyle et al., as Board of Supervisors of Broward Drainage District (not yet officially reported) 80 South. 300. This decision was based upon the want of notice to the taxpayer by reason of the restriction of defenses contained in section 21 of the act. The tax authorized by this section 7 is therefore violative of the Fourteenth Amendment to the Constitution of the United States, as well as the Constitution of the state of Florida, and I think is a federal question, and vests this court with jurisdiction, provided the matter in controversy exceeds $3,000 in value, exclusive of interest and costs.

[2-4] The bill alleges generally that the amount in controversy exceeds $3,000, exclusive of interest and costs, and makes Exhibit A, attached to the bill, a part of the same, and prays reference. This has the same effect as though the facts set out in Exhibit A were alleged in the body of the bill. By this exhibit the Everglades Sugar & Land Company own some 17,000 acres of land in Broward county, in the confines of the Broward drainage district, upon which the tax of 25 cents per acre was assessed. This exhibit therefore shows the jurisdictional amount in controversy in Broward county between one of the complainants and all the defendants, except the tax collector of Dade county. This being so, the joinder of the other parties complainant and the tax collector of Dade county as defendant ceases to be a jurisdictional question, and the motion to dismiss the bill for want of jurisdiction will be denied.

[5, 6] The next general ground for the dismissal of the bill is that it is multifarious. A bill is not multifarious, if it be single as to

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the subject-matter and object thereof and the relief sought, if all the defendants are connected, though differently, with the whole subject of dispute. In the instant case the main object of the bill is to have chapter 7430 declared violative of the Fourteenth Amendment to the Constitution of the United States, and the tax authorized therein void. Each of the complainants are interested in the subject-matter, although in different amounts, and each of the defendants are connected, though differently with the whole dispute. Rule 38 of the Equity Rules (198 Fed. xxix, 115 C. C. A. xxix) provides that when the question is one of common or general interest to many persons, constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole. The bill in this case is filed by the complainants representing a class under said rule. I do not understand that, because the complainants may pray for relief to which they may not be entitled, the bill thereby is made multifarious; nor would the allegations in the bill of facts that may not be material to the relief that will be granted have this effect. I am therefore of opinion that the motion to dismiss on the ground that the bill is multifarious is not well taken.

Motions were made to strike certain portions of the bill. These portions are not specifically pointed out, except as to paragraphs II, III, and IV, and pages 18 b, c, and d of the bill.

[7] Taking up the first motion to strike pages 18, c and d, these pages are amendments to the first paragraph of the bill, and set out sections 3, 4, and 5 of article 7 of the Constitution of the state of Florida, which require the Legislature every ten years to apportion the representation and for taking a census, and then alleges the refusal of the Legislature to do this, and therefore this refusal to obey this constitutional requirement makes void the taxes levied pursuant to laws passed by a Legislature elected subsequent to such refusal. If this contention is correct, it would upset all the laws passed subsequent to 1897. The statement of the effect of the court undertaking to declare invalid a law passed by a Legislature regularly organized and recognized as the existing legislative body by the executive of the state, because a census had been taken, but no apportionment of representation made, seems to me sufficient to condemn the contention of the bill. But the Legislature passing chapter 7430 was the Legislature de facto, and its acts are therefore binding. This I understand from the authorities to be the law, and no authority contra has been cited to me. The motion to strike pages 18 b, c, and d will be granted.

Taking up next the motion to strike paragraph IV of the bill, this paragraph, as I understand it, contends that the state took the swamp and overflowed lands under the act of 1850, with a trust affixed, to use these lands and the proceeds of sale for the purpose of reclaiming them, and in the execution of the trust conveyed them to the trustees of the internal improvement fund; that subsequently the Everglades drainage district was formed, and a board of commissioners appointed therefor. Power to levy taxes, etc., was granted for the purpose of reclaiming the lands, and lien of such taxes de-

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clared; that subsequent to the formation of this Everglades drainage district chapter 7430, creating the Napoleon B. Broward drainage district, was passed. The boundaries defined, and the powers given for the purpose of reclamation, and the lands contained in this last-named district are included also in the Everglades drainage district.

There seem to be two main contentions in this paragraph: (1) That there is a trust attaching to these lands under the act of 1850, that they and the proceeds of the sale of same shall be devoted to their reclamation until all shall have been exhausted; and (2) that, the Everglades drainage district having been established, it was not in the power of the Legislature by a special act to carve out of the territory covered by the Everglades drainage district the Broward drainage district. The first contention seems to be authoritatively decided against the complainants' contention, by the case of Hagar v. Reclamation District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569. The claim of the complainants that as citizens of the United States they attempt to enforce a law of the United States and not the grant is without merit, it seems to me.

[8] The second contention is, it seems to me, equally without merit. Under the authorities, as I view them, it is within the authority of the Legislature to create a subdistrict for reclamation of a larger district theretofore created. The distinction between ordinary taxes levied for general governmental purposes and assessments for improvements has been pointed out in a number of cases. It is for the Legislature to decide the question of the necessity for such improvements and the area and manner of making same, unless there is such a flagrant abuse of the power, because of arbitrary and wholly unwarranted legislative action, as would authorize a court of equity to intervene to protect a constitutional right of the landowner. The motion to strike the fourth paragraph of the bill will be granted; the facts therein stated not being a basis for relief by this court.

Paragraph III of the bill alleges in substance that the trustees of the internal improvement fund in 1905, in order to sell said lands, adopted a map or plat of the Everglades, dividing said lands into sections and townships by projecting the lines of the United States surveys of the surrounding lands, and filed the same for record in the recording offices of Dade and Palm Beach counties, as well as recording same in the records of the trustee; that in 1907 amendments were made to this map, and copies of same duly filed in Dade and Palm Beach counties; that said trustees in 1911 made a new division of all the Everglades land, and substituted arbitrary and different lines for the division of 1905 and 1907, changing the location of the section, township, and range lines, thereby changing the sections and townships included therein from those made by the maps of 1905 and 1907; that the sections, townships, and ranges shown on the map of 1911 are numbered the same as shown on the map of 1905 and 1907, but in fact describe other and different lands; that complainants and their predecessors in title bought their lands from the trustees under and pursuant to the map of 1905 and 1907; that certain areas of land in the Everglades are not included in any section under

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the division of 1911, but townships and ranges were widely separated by such areas; that no map of the division of 1911 has been recorded in Dade, Palm Beach, or Broward counties, but the division of 1911 has been carried out in a new sectional map of Florida authorized by the commissioner of Agriculture, one of the said trustees, and published by the department of Agriculture, which last map includes the Broward drainage district and the lands upon which the uniform tax was levied; that the supervisors of the Broward drainage district are preparing and threatening to survey the lands within said district according to the division of 1911. The section contains copies of the different maps referred to.

[9] The motion to dismiss under the equity rules, as I understand it, takes the place of a demurrer and admits the facts alleged. This suit is primarily to enjoin the uniform acreage tax. The facts that complainants or their predecessors in title purchased land pursuant to one map, and the trustees arbitrarily changed said map, changing the location of the lands purchased, retaining the same designations, but in fact making such designations describe other and different lands than those described by such designations, according to the map pursuant to which the purchase was made, and the taxes being levied according to the last division, are material, it seems to me, to the questions raised in this suit, and without explanation would entitle the complainants to some of the relief prayed. This motion will therefore be denied.

Paragraph II alleges the organization of the board of supervisors on June 15th, the day named in such act for the organization; the passage of the resolution levying the uniform tax, etc.; on August 3d the adoption of a resolution apportioning the estimate of expenses and ratifying the resolution levying the tax adopted June 15th; the report of the secretary of the board and acceptance of same, and instructions to turn over the tax books to the tax collectors of Dade and Broward counties. The section then alleges certain resolutions of the board instructing such tax collectors to retain the books. This section then proceeds to allege the provisions of sections 7 and 14 of article 16 of the state Constitution, and claims that chapter 7430 violates the provisions of section 7, in that it creates the office of drainage supervisor for a period greater than four years, and undertakes to show how; that therefore the board was not legally organized at the meeting in June, and therefore the tax was void; that the levy was made without an estimate first made; that the levy was excessive; that the levy was not made until August 14th, when the secretary made his report; that the tax collectors of Dade and Broward counties did not make delinquent returns as required by the act.

There seem to be three main grounds of attack on the tax by this section:

[10] First. That the act creates an office for more than four years, and therefore there is no board of supervisors, and consequently no legal tax levied. A careful reading of the act convinces me that this ground is untenable. The term of office is fixed at four years from June 15, 1917, by the act itself.

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The second ground of attack is because the tax was levied before the estimate of expense; but the paragraph shows the estimate was made and the estimate approved and the resolution of June 15th ratified.

[11] Again, that the board, instead of having the collectors return the books as delinquent, authorized said books to be retained and tax continued to be collected. This action, if unauthorized, would not invalidate the tax.

[12] And also that the tax was excessive, and the estimate contained items not properly expenses. It is true the paragraph shows $19,900 in excess of the engineers' estimate of expense, provided every dollar of the tax was paid. I do not conceive that a tax levy will be declared excessive, and therefore void, because the levied tax of 25 cents per acre, instead of 24½ cents, would produce a surplus over the estimated expenses. The cost of survey, etc., necessary to formulate a scheme of reclamation, must at best be an estimate before the work is done, and this acreage tax was provided by the Legislature to pay such expenses. It would be impossible to tell with mathematical certainty the amount of the expense before the work was done. I am of opinion that such a difference in the amount of the estimate and the amount expected to be raised by the tax would not constitute an excessive levy or invalidate the tax. The motion to strike paragraph II of the bill will therefore be granted.

[13] The twelfth ground of the motion undertakes to reach certain portions of the bill, by setting out the effect of the portions to which it refers. This is not, I think, good practice. As I understand the law, the court cannot be required to wade through an entire pleading to find out what portion is attacked by the motion. For this reason I have not considered the twelfth ground.

This disposes of all matters submitted to me on the hearing. An order will be prepared pursuant to the foregoing memorandum.

COMMERCIAL CREDIT CO. v. UNITED DIVERS' SUPPLY CO. (two cases).

(District Court, S. D. Florida. August 13, 1918.)

Nos. 598, 599.

1. PRINCIPAL AND AGENT ⟸100(6)—SPECIAL AGENT.
Money lender's agent, kept at debtor's place of business to direct shipment and disposal of sponges purchased with funds advanced by the principal, had only special agency for special purpose, and could not bind principal by approval of or action upon contract of third person with debtor.

2. CONTRACTS ⟸83—REPUDIATION AS "FAILURE OF CONSIDERATION."
Where consideration moving to plaintiff for release of notes was defendant's agreement to perform certain acts, defendant's repudiation of its agreement would not constitute a "failure of consideration" for the release.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Failure of Consideration.]

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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3. EVIDENCE ⟸444(6)—ACTION ON NOTE—PAROL EVIDENCE CONTRADICTING WRITTEN INSTRUMENT.

In an action against an indorser on a promissory note, wherein a release was interposed as a defense, evidence of a parol agreement that the release was not to become effective until approved by plaintiff's board of directors was not inadmissible, as contradicting a written instrument.

At Law. Actions by the Commercial Credit Company against the United Divers' Supply Company. On demurrers to pleas to declarations and replies to pleas. Decrees entered.

M. B. Macfarlane, R. E. L. Chancy, and N. B. K. Pettingill, all of Tampa, Fla., for plaintiff.

McKay & Withers, of Tampa, Fla., for defendant.

CALL, District Judge. These suits are similar, the difference being in the amounts of the two promissory notes. The declarations allege the indorsement before maturity and for value of the notes by the payee to the plaintiff. To these declarations several pleas have been interposed, identical in each case. On the first and second pleas issue is joined, and demurrers interposed to the third, fourth, fifth, and sixth pleas, and two replications filed to the seventh, which are the same in both cases, and to these replications demurrers are filed by the defendant.

The third plea sets up that, prior to the indorsement of the promissory note to the plaintiff, the plaintiff and a certain corporation had an arrangement whereby the plaintiff would advance to the corporation moneys with which to buy sponges, and kept an agent at the corporation's place of business for the purpose of directing the shipment and disposal of sponges so purchased with the funds so advanced; that the corporation applied to defendant to purchase sponges of the value of more than $15,000, and agreed to hold said sponges in trust for defendant, and to sell and dispose of the same, and to assign all bills receivable arising from the sale of said sponges; that their proceeds should be applied to the payment of the purchase price; that pursuant to this agreement two promissory notes in different amounts, aggregating the value of sponges, were given by the corporation to the defendant, and that this agreement was approved by the agent of the plaintiff so maintained at the place of business of the corporation; that in pursuance of this agreement the defendant indorsed and discounted said notes with the plaintiff 77 per cent. of their face value; that subsequently the corporation, with knowledge and consent of the plaintiff's agent so maintained as aforesaid, and without the consent of the defendant, confused these sponges with others purchased with money advanced to the corporation by the plaintiff, and the plaintiff through its agents aforesaid undertook the disposal of all of said sponges so confused, with full power to collect the proceeds of said sales; that by this action of the plaintiff in dealing with and appropriating sponges of defendant of a greater value than the amount received on discount of the notes the defendant is relieved of further liability on its indorsement.

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The fourth plea makes the third a part, and further alleges that the plaintiff received the proceeds from the sale of the sponges, and did not apply same to the payment of the promissory notes, and that the amount so received was more than sufficient to fully discharge defendant of its liability. The fifth plea incorporates the fourth, and further alleges that plaintiff received the proceeds of the sale of all the sponges delivered by the defendant to the corporation, which amounted to more than enough to discharge the liability of the defendant. The sixth plea repeats the averments of the fourth, and prays judgment for the difference between the value of the sponges so delivered to the corporation and the amount received by the defendant on the discount of the note.

[1] The demurrers challenge the sufficiency of these pleas to defeat plaintiff's recovery. The theory of the defendant in interposing these pleas as defenses seems to be that the plaintiff is responsible for the performance or nonperformance of the agreement between the defendant and the corporation in the delivery of the sponges and giving the promissory notes. This it seems to me is the test to be applied to these pleas. The pleas set out fully the transaction and agreement between the defendant and the corporation, but this agreement does not bind the plaintiff, unless it either was a party to it in its inception or by its acts, with knowledge of same, either estopped itself or adopted same. These pleas seek to make the plaintiff liable under the agreement set out by reason of the fact that it maintained an agent for the purpose of shipping and disposing of sponges bought by the corporation with funds advanced to it by the plaintiff for that purpose, and that this agent approved the contract between the defendant and the corporation. It must be borne in mind that this constitutes the only notice to or participation in the contract by this plaintiff. These allegations in the pleas show a special agency for a specific purpose, outside of which purpose the agent by his acts or knowledge cannot bind the principal. The additional allegations in the fourth, fifth, and sixth pleas rest and depend upon the allegations of the third plea for sufficiency as defenses. If the facts alleged in the third plea do not constitute a defense, the fourth, fifth, and sixth pleas do not. I am of opinion that the third, fourth, fifth, and sixth pleas are demurrable. There are various grounds of demurrer urged to these pleas, but the only ground considered by me is the one above discussed.

The seventh plea alleges that on a date subsequent to the falling due of the notes sued on the plaintiff and defendant, in order to settle their differences, entered into an agreement that the defendant would assume certain indebtednesses to plaintiff, and employ a certain individual for a specified time, in consideration of which acts upon the part of defendant the plaintiff would advance moneys to defendant for the purpose of conducting a sponge business; that pursuant to said agreement defendant entered into the contract with the individual named, and stood ready, able, and willing to fully complete its part of the agreement; also that pursuant to the agreement the plaintiff and its president executed a release to the corporation named in the pleas, and

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makers of the notes in suit, acquitting it of all responsibility for the payment of said notes and other amounts claimed to be due the plaintiff from said corporation; that in said release the plaintiff expressly stated that the consideration for said release was the contract theretofore entered into by the defendant with the party named in said pleas; that the plaintiff without just cause refused to carry out its agreement with the defendant, by reason of which agreement and refusal of plaintiff to comply with same and the release given the maker of the notes, defendant is released from its obligation as indorser thereon.

To these pleas the plaintiff files two replications. The first replication denies that the defendant stood ready, able, and willing to perform its agreement, and further denies that plaintiff repudiated the same, but affirmatively alleges that defendant first repudiated the agreement, thereby relieving plaintiff of its obligation under said agreement, and that such repudiation by the defendant constitutes a failure of consideration for the release set up in said pleas. The second replication sets up that the agreement and the release pleaded were entered into on the understanding that said agreement and release should first be approved by the plaintiff's board of directors before either should become binding upon the parties; that plaintiff's board of directors refused to approve of same, and of this the defendant had due notice.

[2] The defendant interposed demurrers to these replications. There are various grounds of demurrer contained in the demurrers. It seems to me the first contains the meat of the objections to the first replication—that:

"The replication does not constitute a reply sufficient in law to bar the defense set up in the seventh plea."

These replications nowhere negative the fact that the consideration moving to the plaintiff in executing the release set out in hæc verba in said plea was the contract between the defendant and the individual named. Nor does it negative the ability of the defendant to perform said contract. These it seems to me are material allegations in said pleas, upon which depend the defense. If this plaintiff, in consideration of the agreement aforesaid entered into by the defendant, released the maker of the notes in suit, then it seems to me it is not in position to demand payment of same by the indorser. There has certainly been no failure of consideration as to such release; and with such release existing the other facts alleged in the replication would constitute no answer to the plea as a whole. I am therefore of opinion that the demurrers to the first replication are well taken.

[3] The second ground of demurrer to the second replication seems to me the main one; i. e., does such replication infringe the rule against altering or contradicting the terms of a written instrument by a former or contemporaneous parol agreement? The allegation in the replication is that the agreement and release were not to become effective until approved by the board of directors of plaintiff. Evidence to establish this understanding or agreement would not, under Burke v. Dulaney, 153 U. S. 228; 14 Sup. Ct. 816, 38 L. Ed. 698, violate this

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rule. It would be to the effect that the agreement and release never became effective.

It is my judgment that the demurrer to the second replication is not well taken. It will be ordered accordingly.

THE BRIS.

(District Court, S. D. New York. June 7, 1918.)

1. SHIPPING ⇐145—GOVERNMENTAL INTERFERENCE—PREPAID FREIGHT—RETENTION BY CARRIER.
   Where libelant shipped varnishes upon a steamship, prepaying freight and receiving a bill of lading, releasing carrier from loss through restraint of rulers or people, and providing prepaid freight be considered as earned and retained by carrier, "vessel or cargo lost or not lost," and after loading the United States refused the owner license to ship, the carrier could retain prepaid freight.

2. SHIPPING ⇐145—BILLS OF LADING—EARNED FREIGHT LOSS—PUBLIC POLICY—TIME OF WAR.
   Insertion by shipowner of clause in bill of lading providing that prepaid freight be considered earned on shipment and retained by carrier, "vessel or cargo lost or not lost," is not in contravention of public policy in time of war.

3. SHIPPING ⇐145—BILL OF LADING—CONSIDERATION.
   Where a carrier loaded goods on a vessel for shipment, and freight was prepaid, and carrier was forced to unload the goods through shipper's failure to secure license from the United States, such was not a "commercial frustration of the adventure," constituting failure of consideration.

In Admiralty. Libel by the Standard Varnish Works against the steamship Bris. Libelant's exceptions to claimant's answer overruled, and libel dismissed.

Julius J. Frank, of New York City (Everett P. Wheeler, of New Hamburg, N. Y., of counsel), for libelant.

Haight, Sandford & Smith, of New York City (Charles S. Haight, of New York City, of counsel), for claimant.

KNOX, District Judge. This matter is before the court upon exceptions filed by the libelant to the answer of the claimant herein. The facts appear to be as follows:

Upon August 13, 1917, the libelant shipped upon the steamship Bris, then lying at the port of New York, 100 barrels of varnishes, which the libelant desired to have carried to the port of Gothenburg, Sweden. Upon reaching that port the merchandise was to be delivered to the Allmanna Svenska Elektriska A. B., of Westeras, Sweden. The freight charges upon the shipment amounted to $2,383.33, and upon August 17, 1917, the libelant paid to the agents of the Bris the freight money as agreed upon. There was then issued to the libelant a bill of lading.

This document contained a clause releasing the carrier from liability for loss or damage arising through restraint of princes, rulers,

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or people; and it also contained two other clauses pleaded in the answer, and frequently referred to upon the argument and in the briefs as controlling, in a large measure, the decision to be made herein. These clauses so far as they are material read as follows:

"(6) * * * Prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the vessel's owners, vessel or cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere. * * *

"(7) Also in case the ship shall be prevented from reaching her destination by quarantine, blockade, war, ice, unsafe navigation, or the hostile act of any power, or in case blocking up by ice is to be feared, or if the discharging of the goods or any part thereof should be objected to by the authorities, the master or owners may either wait until the navigation is reopened or given free, or discharge the goods into any depot or at any convenient port or bring her cargo back to port of shipment where the ship's responsibility shall cease. This to apply also to goods shipped as through freight beyond the original port of destination of the vessel. In any case the freight and charges are to be paid in full and the shippers and consignees to be responsible for all expenses thereby incurred upon the goods and for demurrage and extra expenses of the vessel to be paid in full along with the freight. * * *

"Owing to conditions of war or hostilities existing or threatened, this shipment is accepted at the sole risk of the owners hereof of arrest, restraint, capture, seizure, detention, or interference of any sort by any Power; and the carrier and its representatives are privileged in its or their absolute discretion, if deemed advisable for the protection of the vessel or any cargo, or to avoid loss, damage, delay, expense, or other disadvantages or danger, either with or without proceeding to or toward the port of discharge, or entering or attempting to enter or discharge the goods there, and whether such entry or discharge be permitted or not, to proceed to any other port or ports or return to the port of shipment, once or oftener in any order or rotation, retaining the goods on board or discharging the same at risk and expense of the owners thereof at any such port or ports at the first or any subsequent call, and full bill of lading freight, together with extra compensation for additional transportation and all other charges, shall be paid by the shipper, consignee, and/or assigns, and shall be a lien on the goods."

At the time this shipment went on board the Bris, there was in force a British system of licensing shipments of goods that were to pass through the war zone. Under the regulations established by Great Britian as to the licensing of shipment of goods from the United States, it was necessary for the exporter to obtain what was called a "navicert," and it was necessary that this navicert should accompany the ship's papers, and, if the same was lacking, the Allies would not permit the shipment to proceed to its destination.

At the time the varnishes for which the freight was paid in this case were delivered to the Bris, the shippers had procured the required license from the British government, and it is admitted that upon the date of delivery to the Bris this license was the only one required. However, upon June 15, 1917 (chapter 30, tit. 7, §§ 1, 2, 40 Stat. 225) an act of Congress of the United States was approved by the President, giving the President authority to regulate exports by proclamation, and imposing penalties of fine and imprisonment for any violation of the act. Thereafter, upon June 22, 1917, July 9, 1917, August 27, 1917, and possibly other dates, proclamations were issued by the President, and various administrative steps were taken, under the provisions of the regulating act of June 15, 1917, until

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upon September 18, 1918, the exportation to Sweden of any article of commerce was forbidden, unless a license permitting the article to be exported was procured from the proper authority in the United States.

Some days after the issuance of the President's proclamation of August 27, 1917, which comprehended the shipment in question, the agents of the Bris notified the libelant's agents of the situation as it then existed, and gave formal notice that, unless a license to export the shipment in question was procured on or before September 12, 1917, it would be necessary to discharge the libelant's cargo. Similar notice was given to other shippers whose cargo was on board the Bris.

Owing to the confusion that resulted among shippers by reason of the President's proclamations, and their requirements, and so as to enable the shippers to make appropriate application for licenses, the cargo was not discharged upon September 12th.. In the meanwhile libelant made efforts to procure an export license for the varnishes, but was unable to have the same issued. Upon October 2d, the agents again sent a notice to the libelant, and the other shippers of cargo, in which they once more gave formal notice that unless export licenses were received by October 6, 1917, the cargo would be discharged, and upon October 8, 1917, the claimant began the actual discharge of the cargo, and completed the operation about October 22d. About October 11th it was definitely ascertained that no license for the export of the shipment in question would be issued.

The claimant seeks to retain the freight prepaid upon the shipment of the varnishes, upon the theory that it was through no fault of the Bris that the cargo did not go forward, and that under the bill of lading the claimant was entitled to keep the freight paid in advance, in that, under the sixth paragraph of the bill of lading, the prepaid freight was to be considered as earned on shipment, and that under the circumstances herein set out there was no obligation upon the claimant to return the prepaid freight.

It is contended by the libelant: (1) That the articles in the answer to the libel setting forth the foregoing facts are insufficient in law to constitute a defense; (2) that the performance of the contract between the parties became unlawful after the agreement was made, that the consideration therefor failed, and the libelant is entitled to a return of the prepaid freight; (3) that the clauses from the bill of lading hereinbefore set out were without consideration and against the public policy of the United States; (4) that the said clauses, being an attempt to put off the essential duties resting upon every public carrier by virtue of his employment, are accordingly void; (5) that the said clauses are in violation of Harter Act February 13, 1893, c. 105, 27 Stat. 445 (Comp. St. 1916, §§ 8029–8035), and thereby invalid and void.

The naked question before me is, under the circumstances above recited and the bill of lading issued upon the shipment, can the claimant retain the prepaid freight? Fortunately, I am not without a guide in seeking the proper solution of the question. The Circuit

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Court of Appeals for this circuit, in the recent case of The Gracie D. Chambers, 253 Fed. 182, — C. C. A. — (decided May 22, 1918), and in its facts somewhat similar to these before me, has held in favor of the claimant. Indeed, the facts which justified the decision in favor of the claimant in the Gracie D. Chambers Case appear to me to be less persuasive in supporting the contention of the claimant than do those in the case at bar.

In that case the schooner began to load a general cargo at this port upon September 14, 1917, and between September 27th and September 29th the libelant paper company shipped on board her 120 tons of print paper. Late in the afternoon of September 28th the Treasury Department at Washington telegraphed the collector at the port of New York to withhold clearances of all sailing vessels in port, and any part of whose voyages would bring them within the danger zone. There was no official publication of the embargo, but upon September 29th it was put in effect by the refusal of clearances to such vessels as applied for them. October 3d the Gracie D. Chambers moved out to an anchorage to save wharfage charges and clearance. On October 4th the libelant paid the freight as against the delivery of the bill of lading. On October 5th the master applied for a clearance, which was refused. He then applied to the authorities at Washington to make an exception in this instance, upon the ground that the Gracie D. Chambers had begun to load cargo before the issuance of the embargo order. Upon October 10th the refusal to make an exception in favor of this schooner was definitely made. Cargo was then discharged, and the owners refused to return the prepaid freight. It will be noted, in passing, that the cause which prevented the execution of the contract of the parties in the Gracie D. Chambers Case arose from an infirmity placed upon the schooner by governmental action.

The bill of lading in that case had excepted "restraints of princes and rulers," and also "freight for the said goods to be prepaid in full without discount retained and irrevocably ship and/or cargo lost or not lost." It is said by the libelant in the case before me that the decision in the Gracie D. Chambers Case turned upon the construction of the word "irrevocably" as it was contained in the bill of lading. In other words, that the parties had agreed that the freight should be retained irrevocably, ship and/or cargo lost or not lost. And it is then urged upon me that the bill of lading issued by the agents of the Bris is not the equivalent of that issued by the owners or agents of the Gracie D. Chambers.

[1] It is my judgment that the words, "prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the vessel's owners, vessel or cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere," are for all practical purposes the equivalent of the statement that "freight for the said goods to be prepaid in full without discount retained and irrevocably ship and/or cargo lost or not lost." The effect of the clause in each instance is simply this: That, once the freight money is paid, it is paid for good and may not

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be recovered. That this holding, in certain aspects, must appear harsh, goes without saying.

[2] It does not appear to me, however, that under the existing circumstances the insertion by shipowners of such a clause in a bill of lading contravenes any sound public policy, if public policy enters into the case at all. It is my opinion that public policy in any given instance depends largely upon the existent conditions and circumstances at the time the public policy is enunciated. At the time the parties here entered into their contract, they and the world knew the hazard with which shipping was being carried on. They likewise knew that what was permitted upon one day might not be permitted the next. Indeed, by act of Congress and presidential proclamation they were notified that regulations governing, and perhaps forbidding, exports, were likely to be issued at any time, and in the face of this knowledge the libelant delivered his cargo to the Bris and prepaid the freight as against the bill of lading. It is not to be wondered at, therefore, that ship's owners, in view of the demand for cargo space, sought to protect themselves (if lawfully they might do so) as against any contingency that might arise. The infirmity here, unlike the Gracie D. Chambers Case, was in the cargo of the libelant, and not in the Bris.

By reason of the foregoing considerations, the cases cited by the proctors for the libelant upon what has been declared to be the law with respect to the ability of a carrier to limit its responsibilities seem to me not in point. My attention is called to the principle announced in Scrutton on Charter Parties, section 10, article 137, 8th Ed., page 321, where it is said advance freight "will be recoverable (from the shipowner) if the goods are not lost by excepted perils, or if the shipowner has not fulfilled the condition precedent of starting, within a reasonable time, of a seaworthy ship on the agreed voyage." The answer to this must be that, in this litigation, the libelant did not perform the conditions precedent to his being permitted to forward his goods, and it appears to me that the burden of not having done so, even though prevention was through the action of the government, must fall upon it.

Again, it is urged that the provision in the seventh clause of the bill of lading is applicable only to a case where the ship has begun her voyage and is "prevented from reaching her destination." This seems to me not to be a valid contention. The prevention of the voyage, interposed by the government of the United States within this port, was, so far as the shipowners were concerned, just as potent a factor, and operated in their favor to the same extent, as would the act of an enemy power once the ship was on her way.

[3] I am likewise unable to agree with the libelant that there was here a total failure of consideration, and that there was a "commercial frustration of the adventure," by reason whereof the libelant is entitled to prevail. The libelant, under his contract, had space for its cargo. For weeks the owner held the Bris to enable the libelant to get his export license. Indeed, the Bris, had she not shown a disposition to act fairly with the libelant, would have been able to take on

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another cargo and complete her voyage during the time she lay idle for the purpose of being in a position to sail for Gothenburg, should the libelant procure its license. The adventure was frustrated because of governmental action, and I shall not hold that a frustration of this character dissolved the contract, notwithstanding that the Bris did not "break ground."

Without entering into a discussion, in an opinion already too long, of my reasons for thinking that the Harter Act (27 Stat. 445) has no application to the case at bar, I shall content myself with the mere assertion that it has none.

The exceptions to the answer to the libel are overruled, and the libel dismissed, with costs.

THE PORTUGAL.

(District Court, S. D. Florida. May 29, 1918.)

1. SALVAGE ⇐34—AWARD—AMOUNT.
Where a bark stranded on a Florida reef, from whence it was towed by a large tank steamer worth about $300,000, *held* that, in view of the service and the imminent danger to the bark, which was found to be worth approximately $90,000, carrying a cargo worth about $45,000, the steamer was entitled to an award of $30,000 as salvage, and to a further award of $2,000 for injury to its cables.

2. SALVAGE ⇐52—LIBEL—INTERVENTION.
Where libel was filed for and on behalf of a ship, its owners, and crew, seeking to recover salvage, and members of the crew intervened unnecessarily *held*, that they should bear the costs of the intervention.

3. SALVAGE ⇐52—COSTS—STIPULATION.
The claimant of a vessel libeled for salvage service must pay the cost of the stipulation required before the property could be released, even though it was excessive.

In Admiralty. Libel by the Gulf Refining Company against the bark Portugal, in which certain members of the crew of the steamship Gulf of Mexico intervened. Decree for libelant.

Patterson & Harris, of Key West, Fla., for libelant.

George W. Allen and W. Hunt Harris, both of Key West, Fla., for respondent.

Marks, Marks & Holt, of Jacksonville, Fla., for interveners.

CALL, District Judge. On the morning of August 8, 1917, the Portuguese bark Portugal went ashore on Crocker's Reef. This bark was of 1,353.45 gross tons and 1,223.94 net tons, built of steel, in the year 1889, and was bound on a voyage from New Orleans to Lisbon, Portugal, loaded with 128,100 oak staves. The invoice price of this cargo at New Orleans was $39,767.50.

[1] At about 1 o'clock p. m. of that day the steamship Gulf of Mexico, on her maiden voyage to Port Arthur, Tex., in water ballast, sighted the stranded bark and went to her assistance. The steamship was a tanker, built of steel, of 7,807 gross tons and 4,867 net tons, with engines developing in the neighborhood of 3,000 horse power. At

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about 5 o'clock p. m. a new 9-inch manilla hawser was made fast to the bark's foremast, and the ship commenced to pull. This pulling continued for some hours, until the hawser parted. A new steel cable, 1¾ inch in diameter, was then passed aboard the bark through the stern chocks, and made fast to the mizzenmast, and again the steamship pulled without freeing the bark. A hawser was then run to the other quarter of the stern and made fast to the mizzenmast of the bark and the steamship by the use of her engines and steam winch acting on her anchor, pulling on the two lines, succeeded about 1 p. m., of August 9th, in floating the bark. She thereupon proceeded to Key West with the bark in tow, arriving in the harbor and anchoring the bark about 7:30 p. m. of August 10th.

During the time the ship was pulling on the bark the stern chock carried away, and the after railing, stern bitts, and the mizzen rigging were destroyed. The steamship's hawsers and cable were broken in one instance, and the rest strained and strands broken in the same. The evidence shows the original value of these hawsers and cable to have been $3,250. There is no proof of the value of same in the condition they were after the salvage service had been rendered. The value of the Gulf of Mexico may be reasonably fixed at $300,000. The value of the bark, after she had been saved, was fixed by appraisers at $60,000, and the value of her cargo at $30,000. I find some difficulty in arriving at the value of the bark. The testimony of the experts taken in New York is not altogether satisfactory. It is a fact, so well known that the court can almost take judicial cognizance of it, that sailing vessels, whether of belligerent or neutral nations, bound for European ports, were denied war insurance on account of the unrestricted submarine warfare inaugurated by the Germans in February, 1917, and this fact and the danger of submarine attack upon such slow-moving craft in my opinion vitally affects the value of such craft. But this consideration did not enter into the estimates of the experts testifying in New York. Again, their testimony was based upon the dead weight carrying capacity of the sailing ship, and the evidence nowhere shows what this capacity of the Portugal was, and it varies with the model of vessel under consideration. Now the testimony shows that the Portugal was built of steel, her decks in bad condition, and her plates badly pitted on the sides and requiring renewal in a short time. I think, taking all the testimony into consideration, that a value of about $90,000 would be a fair valuation to place upon the bark.

The captain of the bark testifies that the invoice value of the cargo was more than $39,000 at New Orleans; that oak staves were more valuable in Lisbon than they were in New Orleans; so I reach the conclusion that the value of $30,000 placed by the appraisers on the cargo was too small. Again, I find myself in a quandary about reaching a conclusion as to the value of this cargo. It was certainly of a greater value on board the bark than the invoice price, but to what extent it is difficult to say. Certainly its value was not less than $45,000. I therefore find the value of the bark and cargo is $135,000. That the bark was hard and fast aground on Crocker's Reef I think

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there can be no doubt. Had she been lightly aground at the stern when the steamship made fast the first hawser to the foremast and pulled, she would certainly have been floated with little effort. Had her stern been lightly pounding with the ground swell, which was the only sea running during the salving operations, her anchor being down and holding her, I cannot imagine why she did not float when the steamship pulled on her the first time.

It was contended before me that the damage received by the bark during the salvage operations was due to bad management of the officers of the steamship, but I do not think the evidence bears out this contention. The letter written in Portuguese, and I presume intended for the Portuguese consul at New Orleans, given shortly after the operation was completed, negatives this view expressed at the hearing. Evidently it required extraordinary force to free the bark from the reef. It required the combined force of the engines and the steam winch pulling on the ship's anchor to accomplish the result.

That the service rendered was a salvage service there is no question. The question raised is whether it is a salvage service of a high or low order. That the bark was in an extremely dangerous position there can be no question. It has been said too many times by the courts that a vessel stranded on one of the Florida reefs is in imminent and great danger to admit of question. It is apparent from the testimony of all the witnesses that there was a strong current setting upon the reef, and the existence of this current made it dangerous for any ship approaching the bark to render assistance. I am therefore of opinion that this is a case where the salvage award should be generous. Now, considering the value of the steamship, the value of the salved property, the dangerous position of the bark, the dangers encountered by the steamship in the rendition of the service, the time and effort consumed, and the promptitude, manner, and success of the same, the fact that the steamship was delayed in her voyage to Port Arthur, the time consumed in the salvage service and towing the bark to Key West, I am of opinion that the amount of the award should not be less than $30,000, and in addition the amount of $2,000 for the damage to the ship's hawsers and cable.

[2, 3] There have been three interventions filed by members of the crew of the Gulf of Mexico. I fail to see the necessity of making these additional costs, in a case where the costs are already heavy. The libel was filed for and on behalf of the ship, its owners and crew. The rights of the crew were amply protected under this libel, and the filing of these interventions was unnecessary and simply result in additional unnecessary costs.

There is another matter I wish to advert to, and that is the amount of stipulation required of the claimant before the property could be released. Application was made to the court to reduce it, which the court refused to do, at the time having no light before it, except the value of the property and the amount of salvage claimed in the libel, both of which it now appears to me were excessive. The court having required the stipulation, the cost of same will have to be paid by the claimant. As regards the costs of the three interventions I

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deem it nothing but equity that these costs should be borne by the interveners, and not by the claimant.

It will be decreed in this case that the libelant recover from the claimant and his sureties the sum of $30,000 as salvage and the further sum of $2,000 as damages to the hawsers and cable used in the salving operations, and the costs of the main proceeding; the amount of the salvage award to be divided between the vessel and the crew in the proportion of three-fourths to the vessel and one-fourth to the crew, to be paid to each member in proportion to the monthly wage received by him. The costs of the intervention to be taxed against the interveners and their shares in the award.

It will be so decreed.

In re UNITED GROCERY CO.

(District Court, S. D. Florida. August 8, 1918.)

1. BANKRUPTCY ⟸342—RE-EXAMINATION OF CLAIM—REFEREE'S ORDER.
Order of referee in bankruptcy, on petition to re-examine claim, allowing insolvent bank's claim conditionally on receiver making payment to trustee in bankruptcy, is not justified under Bankruptcy Act July 1, 1898, § 57k (Comp. St. 1916, § 9641), providing that claims which have been allowed may be reconsidered for cause, and reallowed or rejected, in whole or in part.

2. BANKRUPTCY ⟸159—VOIDABLE "PREFERENCE"—DEPOSIT IN BANK.
Deposit of money by receiver of bankrupt in checking account with bank to which bankrupt was indebted, and which subsequently closed its doors, was not a "preference" voidable under the Bankruptcy Act July 1, 1898, § 60b (Comp. St. 1916, § 9644).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Preference.]

3. BANKRUPTCY ⟸178(1)—"CONVEYANCE"—"TRANSFER."
Deposit of money by receiver of bankrupt in checking account with bank to which bankrupt was indebted, and which subsequently closed its doors, was not a "conveyance" or "transfer," etc., void or voidable under Bankruptcy Act July 1, 1898, § 67e (Comp. St. 1916, § 9651).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conveyance; Transfer.]

4. BANKRUPTCY ⟸169—RIGHT OF SET-OFF.
Where, on date of adjudication, bankrupt was indebted to bank, and his receiver, between date of adjudication and date when bank closed its doors, deposited in general checking account sum less than bankrupt's indebtedness to bank, under federal Bankruptcy Act, neither bank nor its receiver could apply deposit to payment of debt to bank, nor could the bankrupt's trustees apply it to discharge pro tanto of the debt.

5. BANKRUPTCY ⟸314(2)—INSOLVENCY—RIGHT OF CREDITOR.
On bankruptcy, creditor becomes equitable cestui que trust in assets in proportion that his claim bears to total amount, and his right to participate may not be diminished by claims arising subsequently to bankruptcy; right to participate being determined as of date of bankruptcy.

6. BANKS AND BANKING ⟸288—INSOLVENCY—CLAIMS.
On insolvency of national bank and appointment of receiver, creditor becomes equitable cestui que trust in assets in proportion that his claim bears to total amount, and his right to participate may not be diminished by claims arising subsequently to insolvency; right to participate being determined as of date of insolvency.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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7. BANKS AND BANKING ⟸119—GENERAL DEPOSIT—RELATIONSHIP OF "DEBTOR AND CREDITOR."

A general deposit of money in a checking account with a bank created simply the relation of "debtor and creditor" between the bank and the depositor.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Debtor and Creditor.]

In Bankruptcy. In the matter of the United Grocery Company, bankrupt. On petition to review an order of the referee. Petition granted, and order modified.

See, also, 239 Fed. 1016.

L. R. Milton, of Jacksonville, Fla., for objecting creditor.
Cockrell & Cockrell, of Jacksonville, Fla., for trustees.

CALL, District Judge. On January 4, 1917, the United Grocery Company was adjudicated a bankrupt, and receiver appointed in said cause. Subsequently the trustees were duly elected by the creditors and appointed by the referee. On January 4, 1917, the bankrupt was indebted to the Heard National Bank in the sum of $30,480.47. The Heard National Bank closed its doors on January 16, 1917, and in due course a receiver to wind up its affairs was appointed by the Comptroller of the Currency. Between the 4th and the 16th of January, 1917, the receiver of the bankrupt deposited with the Heard National Bank to his credit as receiver various amounts which aggregate, after the payment of certain checks against the deposit, the sum of $7,586.04. On January 19, 1917, the receiver of the Heard National Bank filed his proof of claim before the referee in the above stated amount. On March 26, 1917, the trustees of the bankrupt filed their petition before the referee to re-examine the proof of claim of the receiver of the bank, and to strike the same from the files, or to disallow the same, or to cause the same to be modified, or to give such relief in the premises as may be consistent with justice and the acts of Congress.

On March 27, 1917, the referee made an order for a re-examination of the proofs of the bank's claim. On October 26, 1917, a stipulation of facts was filed before the referee, and a hearing had upon the petition to re-examine and such stipulation of facts. On October 31, 1917, an order was entered by the referee, allowing the bank's claim in the sum of $30,480.47, upon the payment to the trustees by the receiver of the bank of $7,586.04, deposited by the receiver of the bankrupt in said bank, prior to January 16, 1917, and after his appointment on January 4, 1917. On November 3, 1917, the bank's receiver filed his petition for a review, assigning three errors as follows:

(1) That the referee erred in allowing the claim of the bank on condition that the deposit should first be paid to the trustees of the bankrupt.

(2) That the referee erred in holding that the trustees were entitled to the payment of the deposit before the bank's claim could be proved.

(3) On the petition to re-examine the claim, the only order the referee could make was an order allowing said claim in whole or in part, or an order rejecting said claim in whole or in part, and the order in this case does neither.

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The two first assignments raise the same question and may be considered together.

[1-3] I will take up the third assignment first. Section 57k, of the act (Act July 1, 1898, c. 541, 30 Stat. 560 [Comp. St. 1916, § 9641]) is as follows:

"Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case," etc.

The order of the referee in this case allows the claim conditionally. While it does not specifically disallow the claim on the failure of the bank's receiver to make this payment to the trustees, that seems to me to be its effect. It does not appear to me that the order is justified under section 57k of the act. I do not understand that the order in this case was made under the provisions of section 57g, which authorizes an order of this kind where the creditor had received a preference, etc.; but, if it were so contended I am clearly of opinion that this deposit in the checking account could not be either a preference voidable under section 60b (Comp. St. 1916, § 9644), or a conveyance or transfer, etc., void or voidable under section 67e (section 9651). I am of opinion that the third assignment should be sustained, and the order of the referee should have allowed the bank's claim either in whole or in part.

[4-7] Now, as to the first and second assignments, which question the correctness of the order, as a question of law: There is no dispute as to the facts. It is unquestioned that the bankrupt, on the date of the adjudication on January 4th, was indebted to the bank in the sum of $30,480.47, nor is it questioned that the receiver of the bankrupt deposited in a general checking account with the bank, between January 4th and 16th, the $7,586.04, nor that the bank closed its doors on January 16th, and a receiver was duly appointed by the Comptroller to wind up its affairs and make distribution of its assets according to the laws governing such cases. The decision of the question seems to me to depend upon whether the right to a set-off, either at law or in equity, exists under these facts. As I understand the Bankruptcy Act and the decisions of the courts, neither the bank nor its receiver could have applied this deposit to payment of the debt owed the bank by the bankrupt nor the trustees of the bankrupt apply this deposit to the discharge pro tanto of the debt to the bank, because there is a want of mutuality in the demands, and because, as I understand the law and the adjudicated cases, upon the bankruptcy of an individual, or the insolvency of a national bank and appointment of a receiver to wind up its affairs by the Comptroller, the creditor becomes an equitable cestui que trust in the assets in the proportion that his claim bears to the total amount of the claims, and his right to participate in the dividends arising from such assets may not be diminished by claims arising subsequently to the bankruptcy or insolvency. This right to participate is determined as of the date of bankruptcy or insolvency. The bank's right to participate in the dividends from the bankrupt's estate matured certainly on January 4th, when the adjudication was made, and the right of the trustees to participate in the dividends of the assets of the bank matured on January 16th, when the Comptroller took charge

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of the affairs of the bank, and this right could not be taken from the bank's receiver by the subsequent deposit of moneys in the bank to a general account, to which no trust was affixed, and which created simply the relation of debtor and creditor between itself and the depositor.

The fact that the bankrupt may pay in full its creditors, and the bank may not be able to do so, cannot change the principles of law. It may work an apparent hardship in the particular case; but all general rules sometimes do that. I am of opinion, therefore, that the order of the referee should have reallowed the claim of the receiver of the bank in the full amount allowed conditionally.

The petition to review will therefore be granted, and the order of the referee modified accordingly.

UNITED STATES v. PAPE.

(District Court, S. D. Illinois, S. D. August 17, 1918.)

No. 15965.

1. WAR ⟹4—ESPIONAGE ACT—CRIMINAL LIABILITY.

A citizen cannot be prosecuted criminally under Espionage Act June 15, 1917, § 3, for giving his reasons for not subscribing for Liberty Loan bonds and thrift stamps, and contributing to Red Cross fund, when requested for his reasons in the privacy of his own home, in the presence of nobody but a duly authorized committee, and especially when such reasons are mere matters of opinion, apparently honestly held.

2. WAR ⟹4—ESPIONAGE ACT—CRIMINAL LIABILITY.

A criminal prosecution under Espionage Act June 15, 1917, § 3, cannot be based on the failure of a citizen to subscribe for Liberty Loan bonds or thrift stamps, or to contribute to patriotic funds, so long as he does not endeavor to induce others to do likewise.

Criminal prosecution by the United States against Theodore B. Pape. On demurrer to indictment. Demurrer sustained.

Edward C. Knotts, U. S. Dist. Atty., of Carlinville, Ill.

Graham & Graham, of Springfield, Ill. (Hugh Graham, of Springfield, Ill., of counsel), for defendant.

FITZHENRY, District Judge. The demurrer to this indictment is to its substance. The indictment contains two counts. The first charges that the defendant, on the 18th day of April, 1918, at Quincy, Adams county, Ill., at a time when the country was at war, did, "with intent to interfere with the operation and success of the military and naval forces of the United States, and to promote the success of its enemies," in the presence and hearing of divers persons, there state:

"He would not subscribe to the Liberty Loan bonds; that it was a matter of principle with him; that he did not want the war to continue, and that the government was wrong in its position; that he thought that if enough people would act in the way he was acting and withhold their money that the government would be forced to a position where it would make a peace by an agreement with Germany; that he did not want the United States victorious, nor did he want Germany victorious, but wanted the war to end in a draw;

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that he believed that, if the United States offered to meet Germany in conference, Germany's position would be such that certain terms of peace could be arrived at; he had not bought any Liberty bonds of any of the series; that he had bought no thrift stamps; that he had not participated in any Liberty bond parades, as he would not buy Liberty bonds; that he would not join the Red Cross, for that would be aiding the war, and he was opposed to the war."

The second count is substantially to the same effect, except that it charges an attempt. Just after counsel for defendant began his argument, he was interrupted by the district attorney, who stated that he wished the court to consider the demurrer in the light of all of the facts surrounding the commission of the alleged crime, and thereupon made the following statement of fact, which was concurred in by counsel for the defendant:

The defendant is a prominent citizen of Quincy, Ill., well educated, a member of the bar, and stands well among his neighbors; that he has not subscribed for any of the Liberty Loan issues, nor for thrift stamps, nor had he contributed to the Red Cross. Upon an examination of the records by the committee in charge of the patriotic activities in Quincy, the absence of the defendant's name from the lists of subscribers and contributors was observed. Members of the committee discussed the matter among themselves, and, nobody being able to explain the reason for the notable absence of defendant's name, it was decided by the meeting to appoint a special committee to wait upon him and ask him his reasons for his omission of patriotic duty. The committee communicated with him and an interview was granted. The committee called at his home, and he was requested for his reasons for failure to subscribe and contribute. He told the committee he would give them his reasons; that it was a matter of principle with him, etc., using the words charged in the indictment. It is not contended that he ever communicated his reasons to any other person or persons than the committee which called upon him for that purpose, and the reasons were given in his own home, in the presence of nobody except the members of the committee. It is stipulated that he never attempted to get anybody else to adopt his views, or to act with reference to these patriotic activities as he was acting; that the words spoken by the defendant were spoken coolly and deliberately, and as an educated man would speak them; that after the interview he presented his views to nobody else, nor endeavored to have anybody else decline to subscribe or contribute.

The part of the act of June 15, 1917 (40 Stat. 219, c. 30, § 3), under which this prosecution was commenced, is as follows:

"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies * * * shall be punished by a fine of not more than $10,000 or imprisoned for not more than 20 years, or both."

The issues raised by this demurrer were argued and submitted in the light of the facts admitted by the demurrer, as supplemented by the agreed state of facts. It is apparent from these facts that the defendant was opposed to the war; that he did not subscribe for bonds or thrift stamps, or contribute to the Red Cross funds, etc., with intent to embarrass his country in the prosecution of the war and to force it to negotiate for peace with Germany. However, it is agreed by counsel that he never attempted to prevent anybody else from doing so, and never did anything with reference to the matter, except to give his reasons for his conduct to a duly authorized committee in charge of the patriotic activities, when requested to do

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so, and then in the privacy of his own home. Two questions are raised:

[1] 1. Can a citizen be prosecuted criminally for giving his reasons for not subscribing for Liberty Loan bonds and thrift stamps and contributing to Red Cross drives, when requested to do so in the privacy of his own home and in the presence of nobody other than the members of a duly authorized committee, and especially when those reasons are mere matters of opinion apparently honestly held?

2. Can a citizen be prosecuted criminally for a failure to buy Liberty Loan bonds and thrift stamps, and for a failure to contribute to the Red Cross drives?

The entire language charged in the indictment was used in explaining to the committee his reasons for his omission, and at the request of the committee. If the issues came before the court upon the indictment alone, where the criminal intent is well pleaded, a different question would be raised. But in the light of the facts submitted to the court, in connection with this demurrer to the indictment, the facts presumably being the ultimate facts susceptible of proof, the question of intent is entirely disposed of, and without a criminal intent there can be no prosecution in a case of this character.

[2] As to the second question: It is clear to this court that a criminal prosecution cannot be based upon the failure of a citizen to subscribe for bonds, or thrift stamps, or to contribute to patriotic funds, so long as he does not endeavor to get others to do likewise, with intent to interfere with the operation and success of the military establishment, or to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces, or to obstruct the recruiting or enlistment service of the United States, to the injury of the service.

Probably no series of events has done more to mobilize the patriotism of the American people than the Liberty Loan, thrift stamp, Red Cross, and other patriotic drives during the present war, and these great drives and their splendid successes, both in raising funds and intensifying the patriotism of the American people because of them, have furnished opportunities to everybody for voluntary service in the common cause. The citizen's love of the republic has frequently driven him to subscribe and contribute, not the criminal laws.

Congress has the power arbitrarily to take such portions of the property of the defendant, or such portion of his income, as may be necessary to promote the common defense, and has passed laws doing so, and it is about to pass another law greatly increasing the taxes which this defendant and every other citizen will have to pay. The criminal laws are constantly in operation to compel every citizen to do his full duty as a citizen with reference to all revenue measures. The Liberty Loan drives, thrift stamp campaigns, and other campaigns for the creation of funds for the Red Cross, Y. M. C. A., K. of C., and other organizations which are doing a great part in the winning of the present war, are solely opportunities for voluntary service. A citizen has a legal right not to buy or subscribe during the great drives, for any reason that is satisfactory to him,

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provided he does not attempt to get others to accept his views, or to follow his acts in line with his views, for the purpose of interfering with the operation of the military establishment of the United States.

For these reasons, it is the opinion of the court that the defendant's demurrer to this indictment, in the light of the ultimate facts submitted, will have to be sustained.

Demurrer sustained. Defendant discharged.

THE FORDENSKJOLD.

THE TAGGERT BROTHERS.

(District Court, S. D. Florida. May 20, 1918.)

1. SALVAGE ⇐30—COMPENSATION—SALVING STRANDED STEAMSHIP.
A tug, which at the second trial on the next high tide floated a steamship worth, with her cargo, $1,000,000, which was stranded off the Florida coast at a dangerous season, although the weather was fair, the work being efficiently done, *held* entitled to an award of $40,000.

2. SALVAGE ⇐26—ELEMENTS OF AWARD.
A tug, which anchored her two barges while salving a stranded steamship, and then proceeded alone to a port and remained two days while trying to adjust the salvage, *held* not entitled to recover for damage subsequently suffered by the barges, consequent upon the delay.

In Admiralty. Suit for salvage by Thomas S. Davis and others, owners of the tug Taggert Brothers, against the Norwegian steamship Fordenskjold and cargo. Decree for libelants.

W. Hunt Harris, of Key West, Fla., for libelants.
G. Bowne Patterson, of Key West, Fla., for respondent.

CALL, District Judge. [1] The Fordenskjold, a Norwegian steamer, left the port of Newport News October 22, 1917, loaded with approximately 5,500 tons of coal, bound for Havana. On the evening of October 26 about 5:30 o'clock, she grounded some 14 miles south of Hillsborough Light, on the Florida coast. The American tug Taggert Brothers, bound from Brunswick to Havana, with two barges, Louis H., and Martha T., having encountered heavy weather, and running short of coal, had anchored the Louis H. in the bight south of Cape Canaveral and the Martha T. opposite Palm Beach, and gone into Miami to get coal. On October 27 a fishing boat notified the captain of the tug that the steamer was ashore and the captain had sent him for assistance. There was another tug, the Resolute, in the harbor of Miami, but she declined to go to the assistance of the stranded ship. Thereupon the Taggert Brothers, after receiving her coal, proceeded to the ship and offered to assist, arriving there between 7 and 8 o'clock in the evening, and offering to assist in floating the steamer. This offer was accepted, and upon being informed that the tide was out, and nothing could be

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done until high water, the tug lay alongside until next morning, when at high water a hawser was passed to the ship and made fast to the stern bitts, and the tug pulled for something like three hours or more, but could not float her. The only effect was to swing the stern of the ship from west to east; the ship being aground at high water at about hatch No. 2, forward of amidships. About 8 o'clock in the morning of the 28th, the tug, with the consent of the captain of the ship, left to pick up her barges, promising to return for the high water next morning. Finding he could not pick up both barges and return for the morning tide, the tug picked up the Martha T. and returned the morning of the 29th at about 3 o'clock, anchoring the Martha T. a short distance from the ship, and again passed his hawser over the stern of the ship and began to pull, and the ship came off the shoal stern first; the hawser was then passed to the bow and made fast to the forward bitts, and the bow pulled around. After the ship was floated, she grounded again, and was again pulled off, and finally towed into deep water, where the mate of the tug was put aboard and she proceeded to Key West. The tug then picked up the Martha T. and anchored her near Cape Florida, and proceeded herself to Miami.

When the ship first grounded a 2,000-pound anchor was run out about 80 fathoms from the port bow. The officers of the ship claim that the ship first grounded on the 26th at the stern, and by the use of this anchor and the ship's engines she was floated at high tide on the morning of the 27th and took the shore again. However this may be, there is no question that at the time she took the ground the first time she was proceeding at full speed, and that there was deep water to the east of the reef on which it is claimed she first grounded. The claim that she took the ground so gradually and slowly that one did not realize it, in the light of these admitted facts, seems, to say the least, highly improbable.

There is a sharp conflict between the testimony of the libelants and claimant of what occurred. Taking all the testimony, it seems to me that the situation was about as follows: The ship was ashore upon an inner reef, there being sufficient water between to float the ship and a channel through the outer reef to deep water. There was only some 250 feet between the two, and the ship from her position did not have steering room to make this channel, had she been able to float herself by jettisoning her cargo and using her engines. There can be no question that any ship ashore on the Florida Reefs, exposed as this one was to the full force of the sea during the months of September and October, is in great peril. It is true that during the operations the weather was fine and the seas light, so light that the tug could lay alongside the ship; but nevertheless the position of the ship was one of extreme peril, and it is proper that the court should consider this in arriving at a proper award of salvage. The assistance was promptly and efficiently rendered, and without assistance I am satisfied that she would have been unable to extricate herself. She was ashore from the evening of the 26th to the morning of the 29th, and no effective assistance tendered, except that of this tug; and going to show that she

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was hard aground is the condition of her plates and the repairs made necessary by this accident.

Stress was laid on the fact that the tug left the ship for about 19 hours to go for the barges, thereby abandoning the ship; but this was done with the consent of the captain of the ship and with the promise to return the next morning, and the tug did return in time for the morning high water, at which time the ship was floated. Testimony was taken of the value of the ship and cargo, and, taking the lowest of these valuations, the value of the property saved was at least $1,000,000; the value of the cargo being about $55,000, and that of the ship $945,000. The value of the tug may be stated at $85,000.

As has been said in numerous cases, salvage is a reward for meritorious service in saving property in peril from the sea, which might otherwise be lost, and is allowed as an encouragement to persons to bestow their utmost endeavors to save vessels and cargoes in peril. The peril from which the salved property is saved is to be considered, as well as the labor bestowed, time consumed, etc. There were no elements of heroism or danger to life in the instant case. The only danger to the tug was such as was incident to going to the ship ashore, which in this case was slight, and no damage was suffered, except such as was incidental to pulling on the tug's hawser.

[2] It is contended that damages suffered by the barges, Louis H. and Martha T. should be compensated for out of the salved property, as being a part of the fleet, as well as the loss of another barge, whose trip was delayed. But all these damages occurred subsequent to the completion of the salving operations, and days after the salved property had reached the port of Key West. Had the tug returned to the Louis H. after the ship was floated and started to Key West with a representative of the salvors on board, it is entirely probable that the damages suffered by the barges would not have occurred. But the tug lay in the harbor of Miami for more than two days, awaiting the return of the captain from Key West, where he had gone to adjust the salvage claim. It does not seem to me that damages suffered by the barges by reason of weather blowing up after this delay should be compensated for by the salved property. The choice lay with the officers of the tug whether it was more important to take care of the barges than settle the salvage claim, and they made the choice, and the damage resulting therefrom must remain where it had fallen.

Guided by the rules stated above announced by many courts, I am of opinion that in this case the sum of $40,000 is a proper allowance in this case, to be paid proportionately by the vessel and cargo, according to the values as found above; this amount to be divided, two-thirds to the owners of the tug, and one-third distributed among the crew in proportion to the wages of each.

It will be so decreed.

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In re EVANS.

(District Court, W. D. Tennessee, E. D. September 27, 1918.)

No. 979.

BANKRUPTCY ⊂⊃138(1)—PROPERTY PASSING TO TRUSTEE—WAGES EARNED PRIOR TO BANKRUPTCY.

Bankrupt was of a class of railroad employés which had demands for increased wages pending and undetermined when the roads were taken over by the government, and remained in the service on promise of the Director General to consider the claims, and that, if allowed, the increase should date from that time. The increase was allowed and paid after the bankruptcy. *Held*, that so much of it as was earned prior to that time passed to the trustee as part of the estate.

In Bankruptcy. In the matter of W. C. Evans, bankrupt. On review of order of referee. Confirmed.

Appleby & Johnson, of Lexington, Tenn., for bankrupt.

McCALL, District Judge. This case is before me on a certificate of T. A. Lancaster, Esq., one of the referees of this court, for a review of his action in dismissing the petition of the bankrupt filed in this case, to determine the respective rights as between the trustee and bankrupt to certain funds now in the hands of the referee. There is no disagreement about the material facts, which are in substance as follows:

In a voluntary proceeding in bankruptcy W. C. Evans was adjudged a bankrupt on May 18, 1918. A trustee was duly appointed. The money in question, $189.65, is the amount of additional and back pay allowed by W. G. McAdoo, Director General of the Railroads of the United States, to W. C. Evans, the bankrupt, a brakeman and employé of the Nashville, Chattanooga & St. Louis Railway Company, for labor rendered by him from January 1, 1918, to May 18th, the date of adjudication. The order of the Director General was promulgated May 25, 1918, seven days after adjudication. The question for determination before the referee was whether the $189.65 back pay goes to the bankrupt estate, or whether it goes to the bankrupt as after-acquired property. The referee held that it goes to the trustee. For a review of his actions the case has been certified to me.

The question is not free from difficulty. On the one hand, it is urged that the service for which the additional and back pay was allowed was rendered by the bankrupt prior to adjudication, and is therefore a part of the bankrupt estate. On the other hand, it is urged that the additional and back pay was only a possibility, and as such it had no value, and was not transferable, and hence was not a part of the bankrupt estate, within the meaning of the Bankruptcy Act.

Subsection 5, section 70, of the Bankruptcy Act of July 1, 1898 (30 Stat. 565, c. 541 [Comp. St. 1916, § 9654]), provides that the trustee—

"shall * * * be vested * * * with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * property which prior to the filing of the

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petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."

Under subsection 5 the trustee took such title to this fund as was vested in the bankrupt, except it be exempt property. There is no claim of exemption; hence it follows that, if the bankrupt on the date of adjudication was vested with such title to the claim for $189.65 as "he could by any means have transferred," the funds passed to the trustee.

It is a part of the history of the country, and of common knowledge, that just prior to January 1, 1918, a class of railway employés, to which class the bankrupt belonged, made a demand of their employers for an increase of compensation for their services, coupled with a statement that, if the increase was not allowed, they would go out on a strike. This matter was under consideration at the time the railroads were taken over by the government, through the Director General of Railroads. To meet that condition the Director General requested the railroad employés to continue in the railroad service under the management of the government, and that he would take their demand for increased pay under advisement, with a statement, if he decided they were entitled to an increase, he would make the order retroactive, so as to be effective as and from January 1, 1918; so that from January 1, 1918, up to May 18, 1918, the employés were in the service of the United States at the rate of pay which they had theretofore received from the railroad companies, with a demand for increase of pay pending before the Director General of Railroads, and the assurance that, if he found their claim meritorious, he would allow it as and from January 1, 1918. He did so find, and allowed it in accordance with his promise.

The employés, therefore, did have a claim for increased wages pending decision, with the assurance, if allowed, they would receive it as a supplement to the rate of wages in force at the time the railroads went into the hands of the Director General. At the time of bankruptcy in this case, the bankrupt had rendered the service. The claim for increase in pay was pending. As was said by Mr. Justice Lamar, speaking for the Supreme Court of the United States in Williams v. Heard, 140 U. S. 529, 11 Sup. Ct. 885, 35 L. Ed. 550:

"There was at least a possibility of their payment by Congress—an expectancy of interest in the fund; that is, a possibility coupled with an interest."

At the time of bankruptcy was the bankrupt's claim for and expectancy of back pay by any means transferable? This question may be answered by asking another. If, instead of having been adjudicated a bankrupt on May 18, 1918, the bankrupt had died, would the fund in question have passed to his administrator? An answer is found to this latter question in Comegys v. Vasse, 26 U. S. (1 Pet.) 218, 7 L. Ed. 108, when, considering a similar question under Bankruptcy Act April 4, 1800, c. 19, 2 Stat. 19, Mr. Justice Story said:

"It will not admit of question that the rights devolved upon Vasse by the abandonment could, in case of his death, have passed to his personal representative, and, when the money was received, be distributed as assets."

The principles of that case were applied in Milnor v. Metz, 41 U. S. (16 Pet.) 221, 10 L. Ed. 943, to a case of a claim for extra pay for

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services rendered by a bankrupt as gauger, which, although presented to Congress prior to his adjudication in bankruptcy, was not recognized by that body, or satisfied, until afterwards; the court holding that the claim passed to the assignee as a part of the bankrupt's estate, and that the doctrine of donation did not apply. Williams v. Heard, supra.

To illustrate: If we assume that, at the time the Director General took charge of the railroads, the employés had said to him:

"We will not continue to work for the rate of pay we have been receiving, but at your request we will continue and work for the government without any stated wage, until you have decided what our services are reasonably worth, and then pay us at that rate in one sum as and from January 1, 1918. less any advancement you may have from time to time made."

Under such circumstances, would the money so earned by the bankrupt have passed to the trustee? It seems that it should. I am inclined to the opinion that the bankrupt on the day of adjudication could have sold and transferred his pending claim for additional pay for services rendered from January 1, 1918, to that date, and the transferee would have been entitled to the amount of increased back pay, if and when granted. It was not a gift, or gratuity, or bonus. The Director General is not authorized thus to dissipate either the earnings of the railroads or the funds of the United States. He ordered it paid because in his judgment the employés had earned it, and it justly belonged to them, which is in effect to say that they had earned and should have received, on each previous pay day, compensation at the increased rate. The authorities cited and relied on by the bankrupt are either not in point or not controlling.

An order will be entered, confirming the action of the referee, with costs, and referring the case to him for further proceedings under the Bankruptcy Act.

In re LIBBY.

(District Court, S. D. Florida. May 31, 1918.)

1. BANKRUPTCY ⟸400(4)—PETITION TO REVIEW—RECORD.
   The file marks, showing when the trustee's report setting aside exemptions, and the creditor's exceptions thereto were filed, must be accepted as establishing those dates, where on petition to review the referee's order sustaining the exceptions it was contended they were not filed within 20 days as required by General Order XVII.

2. BANKRUPTCY ⟸396(1)—EXEMPTIONS—PRECEDENTS.
   The bankruptcy court, in allowing exemptions under the state laws, must be governed by the construction and interpretation of the highest court of the state.

3. BANKRUPTCY ⟸399(3)—EXEMPTION—ALLOWANCE.
   A Florida bankrupt *held* not entitled to the full homestead exemption claimed out of his stock, which he undervalued, it appearing that he made preferential payments shortly before his bankruptcy, and that in contemplation of that event he ceased making deposits in the bank and to keep proper accounts; so the referee's reduction of the amount allowed by the trustee was proper.

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4. BANKRUPTCY ⇐444—PETITION TO REVIEW—TIME FOR SETTING DOWN.
The District Court has power, upon cause shown, to suspend the rule requiring petitions for review to be set down in 20 days.

In Bankruptcy. In the matter of J. C. Libby, bankrupt. On petition to review the order of the referee. Order affirmed, and petition to review denied.

L. W. Nelson, of St. Augustine, Fla., for bankrupt.
W. T. McCaffrey, of Jacksonville, Fla., for creditors.

CALL, District Judge. This cause comes on upon petition to review the order of the referee made on March 26, 1918, whereby the exceptions of certain creditors to the trustee's report setting aside an exemption was partly sustained. The findings of the referee, which are amply sustained by the testimony, are that the bankrupt appraised his stock, consisting of plumbing supplies, at one-third of the cost price of sale; that prior to the month of December, 1917, regular deposits were made in two banks at St. Augustine of the receipts from the business conducted by the bankrupt; that during the month of December the deposits were small and irregular; that during said month of December the bankrupt turned over to his wife $300 in payment of a loan made some months before, and this payment worked a virtual preference of the wife, and failed to account for the receipts from the business for that month, except for this $300, paid to his wife in an amount in excess of $300; that up to December, 1917, the bankrupt kept books, which, while not technical, yet showed his collections, etc.

The referee allowed the bankrupt to select from the stock an exemption of the value of $500. It is this order the bankrupt seeks to have reviewed. The assignments of error are seven in number.

[1] The seventh assignment is that the referee erred in not granting the motion of bankrupt to dismiss the creditor's exceptions to the trustee's report on the ground that the same had not been filed within 20 days, as required by General Order XVII. The file marks on the papers show this assignment not well taken. Some contention is made in the brief of the attorney for the bankrupt that the report was lodged in the referee's office some days prior to the date shown by the file mark. However this may be, I must be governed by the record before me. The exceptions were filed on the day of the last examination of the bankrupt.

[2, 3] The other assignments challenge the correctness of the referee's order disallowing the bankrupt's claim for exemption in the sum of $500, because of this payment to his wife of $500, and failure to further account for the receipts of the business during the month of December, 1917. The bankruptcy court, in allowing exemptions under the state laws, must be governed by the construction and interpretation of the highest court of the state. Therefore it is to the Supreme Court of Florida we must look for this construction and interpretation.

Decisions of federal courts in other states can be of little assistance,

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unless the exemption laws of such states are the same as the provisions of the Florida Constitution. That court, since the case of Drucker v. Rosenstein, 19 Fla. 191, has laid down and maintained the doctrine that the exemption laws should be liberally construed to benefit the family, but such laws should not be applied so as to make them an instrument of fraud or imposition upon creditors. And the further principle was announced in Florida Loan & Trust Co. v. Crabb et al., 45 Fla. 306, 33 South. 523, that a debtor, who conceals or removes beyond the reach of his creditors a part of his personal property as a preliminary to claiming the exemption, will, when the property so remains concealed or removed, be held to have selected such concealed or removed property pro tanto as his exemption. Now, this is exactly what the referee did in this case, as I understand his order.

Up to December, 1917, the bankrupt kept books from which his collections could be ascertained, and made his deposits in the two banks regularly. Commencing with December and until January 10th following, when his petition was filed, this method of conducting his business is changed; accounts are collected, deposits not made as theretofore, and he turns over to his wife in payment of a loan made some 12 months before the sum of $300. He is unable upon the two examinations by the creditors to explain or account for the receipts of the business for the month of December other than the payment of this sum of $300, and it further appears that shortly before filing his petition he pays to his attorney, presumably for services to be rendered in these proceedings, $125, and presents his claim for exemption to the entire stock of goods and collectable accounts.

Is this such a concealment or removal of property, in contemplation of the claim for exemption, as is referred to in the Crabb Case above? In that case money was deposited in the wife's name, the business was exempted and turned over to the wife, and afterwards the exemptor conducted it as agent of his wife. The court in that case announced the doctrine above noticed and applied to the referee in the instant case. It seems to me the conclusion that the act of payment to the wife, failure to conduct his business as theretofore and exhaustion of his bank accounts were all done in contemplation of bankruptcy and claiming the stock of merchandise as exempt on a preposterously low valuation. It is so generally known that the court could almost take judicial cognizance of it that prices of all kinds, especially copper, brass, iron, and the articles usually carried in a plumbing stock, have been rising and are continuing to rise for the last two years. The bankrupt admits such advance in pipe, copper, and brass, but still values his stock for exemption purposes at one-third the cost.

A liberal construction of the homestead laws, for the benefit of the family, has been had in this case, under the order sought to be reviewed.

[4] Something was said in argument that the petition to review should be dismissed, because it was not set down in the 20 days. The court has the power to suspend this rule upon cause shown, and in this case the application was made as soon as the attorney for the bankrupt became aware of the rule. The rule is intended to expedite

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business, and, knowing the engagements of the court, a more expeditious hearing could not be had.

The order of the referee will be affirmed, and the petition to review will be denied.

UNITED STATES v. SCOTT.

(District Court, E. D. Washington, N. D. January 21, 1918.)

ARMY AND NAVY ⟸20—SELECTIVE DRAFT LAW—FAILURE TO REGISTER—ABSENTEES FROM COUNTRY.

Under Selective Draft Act, § 5, and the regulations thereunder, which require persons subject to registration who were absent from the United States on registration day to register within five days after their return, such a person cannot avoid the duty by again leaving the United States before the expiration of the five days.

Criminal prosecution by the United States against Alban N. Scott. On motion for new trial. Denied.

Francis A. Garrecht, U. S. Atty., of Spokane, Wash.

Louis A. Dyar, of Spokane, Wash., for defendant.

RUDKIN, District Judge. Section 5 of the Selective Service Law, approved May 18, 1917 (40 Stat. 80, c. 15), provides as follows:

"That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him, or by his direction, stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this act; and every such person shall be deemed to have notice of the requirements of this act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction in the District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered."

The proclamation of the President under date of May 18, 1917, provides, among other things:

"And I do further proclaim and give notice to all persons subject to registration in the several states and in the District of Columbia in accordance with the above law that the time and place of such registration shall be between 7 a. m. and 9 p. m. on the 5th day of June, 1917, at the registration place in the precinct wherein they have their permanent homes. Those who shall have attained their twenty-first birthday and shall not have attained their thirty-first birthday on or before the day here named are required to register, excepting only officers and enlisted men of the Regular Army, the Navy, the Marine Corps, and the National Guard and Naval Militia while in the service of the United States and the officers in the Officers' Reserve Corps and the enlisted men in the enlisted Reserve Corps while in active service. In the territories of Alaska, Hawaii, and Porto Rico a day for registration will be named in a later proclamation."

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Provision is then made for the registration of those who through sickness shall be unable to present themselves for registration and for those who expected to be absent on the date named. Section 65 of the registration regulations promulgated on the same day provides as follows:

"Male persons within the designated ages who, on account of absence at sea or on account of absence without the territorial limits of the United States, may be unable to comply with the regulations herein pertaining to absentees will, within five days after reaching the first United States port, register with the proper registration board or as herein provided for other absentees."

Section 56 of the regulations promulgated November 8, 1917, provides as follows:

"Citizens and persons who have declared their intention to become citizens residing abroad are not required to register, but any such citizen or person may do so by applying to the nearest American consulate to have his registration card filled out."

Section 53 of the regulations of the same date provides:

"Citizens or persons who have declared their intention to become citizens who have not hitherto registered on account of absence without the territorial limits of the United States are required to register within five days after their return to the United States."

The indictment in this case charges that the defendant is a citizen of the United States within the designated ages; that on the 5th day of June, 1917, he was temporarily without the territorial limits of the United States and within the Dominion of Canada; that on the 6th day of December, 1917, he returned to the United States at the port of Laurier, within this district, and proceeded thence to the city of Spokane, where he arrived on the 7th day of December, 1917, and has since remained; and that he thereafter unlawfully and willfully failed, neglected, and refused to register or present himself for registration or submit thereto within the period of five days as provided by the act of Congress and the proclamation of the President. Upon the trial the jury returned a verdict of guilty under the instructions of the court, and the defendant has interposed a motion for a new trial.

There is no controversy over the material facts. The defendant is a citizen of the United States of the age of 25 years. He left the United States about the month of July, 1916, and went to the Dominion of Canada. He resided in the Dominion of Canada from that date until the 6th day of December, 1917, and claimed his permanent residence there. On or about the 6th day of December, 1917, he made certain statements in a hotel at Grand Forks, British Columbia, derogatory to his own country and to the cause of the countries engaged in the present war against the German Empire. He was placed under arrest by the immigration officers of the Dominion and deported to the United States. At the border he was turned over to the United States immigration officers, and was by them in turn turned over to the United States marshal for this district, who placed him in jail in the city of Spokane. The cause of his arrest and detention after entering the United States was apparently based on suspicion that he was

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a deserter from the United States Army. Within five days after entering the United States he was requested by a deputy United States marshal to register and was given an opportunity to do so. This request he refused to comply with, and still refuses.

The sole contention now made in his behalf is that, under the regulations promulgated by the War Department, he was allowed the full period of five days to register after entering the United States, and was guilty of no offense until after the expiration of that period; that during the period thus allowed he was at liberty to again leave the United States and return to the Dominion of Canada, or to any other foreign country, without violating the laws of the United States or the regulations made pursuant thereto, and, having been denied the right to thus leave the country because of his imprisonment and forcible detention, he should be acquitted. With this contention I am unable to agree. The court cannot inquire into the lawfulness of his deportation from the Dominion of Canada. He came into the United States on the 6th day of December, and the duty to register within five days thereafter was absolute and unqualified. That duty he could not shirk or avoid by leaving the country before the expiration of five days, any more than any other citizen could avoid the like duty by leaving the country immediately prior to the 5th day of June, 1917.

The motion for a new trial is accordingly denied.

In re TIETJE.

(District Court, E. D. New York. July, 1918.)

1. BANKRUPTCY ⟸138(1)—ADMINISTRATRIX—PROPERTY PASSING TO TRUSTEE.
Where an administratrix, without authority from the probate court, continued the mercantile business of decedent, purchasing new goods and contracting new debts, all merchandise on hand acquired by her and all accounts accruing to her after her appointment are property of her estate in bankruptcy, as well as proceeds of accounts made while the business was conducted by her receiver.

2. BANKRUPTCY ⟸143(9)—RECEIVER—COLLECTION OF RENTS.
Where an intestate left real estate which was conveyed by the next of kin to bankrupt, who held it at the time of bankruptcy, and no proceedings for its sale to pay debts of decedent had been taken, a receiver in bankruptcy is entitled to collect the rents.

In Bankruptcy. In the matter of Elizabeth V. Tietje, bankrupt. On motion to require receiver to surrender to bankrupt, as administratrix, certain property. Granted in part.

Joseph M. Gazzam, of New York City, for bankrupt.

Leon Lauterstein, of New York City, for petitioning creditors and receiver.

Morris Kamber, of New York City, receiver.

GARVIN, District Judge. This is a motion to compel the receiver in bankruptcy of Elizabeth V. Tietje, bankrupt, to surrender to said

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Elizabeth V. Tietje, as administratrix of Frederick H. Tietje, deceased, the following property:

(1) Rents received from real estate, including all rents collected by said receiver, and rents collected by said administratrix and paid to said receiver.

(2) Proceeds of sale of horses, wagons, automobiles, and other fixed assets of said estate, sold by J. W. & W. H. Reid, auctioneers.

(3) Proceeds of merchandise sold by J. W. & W. H. Reid, auctioneers.

(4) Proceeds of accounts which accrued prior to the receivership, and which have been collected by said receiver, or paid by said administratrix to said receiver.

(5) Proceeds of accounts which accrued while business was conducted by said receiver.

[1] The receiver was appointed on or about June 13, 1918. Elizabeth V. Tietje was appointed administratrix July 3, 1917. The decedent was engaged in business as a provision dealer. The administratrix continued the business without authority from the Surrogate's Court. The stock on hand at the time of the decedent's death was disposed of by the administratrix before the appointment of the receiver.

I am of the opinion that where an administratrix, instead of proceeding forthwith to liquidate the business of the decedent, continues it, incurs new debts, and creates new accounts due without the authority of the Surrogate's Court, if she is thereafter adjudicated a bankrupt, such merchandise as remains on hand, acquired after she was appointed administratrix, and all outstanding accounts arising after such appointment, are the property of the receiver in bankruptcy. This disposes of the property described in paragraphs (3) and (4).

I have no doubt but that the proceeds of all accounts which accrued while the business was being carried on by the receiver belong to him. This refers to the property described in paragraph (5).

[2] In my judgment, where a decedent leaves real estate which is transferred to the bankrupt by the next of kin, as was the case here, and the bankrupt has title to the real estate when the petition is filed, no proceedings to sell the same to pay decedent's debts having been instituted, the creditors of the decedent have no such interest in the real estate as will justify this court in preventing the receiver in bankruptcy from collecting the debts. The property in paragraph (1) above is affected by this conclusion.

Any personal property belonging to the decedent must be accounted for, if sold by the receiver in bankruptcy, and the proceeds turned over to the administratrix. Property described in paragraph (2) above comes within this class.

This motion must therefore be denied, except that the receiver will be required to pay over to the administratrix the proceeds of sale of horses, wagons, automobiles, and other fixed assets of the estate of Frederick H. Tietje, deceased, sold by J. W. & W. H. Reid, auctioneers.

It follows that this determination requires that the fund created by

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a payment by Feltman Bros. under order of this court dated July 24, 1918, be turned over to the receiver, or to the trustee, if elected, forthwith.

UNITED STATES v. E. ROSENBURG & SONS.

(District Court, S. D. Florida. August 3, 1918.)

CUSTOMS DUTIES ⇐92—AUTHORITY OF SECRETARY OF TREASURY—STAMPS FOR CIGAR BOXES.

Act Oct. 3, 1913, § 4M (Comp. St. 1916, § 5672), allowing the withdrawal for home consumption of tobacco from a bonded warehouse "upon the payment of duties on such tobacco in its condition as imported under such regulations as the Secretary of the Treasury may prescribe," does not authorize the Secretary of the Treasury to promulgate regulations requiring manufacturers of cigars to pay $10 per thousand for stamps to indicate the origin of the tobacco and the place of manufacture.

At Law. Action by the United States against E. Rosenburg & Sons, a corporation. On demurrer to declaration. Sustained.

Herbert S. Phillips, U. S. Atty., of Tampa, Fla.
McKay & Withers, of Tampa, Fla., for defendant.

CALL, District Judge. The declaration in this case, after setting out the passage of Act Oct. 3, 1913, c. 16, 38 Stat. 114, and that the defendant company executed the bond required, alleges that pursuant to the provisions of the act the Secretary of the Treasury promulgated a regulation requiring all manufacturers of cigars doing business under the act to pay to the United States $10 per thousand for all stamps to be used to indicate the character of the boxes, etc., containing cigars, the origin of the tobacco, and the place of manufacture, and that pursuant to this regulation 70,000 stamps were furnished the defendant company, for which it had not paid, and claims $700 therefor.

To this declaration the defendant interposed a demurrer on 10 grounds. The third ground is as follows:

"The declaration fails to show the legal authority of the Secretary of the Treasury to promulgate the regulations therein contained."

The regulation in question is contained in T. D. 34659, and is as follows:

"Treasury Department, July 22, 1914.

"Sir: Replying to the various requisitions made by your office for stamps to be affixed to boxes containing cigars made in a bonded warehouse under the provisions of the act of October 3, 1913, I have to request that proprietors of the bonded premises using such stamps be charged therefor at the rate of ten dollars per thousand stamps," etc.

"Wm. P. Malburn, Asst. Sec."

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Section 4M of the act of October 3, 1913 (Comp. St. 1916, § 5672), among other things provides that:

"Articles manufactured under these provisions may be withdrawn, under such regulations as the Secretary of the Treasury may prescribe for transportation and delivery into any bonded warehouse at an exterior port for the sole purpose of immediate export therefrom: Provided that cigars manufactured in whole of tobacco imported from any one country, made and manufactured in such bonded manufacturing warehouses, may be withdrawn for home consumption, upon the payment of the duties on such tobacco in its condition as imported under such regulations as the Secretary of the Treasury may prescribe, and the payment of the internal revenue tax accruing on such cigars in their condition as withdrawn, and the boxes or packages containing such cigars shall be stamped to indicate their character, origin of tobacco from which made, and place of manufacture."

It is the proviso to which this Treasury Decision and the stamps showing the character, origin of tobacco, and place of manufacture applies, and the power to make it rests upon the words contained in such proviso:

"Under such regulations as the Secretary of the Treasury may prescribe."

The decision of the question of the power of the Secretary to require the manufacturer to pay to the government $10 per thousand for these stamps must be decided upon the words and the context in which they are used. The part of the proviso containing the quoted words is to the effect that cigars manufactured from imported tobacco may be withdrawn for home consumption upon the payment of the duties on such tobacco in its condition as imported, under such regulations as the Secretary may prescribe and the payment of the internal revenue tax on the cigars and stamping the boxes or packages as required by the act. The act requires these packages or boxes of cigars to be stamped, indicating their character, origin of tobacco, and place of manufacture. It also provides that all labor performed and services rendered under these provisions shall be under the supervision of a duly designated officer of the customs and at the expense of the manufacturer.

Does the power delegated by Congress to the Secretary of the Treasury to prescribe regulations for the payment of the import duty on the tobacco from which the cigars were manufactured invest the Secretary with power to prescribe the amount the manufacturer shall pay for a stamp indicating the character, tobacco, and place of manufacture, in addition to the import duty on the tobacco, the internal revenue tax, and the labor performed and services rendered under the provisions and required to be paid by the manufacturer by the act? In other words, has the Secretary of the Treasury the power to require by regulation the manufacturer to pay $10 per thousand for these stamps additional to the amounts required by the act itself? The power to levy the tax and imposts is with Congress, and if an attempt has been made to delegate such power to the Secretary it would scarcely be contended that it was legal; but in the instant case it is clear to me that Congress made no such attempt. It seems to me that the attempt of Congress was to invest the Secretary with power

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to make regulations for the inspection, grading, fixing the quality, proper amount of import tax, etc., on the tobacco in its condition as imported, in order to arrive at the proper amount of import tax on such tobacco. The payment of the internal revenue tax on the cigars and the contents of the stamp to be placed on the package or boxes is prescribed by the act, and there is no attempt to vest the Secretary with power to regulate these or either of them. It seems to me that the Treasury Decision relied upon to fix the indebtedness upon the defendant in the case is a sum in addition to and beyond what the act requires to be paid by the manufacturer before the goods can be withdrawn from the bonded warehouse for home consumption, and not in the nature of a regulation authorized by the act, a sum apparently fixed arbitrarily, and is an addition to the law.

For these reasons, I am of opinion that the demurrer to the declaration is well taken, and should be sustained.

NEW YORK LIFE INS. CO. v. KENNEDY et al.

(District Court, S. D. Florida. June 27, 1918.)

1. COURTS ⟸274—JURISDICTION OF FEDERAL COURTS—CONSTRUCTION OF STATUTE.

Under Act Cong. Feb. 22, 1917, authorizing insurance companies to file bills of interpleader, vesting District Courts of the United States with jurisdiction, and providing that bill "shall be filed in the district where the beneficiary or beneficiaries reside," suit must be brought in the district of the residence of the beneficiary, whether there has been as assignment of the policy or not.

2. COURTS ⟸92—FEDERAL COURTS—FOLLOWING PRIOR DECISION—DICTA.

A prior decision placing a construction upon a statute is only persuasive where a construction was not necessary to a decision of the matter involved.

In Equity. Bill of interpleader by the New York Life Insurance Company against Georgia L. Kennedy and others. On complainant's motion to strike out certain portions of answer of defendant Thomas R. L. Daughtery. Granted.

John L. Doggett, of Jacksonville, Fla., for plaintiff.

Marks, Marks & Holt and Hartridge & MacDonell, all of Jacksonville, Fla., for defendants.

CALL, District Judge. This cause comes on for a hearing on motion of the complainant to strike certain portions of the answer of Thomas R. L. Daughtery, one of the defendants.

[1] The portion of the answer moved to be stricken sets up the want of jurisdiction in this court to hear and determine the questions presented by the pleadings. The bill of complaint was filed under the act of Congress approved February 22, 1917 (39 Stat. 929, c. 113), authorizing insurance companies, etc., to file bills of interpleader. This act, after vesting District Courts of the United

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States with the general jurisdiction to hear and determine the controversies between insurance companies and bona fide claimants, under the conditions therein set out, continues as follows:

"Provided, that in all cases where a beneficiary or beneficiaries are named in the policy of insurance, * * * or where the same has been assigned and written notice thereof shall have been given to the insurance company, * * * the bill of interpleader shall be filed in the district where the beneficiary or beneficiaries may reside."

[2] This proviso determines the situs of the suit. In the case of Penn Mut. Life Ins. Co. v. Henderson et al. (D. C.) 244 Fed. 877, Judge Sheppard reached the conclusion that Congress meant to include assignees by the words "beneficiary or beneficiaries," used in the proviso. This construction was not necessary to the decision of the motion then pending before him, and is therefore only persuasive on the question now before me. Without this proviso, the situs of the suit would have been fixed by the Judicial Code, and the suit could have been brought in the district of the residence of either of the interested parties. This proviso makes an exception to this rule in all cases where a beneficiary is named in the policy, or where there has been an assignment of the same and notice given. It is with these facts in view that we must construe this portion of the act.

In a case where there is a beneficiary named in the policy and an assignment of the same, and the residence of the beneficiary and assignee is in different districts, the question would arise which would be the proper district in which to bring said suit. Congress could have invested either District Court with the jurisdiction, by adding "assignees" to "beneficiary," but did not do so, but confined it to the residence of the beneficiary or beneficiaries. And in this case that exact condition prevails. It is true that in this case the beneficiary named in the policy has assigned her interest to the defendant Daughtery, making the objection to the jurisdiction; but, if Congress meant to invest jurisdiction in the district of the residence of the named beneficiary, this fact would not oust this court of jurisdiction, and vest it in the district of the residence of such assignee. A difficulty might arise where there is no beneficiary named and an assignment of the policy is made. In this last-mentioned case does the act authorize the institution of the suit in the district of the residence of the assignee? It does not say so, unless the assignee is construed to be the beneficiary, and such construction might be reasonably made in such a case.

It seems to me the reasonable construction of the act is that, if there is a beneficiary named in the policy, the suit must be brought in the district of the residence of such beneficiary, whether there has been an assignment of the policy or not.

The motion to strike the portion of the answer referred to in said motion will therefore be granted.

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THE MARIO MARIOFEL.

(District Court, S. D. Florida. May 31, 1918.)

SEAMEN ⊂=28—SHARE IN EARNINGS—SUPPLIES.

Where cruise is made on agreement for sharing in net earnings, the owner of the boat, being a merchant, and furnishing the supplies, may charge the market price, and need not furnish goods from his store at cost, or give the crew the benefit of trade discount in purchase from other merchants.

In Admiralty. Libel by George Calamakis against the schooner Mario Mariofel. Decree for libelant.

James B. Gibson, Jr., of Tampa, Fla., for libelant.
Macfarlane & Chancey, of Tampa, Fla., for respondent.

CALL, District Judge. The facts as they appear from the evidence may be stated as follows: The libelant, with others, agreed to go on a sponging cruise, each of the crew to receive a proportion of the net results of such cruise; the proceeds to be divided into 21 shares, the boat to receive 5 shares, the libelant 1½ shares, and the others of the crew different numbers of shares, according to the labor performed by each. After the termination of the voyage and the sale of the sponges, a division clerk was appointed, who audited the accounts for supplies, etc., and made the division among the crew, which was accepted by all, except the libelant, as satisfactory. There seem three points on which the libelant was dissatisfied:

1. He claims the proceeds were to be divided into 19½ shares, instead of 21. The number of shares seems to have been understood by all the others interested in the eventure to have been 21, and therefore, from the evidence, I find that 21 was the number agreed upon.

2. He objects to an expense of $150 deducted from the gross proceeds paid to an oarsman for service on the voyage. It appears peculiar that libelant should have been the only member of the crew who was ignorant of this arrangement. If there had been others, undoubtedly their testimony would have been produced. In the division this $150 was added to the expenses of the voyage, and the remaining proceeds divided into 19¾ shares, instead of 21. Oarsmen's shares seem to have been always 1¼, and, the oarsman having been paid $150 unconditionally, instead of a share, the share he would have drawn ordinarily was, it seems to me, properly subtracted from the 21 shares into which the proceeds were to be divided under the original agreement.

3. He objects to $50 charged as paid to a negro. The testimony is such on this item that I cannot find it was a proper or necessary expense of the voyage.

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He also objects to the bill for supplies furnished the vessel. The testimony in regard to these seems to me to support the charges. I gather from the testimony that the owner of the boat was a merchant at Tarpon Springs, furnishing the supplies from his stock, such as he had, and purchasing from others such as he did not have. It is well known that merchants purchasing from others receive what is called a trade discount, so as to permit them to supply their customers at a profit to themselves. Now, the testimony shows that the articles, whether purchased from the store of the owner or procured from other merchants, were furnished to the boat at the market price. This is all that the crew could reasonably require. They would have no right to demand or expect that the owner should furnish goods from his store at cost, nor give them the benefit of any trade discount received by him in the purchase of other articles from other merchants.

The account may be stated as follows:

Expense for supplies		$1,065.40
Wages to oarsman		150.00
Wages to Salvadon		20.00
Wages to division clerk		6.50
Total of expense		$1,241.90
Total proceeds of sale	$2,734.06	
Amount to be divided		$1,492.16
Libelant's share	$94.44	
Supplies furnished	66.95	
Amount libelant is entitled to	$27.49	$27.49

A decree will be entered for this amount in favor of the libelant, with interest at the rate of 6 per cent. from October 3, 1916, and the costs of this proceeding.

Respondent could have, under rule 41 (c) of the Admiralty Rules, relieved himself of the costs and interest subsequent to filing his answer, had he seen fit to do so. But this he did not do, and therefore the interest and costs must be decreed against it.

It will be so decreed.

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UNITED STATES v. GUARANTY TRUST & SAVINGS BANK.

(District Court, S. D. Florida. August 13, 1918.)

INTERNAL REVENUE ⟹25—EXCISE TAXES—CALCULATION — DEDUCTION OF STATE TAXES.

State, county, and municipal taxes paid by a bank under Laws Fla. 1907, c. 5596, § 8, constitute a liability of the bank, and not its stockholders, and are to be deducted from the gross income of the bank, to ascertain the net amount on which the 1 per cent. of excise tax under Act Aug. 5, 1909, § 38, cl. 2, subd. 4, is to be calculated.

At Law. Action by the United States against the Guaranty Trust & Savings Bank. Judgment for defendant on the pleadings and stipulated facts.

H. S. Phillips, U. S. Atty., of Tampa, Fla., and Fred Botts, Asst. U. S. Atty., of Jacksonville, Fla.

W. M. Bostwick, Jr., of Jacksonville, Fla., for defendant.

CALL, District Judge. This suit is brought by the government to recover from the defendant a certain amount as taxes upon the net income of the bank for the years 1909, 1910, 1911, 1912, 1913, and 1914, which amounts are arrived at by disallowing certain amounts paid by the bank as taxes to the state, county, and city. The declaration contains six counts, each count claiming an amount for one of the years above mentioned.

The defendant interposed two pleas to each of the first three counts: (1) The plea of never was indebted as alleged; and (2) the plea denying that the amount stated in the counts was correct amount of net income of the bank for that year. To the fourth, fifth, and sixth counts the defendant pleaded that the tax sued for had been paid, and application is now pending before the department for a refund.

Issue was joined on these pleas, and a stipulation of facts filed, with the waiver of a jury and submission of the case to the court for trial without a jury. The stipulation of facts is as follows:

The defendant is a banking corporation, incorporated under the laws of the state of Florida, and doing business at Jacksonville, in said state, during the years 1909, 1910, 1911, 1912, 1913, and 1914, and rendered to the collector of revenue for the district its return of annual net income for each of said years; that in each of its annual returns for the years 1909, 1910, and 1911 deductions were made for state, county, and municipal taxes, paid under chapter 5596 of the Laws of Florida, 1907; and that the amounts claimed in the first three counts are 1 per cent. of these taxes so deducted, specifying each of such amounts. As to the amounts claimed in the fourth, fifth, and sixth counts, it is stipulated that these amounts have already been paid, and application is now pending before the department for a refund.

I find the facts as set forth in the stipulation, which stipulation is made a part hereof. This presents the question of law, on the first,

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second, and third counts, whether the tax paid by the bank defendant to the state, county, and city was properly deducted from the gross income. Section 8 of chapter 5596 of the Laws of Florida, is as follows:

"The owner or holder of stock in any incorporated company doing business under the corporate name shall not be taxed for such stock: Provided, that such stock is returned for taxation by such incorporated company and taxes are paid thereon by such company, or the property of said company is assessed for taxes where located and taxes are then paid on such property."

The decision of the question of the liability of the bank under the first three counts depends upon the construction of this act of Florida Legislature. If the tax is upon the bank, as distinguished from the stockholder, the defendant is not liable. If it is a tax upon the stockholder, and the payment by the bank is for the stockholder, not for itself, then it is liable. The rest of the provision of section 8 of the chapter, where provision is made for the taxing of the stockholders in national banks, would seem to evince the intention of the Legislature to make the bank return its property, stock, etc., and pay taxes thereon. In case of failure of the bank to do this, then and only then the state would look to the stockholder for taxes on the value of his stock. It seems to me the primary obligation rests upon the bank to pay this tax, without provision to recover it from the stockholder, as is the case with national banks. Such being the case, the tax so paid must be deducted from the gross income, to arrive at the net amount on which the 1 per cent. of excise tax is to be calculated, under the fourth subdivision of the second clause of section 38 of the Act of August 5, 1909 (36 Stat. 113, c. 6).

I am therefore of opinion that, upon the pleadings and stipulation of facts filed herein, judgment should go for the defendant on all the counts in the declaration.

CENTRAL TRUST CO. OF ILLINOIS et al. v. UNION TERMINAL CO. et al.

(District Court, S. D. Florida. May 21, 1918.)

1. MORTGAGES ⟸151(5)—LIENS—SUPERIORITY.
One who furnished fire-extinguishing apparatus for a building with knowledge that the owner had executed a mortgage securing bonds issued and sold to raise funds to defray the cost of construction is not, though he had recovered a judgment for the amount due, entitled to a lien superior to that of the bondholders.

2. MORTGAGES ⟸492—PAYMENT OF LIENS.
Where a decree establishing a lien prior to a mortgage gave the mortgagees leave to pay off the same, the mortgagees, having discharged the lien and relieved the property therefrom, are in equity entitled to recover from the property the amount so paid.

In Equity. Suit by the Central Trust Company of Illinois and William T. Abbott against the Union Terminal Company and others. On exceptions to the master's report. Exceptions overruled.

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N. P. Bryan, of Jacksonville, Fla., for complainants.

J. T. G. Crawford, of Jacksonville, Fla., for defendant Union Terminal Co.

F. P. Fleming, of Jacksonville, Fla., for defendant General Fire Extinguisher Co.

R. P. Marks, of Jacksonville Fla., for defendant Turner Construction Co.

CALL, District Judge. This cause comes on for a hearing upon the exceptions to the master's report, filed by the Turner Construction Company and the General Fire Extinguisher Company. The contention of the General Fire Extinguisher Company is that its lien upon the fire-extinguishing apparatus is superior to the lien of the complainant mortgagees. Two cases, Holt v. Henley, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767, and Detroit Steel Cooperage Co. v. Sistersville Brewing Co., 233 U. S. 712, 34 Sup. Ct. 753, 58 L. Ed. 1166, are particularly relied upon to sustain this contention.

[1] The facts of this case are radically different from those of either of those cases. In the instant case a mortgage was executed to the complainants, and bonds issued and sold, for the purpose of constructing the building, including the fire-extinguishing apparatus to be installed. With knowledge of this condition of affairs, the General Fire Extinguisher Company installed and affixed to the building the apparatus on which it now seeks to affix a lien superior to the lien of the complainants, under the agreement filed in evidence before the master, which on its face purports to give a first lien to said Extinguisher Company. On default in the payments the company brought a simple action at law and recovered a judgment for the amount due for the apparatus. The lien of this judgment upon the entire property is subsequent to the lien of complainants. While the complainants do not occupy the position of subsequent creditors or purchasers, strictly speaking, yet I think they do occupy a position which gives them a superior equity to have their claim first satisfied before the General Fire Extinguisher Company can assert any special lien to the apparatus installed in and made a part of the building to be erected by the funds derived from the sale of the bonds which the mortgage was given to secure.

The exceptions filed by the Turner Construction Company raise questions, it seems to me, which will properly arise before the master when it comes to the payment of the bonds. The evidence shows that the bonds were sold and outstanding, and this in judgment proves the debt due from the debtor.

The exceptions of the General Fire Extinguisher Company and the Turner Construction Company will therefore be overruled.

[2] At the hearing the solicitor for the complainants offered in evidence the certified copy of the master's report, showing the payment by the complainants of the decree in the case of Turner Construction Company against the mortgagor defendant herein, which had heretofore been declared a lien prior to the lien of the mortgage, with the request

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that the amount so paid be included in the decree of foreclosure. The General Fire Extinguisher Company and the Turner Construction Company object to this being done. This decree was a prior lien to the mortgage, and in the decree the mortgagees were given leave to pay off same. This they have done, thus relieving the property of this prior lien. It seems nothing but equity to allow the mortgagees to recover from the property the amount so paid.

The decree will provide for the payment of the sum so paid in satisfaction of the decree.

In re UNITED STATES CHRYSOTILE ASBESTOS CO.

(District Court, S. D. New York. April 22, 1918.)

BANKRUPTCY ⇐213—POWERS OF COURT—DETERMINING VALIDITY OF MORTGAGE.

Where a trustee has possession of mortgaged real estate in another state, the court of original jurisdictiof has power to summarily determine the validity of the mortgage and to restrain a sale thereunder if it has jurisdiction over the person of the mortgagee; but the customary procedure is to permit a foreclosure suit to be brought in which the validity of the mortgage may be determined.

In Bankruptcy. In the matter of the United States Chrysotile Asbestos Company, bankrupt. On motion by trustee for injunction. Restraining order continued.

Saul S. Myers, of New York City, for trustee.

Alexander Dunnett, of St. Johnsbury, Vt., for Northern Trust Co.

AUGUSTUS N. HAND, District Judge. The trustee in bankruptcy has brought a proceeding in this court to sell certain real and personal property in Vermont, free from the lien of a mortgage which the trustee alleges was induced by fraudulent representations. After the Northern Trust Company of Philadelphia, which is the trustee of the mortgage, had appeared in the foregoing proceeding and obtained an adjournment, it instituted a suit to foreclose the mortgage in the United States District Court for the District of Vermont. The referee, before whom the proceeding to sell free from the lien of the mortgage is pending, has handed down an opinion in favor of such a sale. In order to sell free from the lien, without any interference from the foreclosure suit, the trustee has moved in this court to stay the Northern Trust Company from going on with that suit in Vermont, and served notice of motion by mail.

The Vermont property was in possession of the trustee in bankruptcy before the foreclosure suit was commenced by the Northern Trust Company. There is therefore no doubt that a summary proceeding might be had by the proper bankruptcy court to determine the validity of the mortgage. The court of original jurisdiction may be invoked for this purpose and notice by mail to a claimant outside the jurisdiction would seem to be sufficient to conclude his

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rights in the property if he did not choose to come in and defend them. The customary method of procedure, however, in such a case is to allow the mortgagee to proceed by foreclosure. The validity of the mortgage can be tested in such a suit. In re Granite City Bank, 137 Fed. 818, 70 C. C. A. 316. It is, however, almost unnecessary to say that this court would have no power to restrain the Northern Trust Company from instituting the foreclosure suit in Vermont unless it could secure jurisdiction over the person of that company. Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208. Counsel for the trustee in bankruptcy urgently insist that, since the Northern Trust Company is here contesting the proceeding to sell free from the lien of the mortgage, this court can enforce its jurisdiction by prohibiting that trust company from continuing foreclosure in Vermont.

There is, however, a distinct difference between an adjudication as to property outside the jurisdiction, such as a sale free from an underlying mortgage, and an order directed against the person of the Northern Trust Company when the latter is a resident of Philadelphia, and is not within the Southern district of New York.

The trust company, while insisting that the referee was without jurisdiction to order a sale of the Vermont property free from liens, did not take the position before the referee that the court had no personal jurisdiction over it, but appeared generally and obtained an adjournment. Under such circumstances, the only question is whether, the company being here to oppose an order of sale, this court can protect the proceeding by restraining the trust company from going on with the foreclosure suit in Vermont. I am inclined to think that it has the power; but, irrespective of that, and as a matter of discretion, I will only continue the restraining order upon the following terms and to the following extent:

(1) The trustee shall make no sales of property covered by the Vermont mortgage until the Northern Trust Company shall have time to review the referee's decision by an appeal to a judge of this court.

(2) The Vermont suit may proceed, and the trustee shall answer therein, except that the Northern Trust Company shall not go to a sale in the Vermont court without the further order of this court.

Settle order on notice.

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In re C. W. BARTLESON CO.

(District Court, S. D. Florida. August 15, 1918.)

1. BANKRUPTCY ⟸84—INVOLUNTARY PETITION—AMENDMENT.
A petition in involuntary bankruptcy may be amended, although the alleged act of bankruptcy has occurred more than four months prior to the amendment.

2. BANKRUPTCY ⟸84—INVOLUNTARY PETITION—AMENDMENTS.
Where a petition for leave to amend an involuntary petition in bankruptcy was filed, and a consent order was entered that the petition "be and the same is hereby amended as prayed," and the petition for and containing the amendments was properly signed and sworn to by the petitioning creditors, the amendments were sufficiently signed and sworn to.

In Bankruptcy. Involuntary proceedings in bankruptcy against C. W. Bartleson Company. On motion to strike the petition as amended. Denied.

See, also, 243 Fed. 1001.

George M. Powell and Fleming & Fleming, all of Jacksonville, Fla., for bankrupt.

Haley & Heintz, George C. Bedell, John C. Cooper & Son, and McNeill & Strum, all of Jacksonville, Fla., for various creditors.

CALL, District Judge. April 15, 1916, an amended involuntary petition in bankruptcy was filed against the bankrupt, and such proceedings had that a reference was made to an examiner to take testimony. After the taking of testimony had proceeded, the petitioning creditors filed, on October 13, 1917, their petition for leave to amend paragraphs 6 and 7 of the amended petition in certain particulars to conform to the testimony then taken; also to add another paragraph, 7a, charging the disposal of certain real estate within four months before the filing of the amended petition, with intent to hinder and delay creditors of the bankrupt. This petition was granted, and on October 18, 1917, the bankrupt filed its motion to dismiss the amended petition as amended.

The grounds of the motion to dismiss, as contained in this last motion, except those referring specifically to paragraph 7a, and the grounds going to the sufficiency of signing and swearing to the amendment, were considered and ruled upon in the motion to dismiss the amended petition on March 20, 1917. I see no reason to change that ruling. This leaves the grounds of the motion directed to the sixth and seventh amended paragraphs, and paragraph 7a. The only grounds to these paragraphs, which call for special attention, are the twenty-fourth, twenty-fifth, thirty-fourth, and thirty-fifth.

[1] The twenty-fourth and twenty-fifth grounds raise the question whether the act of bankruptcy alleged, having occurred more than four months prior to the amendment, can be considered. This question, it seems to me, is settled in the affirmative by the case of Hark v. C. M. Allen Co., 146 Fed. 665, 77 C. C. A. 91, 17 Am. Bankr.

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Rep. 3. I have read the case of Armour & Co. v. Miller, 209 Fed. 784, 126 C. C. A. 508, but I do not think the principle decided in this case changes the rule as laid down in the first case cited, which I think governs the instant case.

[2] The thirty-fourth and thirty-fifth grounds challenge the signing and swearing to the amendments. In this case a petition was filed, praying for leave to make the amendments. The order allowing said amendments was made by consent of the parties, on October 15, 1917, in which it is ordered that the "amended petition in bankruptcy, filed on April 14, 1916, be and the same is hereby amended as prayed in said petition." The specific amendments were not filed, but the proposed amendments were set out in the petition to be allowed to make such amendments. These amendments have been treated by all the parties as filed. The petition to make the same was properly signed and sworn to by the petitioning creditors. While it would probably have been better in strict pleading for the amendments to have been prepared, signed, and sworn to as required by the Bankruptcy Law, yet I do not think the court would be justified in striking the amendments because of this failure, when by a consent order the court has made those proposed amendments a part of the amended petition.

I am of opinion that the motion to strike the amended petition as amended, and the paragraphs thereof, should be denied. It will be so ordered.

HALL et al. v. PULLMAN CO.

(District Court, S. D. Florida. August 3, 1918.)

1. CARRIERS ⟸411—CARRIAGE OF PASSENGERS—ASSAULT—LIABILITY OF PULLMAN COMPANY.
Where the porter of a Pullman car conspired and colluded with a passenger in the latter's making of an assault upon another passenger while in her berth, the Pullman Company was liable to the assaulted passenger.

2. CARRIERS ⟸411—CARRIAGE OF PASSENGERS—LIABILITY FOR ASSAULT.
Where passenger on Pullman car indicated he intended to assault woman passenger in her berth, who rang bell for porter and conductor, and they failing to respond, whereupon assault was committed, Pullman Company was not liable, unless it or the porter had reasonable ground to believe violence was imminent.

At Law. Action by Florence M. Hall and another against the Pullman Company. On demurrer to declaration. Demurrer overruled as to first count, and sustained as to second and third counts.

George M. Powell and Giles J. Patterson, both of Jacksonville, Fla., for plaintiffs.

John E. & Julian Hartridge, of Jacksonville, Fla., for defendant.

CALL, District Judge. The first count of the declaration charges that the plaintiff was assaulted while in her berth in a sleeping car by

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a passenger, and that the porter conspired and colluded with said passenger in the making of the assault. The second count charges that the plaintiff and the passenger making the assault were passengers on the sleeping car, and that by his acts and demeanor he indicated that he intended making the assault, whereupon she rang the bell for the porter, but that the porter failed to respond, whereupon the assault was committed, and that, had the porter responded to the call, he could have prevented the assault. The negligence charged in this count is the porter's failure to answer the bell. The third count charges substantially the same facts, but substitutes the conductor for the porter.

[1, 2] In Scheffer v. Washington City, V. M. & G. S. R. Co., 105 U. S. 249, 26 L. Ed. 1070, Justice Miller says:

"To warrant a finding that negligence * * * is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, * * * and that it ought to have been foreseen in the light of the attending circumstances."

In Ball v. C. & O. R. Co., 93 Va. 44, 24 S. E. 467, 32 L. R. A. 795, 57 Am. St. Rep. 786, Judge Keith quotes approvingly from Britton v. A. & C. Air Line R. Co., 88 N. C. 536, 43 Am. Rep. 749, as follows:

"The liability of the defendant to the plaintiff grows not out of the fact that she was injured, but out of the failure of its servants to afford her protection, after they had reasonable grounds for believing that violence to her was imminent."

Testing this declaration by these principles, I am of opinion that the first count is not vulnerable to the attack by demurrer, but that the second and third counts are. The rule of liability in a case of loss of baggage and damage resulting from an assault by a fellow passenger is, as I understand the cases, different, and this difference is based upon the fact that larceny may and ought to be expected and guarded against by the sleeping car company or its agents and servants, while an assault by a fellow passenger is not to be expected, and the company cannot be held for negligence in not protecting the passenger, unless the company or its servants had reasonable grounds for believing that violence was imminent, either through the circumstances surrounding the injured person within the knowledge of the company's servants or by being informed of such circumstances. A criminal assault upon a female passenger, although there are only two passengers on the sleeping car, is not within the rule enforced in cases of larceny of the passenger's baggage, nor is the failure of the porter or conductor to answer the call bell the natural and probable cause of the injury complained of, which ought to have been foreseen in the light of the attending circumstances set out in the second and third counts of the declaration.

The first count is, I think, good under the decision in Pullman Palace Car Co. v. Campbell, 154 U. S. 513, 14 Sup. Ct. 1151, 32 L. Ed. 1069. If an assault by the porter makes the company liable, then the assault by a passenger conspiring with the porter would equally make the company liable.

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In re ABRAMOVITZ.

(District Court, S. D. Florida. May 25, 1918.)

1. BANKRUPTCY ⟸413(3)—DISCHARGE—SPECIFICATIONS OF OBJECTION.
Specifications of objection to a bankrupt's discharge are pleadings within Bankruptcy Act, § 18c (Comp. St. 1916, § 9602), and must be verified by positive oath to the facts alleged.

2. BANKRUPTCY ⟸413(3)—DISCHARGE—SPECIFICATIONS OF OBJECTION—SUFFICIENCY.
Specifications of objection to the bankrupt's discharge, which are made on information and belief, and enter into no details as to property, etc., are insufficient.

3. BANKRUPTCY ⟸413(3)—DISCHARGE—SPECIFICATIONS OF OBJECTION—WHO MAY FILE.
Specifications of objection to a bankrupt's discharge are made by creditors, and should be signed by the creditor, whether an individual or a corporation.

4. BANKRUPTCY ⟸413(3)—DISCHARGE—SPECIFICATIONS OF OBJECTION—SIGNING BY CORPORATION.
Where a corporate creditor files specifications of objection against a bankrupt's discharge, it must sign the same by having its seal affixed thereto by proper authority.

In Bankruptcy. In the matter of the bankruptcy of Adela Abramovitz. On motions to strike specifications of objection to discharge. Motions granted.

W. Hunt Harris and H. H. Taylor, both of Key West, Fla., for bankrupt.

Rand & Kurtz, of Miami, Fla., for objecting creditor.

CALL, District Judge. On April 25, 1918, certain specifications of objection to discharge were filed. These specifications, two in number, were signed Beasley Shoe Company, by Rand & Kurtz, attorneys. This is sworn to on information and belief. On April 25, 1918, a paper styled "Supplemental Specifications of Grounds of Opposition to Bankrupt's Discharge," was filed, signed "Rand & Kurtz, Attorneys for Beasley Shoe Company." These, consisting of five, and all, except the fifth, made on information and belief, are sworn to by E. B. Kurtz. This appears to be a carbon copy of the same paper filed May 17th, except it is sworn to on information and belief by J. T. Gilliam, as treasurer, and signed by "Beasley Shoe Company, by Rand & Kurtz, Its Attorneys." Motions are made by the bankrupt to strike the papers filed April 25th and May 17th, on the ground that the same are not signed by objecting creditors, nor sworn to as required.

[1] Section 18c of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 551 [Comp. St. 1916, § 9602]) requires all pleadings setting up matters of fact shall be verified under oath. In Re Brown, 112 Fed. 49, 50 C. C. A. 118, the Circuit Court of Appeals for this circuit decided that specifications of objection to bankrupt's discharge are pleadings, and the form of oath attached to these papers did not

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authorize the court to hear and determine same. The motion to strike same will therefore be granted.

[2] There are other grounds of the motions which are not necessary to decide, but, since the attorneys for the creditor request leave to amend its specifications filed April 25th, by having the proper oath made to them, which request will be granted, it is better that I call attention to the so-called supplemental specifications. The first four are made on information and belief, and enter into no details as to property, etc. It does not seem to me that these four state, either in the form in which they are filed, or the matter stated therein, proper specifications of objection to discharge.

[3, 4] Specifications of objection to a bankrupt's discharge are made by the creditor. If it is an individual, he should sign such specifications. If it is a corporation, such specifications should be signed by the corporation, and the only way a corporation may sign an instrument or pleading requiring its signature is by having its seal affixed by proper authority. The decision by Judge Hammond (In re Glass [D. C.] 119 Fed. 509) is enlightening, and I think states the law.

An order will be made, granting the motions to strike and allowing the creditor 20 days within which to make such amendments as it may be advised.

In re MINNERS.

(District Court, S. D. New York. August 8, 1918.)

1. BANKRUPTCY ⟸372—REOPENING ESTATE—DEFECTIVE CONVEYANCE OF PROPERTY.

A court of bankruptcy given power by Bankr. Act 1898, § 2, subd. 8 (Comp. St. 1916, § 9586), to reopen estates "whenever it appears they were closed before being fully administered," may properly reopen an estate on petition of a purchaser of real estate from the trustee where it appears that the sale was not legally perfected.

2. BANKRUPTCY ⟸372—REOPENING OF ESTATE—ELECTION OF TRUSTEE.

On reopening an estate for further administration, the trustee should not be reinstated, but a new trustee elected.

In Bankruptcy. In the matter of Charles Minners, bankrupt. On petition to reopen estate. Granted.

Bernard Braun, of New York City, for purchaser.

AUGUSTUS N. HAND, District Judge. [1] A purchaser of real estate from the trustee in bankruptcy in this estate asks the court to reopen the estate, reinstate the trustee, and call a meeting of creditors to confirm the sale which appears to have been made without notice to creditors.

Section 2 (8) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 545 [Comp. St. 1916, § 9586]) empowers the court, among other things, to "close estates whenever it appears that they have been fully administered, by approving the final accounts and discharging the trus-

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tees, and reopen them whenever it appears they were closed before being fully administered."

[2] If the sale was not legally perfected even though an equitable title passed to the trustee's vendee by estoppel, yet the legal title would be still outstanding. Under such circumstances, I think the estate cannot in a fair sense be regarded as fully administered. A proposed order is submitted reinstating the former trustee. This should not, under the opinion of the Circuit Court of Appeals for this circuit in Re Rochester Sanitarium & Baths Co., 222 Fed. at pages 27, 28, 137 C. C. A. 560, be done, but a new trustee should be elected for the purpose of executing a confirmatory deed, if such should be ordered, and for taking any further steps in the administration of the premises which were attempted to be conveyed by the former trustee that may be necessary. The purchaser's vendee is a party interested in the estate within the meaning of such decisions as In re Chandler, 138 Fed. 637, 71 C. C. A. 87. He is either entitled to have a deed from the trustee properly authorized, or to receive back from the creditors the consideration paid. The court may therefore reopen the estate on his motion, but he should indemnify the referee for the expenses of calling the creditors' meeting, and should also pay any expenses to which the new trustee may be put in procuring his bond if the creditors authorize a confirmatory deed by the trustee.

In re KAUFMAN.

(District Court, S. D. New York. April 27, 1918.)

BANKRUPTCY ⟸92—DISMISSAL OF PROCEEDINGS—REINSTATEMENT.

Dismissal of an involuntary petition based on a written consent, apparently of all creditors, pursuant to an agreement for settlement, will not be set aside because the agreement was not made or carried out by bankrupt in good faith.

In Bankruptcy. In the matter of Morris Kaufman, bankrupt. On petition to set aside order of dismissal. Denied.

Henry H. Silver and Harry J. Moskowitz, both of New York City, for petitioner.

Frank & Wolfson, of New York City, for bankrupt.

H. & J. J. Lesser, of New York City, for petitioning creditors, receiver, and trustee.

AUGUSTUS N. HAND, District Judge. This is a petition to set aside an order dismissing a proceeding in bankruptcy on the grounds (1) that the order was not obtained upon the consent of, or on notice to, all of the creditors; (2) that the order was obtained by fraud. A consent was signed in the following form:

"We the undersigned, creditors of the above-named bankrupt, do hereby agree to and with each other, and with the said bankrupt, to receive in full settlement of our respective claims against the said Morris Kaufman, a

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sum equal to 50 per cent. of our claims to be paid as follows: * * * This acceptance shall be valid as an acceptance of a like offer of composition in bankruptcy, if made by the said Morris Kaufman, and shall also be valid, if signed on separate sheets. We do hereby also consent to the dismissal of the involuntary petition herein."

It does not seem to be established that the owners of all claims against the bankrupt estate did not consent to the dismissal of the petition, but it is said that several creditors obtained more than 50 per cent. of the amounts due them. This was not a composition in bankruptcy, but a common-law settlement. If the bankrupt broke his promise, and paid certain creditors more than 50 per cent. of their claims, when he had agreed that no creditor should receive more than that amount, or made any fraudulent representations to any creditor as to the percentage others were getting, nevertheless a valid order of dismissal was granted on consent. To establish a doctrine that a bankruptcy proceeding, once dismissed, can be reopened under such circumstances, with the possible attendant result of suits to recover property and set aside preferences, would, I think, be an undesirable result.

The jurisdiction of this court is gone, and the petitioner must seek his remedy in the state court, or in a new bankruptcy proceeding, where the estate will consist of present assets.

LEWIS FOUNDRY & MACHINE CO. v. CAYUGA TOOL STEEL CO., Limited.

(District Court, N. D. New York. October 12, 1918.)

MASTER AND SERVANT ⊂=25, 59—CONTRACT OF EMPLOYMENT—IMPOSSIBILITY OF PERFORMANCE.

It is an implied condition of a contract for employment in a special service for a term of years that in case of involuntary inability to perform by either party no damages for breach are recoverable.

In Equity. Suit by the Lewis Foundry & Machine Company against the Cayuga Tool Steel Company, Limited. In the matter of the claim of Charles M. Hammond for damages for breach of contract by defendant. Claim disallowed.

Charles M. Hammond presents a claim for damages for breach of contract of employment growing out of a state of facts which will be stated in my opinion. The special master has reported against the validity of the claim.

Hancock, Spriggs & Hancock, of Syracuse, N. Y., for claimant.

Chas. V. Byrne and D. F. Costello, both of Syracuse, N. Y., for creditors.

Gannon, Spencer & Michell, of Syracuse, N. Y., for receivers.

RAY, District Judge. Cayuga Tool Steel Company, Limited, is a corporation of the state of New York, and was engaged in manufac-

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turing at the city of Auburn, N. Y., where its plant and property were situated. It entered into a valid contract with Charles M. Hammond, by the terms of which Hammond was to perform services for the said corporation in overseeing production and selling for a term of years at a fixed compensation per year, and in addition he was to have a certain commission on sales made by him. The contract as stated by claimant was:

"Mr. Hammond was employed by the Cayuga Tool Steel Company for the period of five years from January 1, 1917, to manage and direct the manufacture of the company's products, etc., on terms as follows: $5,000 for the first year, $6,000 for the second year, and $7,500 for the third year—and that a rate for the fourth and fifth years is to be fixed by the board of directors, but at not less than $7,500 per year; that in addition thereto said Charles M. Hammond is to receive additional compensation by way of a bonus in an amount equal to 10 per cent. of the company's profits, after deducting an amount equivalent to 7 per cent. of the then outstanding capital stock of the company, to be payable in the capital stock of the company."

Some months ago the corporation found itself in financial difficulties and this action was brought by the plaintiff, a large creditor, to conserve the assets, etc. The claimant, Hammond, was paid for all the services actually performed by him for the company and all commissions earned. Receivers were appointed by this court, with authority to continue the business, and the business was continued by them. The receivers neither affirmed nor disaffirmed the contract, but on their appointment employed Hammond to work for them on the same terms he had been working for the corporation, and he did work and has been or will be paid in full for such services. As the corporation was insolvent, a decree of sale of all the assets and property was made in such suit and entered, and the property has been sold and the corporation put out of business by action of the court. It cannot further or hereafter do business, and has no assets, except such as were derived from this sale, and which are to be distributed to creditors after the payment of expenses.

By reason of the insolvency of the corporation and the action of this court the corporation cannot give work to Hammond as agreed, or pay as agreed. The corporation has never denied or repudiated the contract. The action of this court, predicated on the facts stated, makes performance by the corporation impossible. It has not voluntarily or willfully done any act in violation of the contract. Its inability to give employment is wholly involuntary on its part.

This was and is a personal contract, providing for employment in a special service by the one party and the performance of such service by the other. The contract is not assignable. It seems to me it implied that in case of involuntary inability to perform by either party no action for damages would lie. "Where the contract is wholly executory, there must be some express and absolute refusal to perform, or some voluntary act on the part of the individual which renders it impossible for him to perform, in order to constitute an anticipatory breach for which an action will lie." Ga Nun v. Palmer, 202 N. Y. 483, 489, 96 N. E. 99, 101 (36 L. R. A. [N. S.] 922). In Jones v. Judd,

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4 N. Y. 412, it was held that if, after a contract is made, the law interferes and makes subsequent performance impossible, the party is held to be excused. Here the law has interfered and made performance by the Cayuga Tool Steel Company impossible. In Jones v. Judd, supra, the facts are thus stated in the syllabus:

"Thus, where the defendant contracted with the state to construct a section of the Genesee Valley Canal, and made a subcontract with the plaintiffs for a portion of the work, at so much per yard for excavation and embankment, payable monthly, except 10 per cent., which was not to be paid until the final estimate, and before the completion of the plaintiffs' job the work was stopped by the state officers, and the original contract terminated by an act of the Legislature, held, that the plaintiffs were entitled to recover the price agreed on for the work actually done by them."

This case is cited and approved in Lorillard v. Clyde et al., 142 N. Y. 456, 462, 37 N. E. 489, 24 L. R. A. 113, which to a certain extent is in point here. See, also, Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415. In this last-cited case the court said:

"But there are a variety of cases where the courts have implied a condition in the contract itself, the effect of which was to relieve the party when the performance had, without his fault, become impossible; and the apparent confusion in the authorities has grown out of the difficulty in determining in a given case whether the implication of a condition should be applied or not, and also in some cases in placing the decision upon a wrong basis. The relief afforded to the party in the cases referred to is not based upon exceptions to the general rule, but upon the construction of the contract."

See, also, Spalding v. Carl Rosa et al., 71 N. Y. 40, 27 Am. Rep. 7.

I am of opinion, and hold, that in this case no claim exists in favor of Hammond against the Cayuga Tool Steel Company for breach of this contract, as the law came in and made performance impossible, and such company is excused. This was a contingency within the contemplation of the parties.

The report of the special master, rejecting the claim, is confirmed.

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FIREMEN'S FUND INS. CO. v. TROJAN POWDER CO.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1918.)

No. 3037.

1. INSURANCE ⟸488 — MARINE INSURANCE — LIABILITY FOR FORWARDING CHARGES.
Where the contract of affreightment authorized the carrier in case of stranding to forward by another ship, and charge extra compensation therefor, which contingency happened, the cargo insurer, which, although exempted from particular average, contracted to pay special forwarding charges for which it would otherwise be liable, *held* liable for the extra cost of forwarding.

2. SHIPPING ⟸112—DISABILITY OF SHIP—AUTHORITY TO FORWARD CARGO.
Under the law of England, where a ship is damaged on the voyage and cannot be repaired without a very great loss of time, the master or the shipper may procure another ship to carry her cargo to place of destination.

3. INSURANCE ⟸488—MARINE INSURANCE—"PARTICULAR CHARGE."
By the law and custom of England, when in consequence of a peril insured against the voyage cannot be accomplished in the original ship, the cargo underwriter is liable for the excess expense of forwarding by another vessel as a "particular charge."

4. INSURANCE ⟸488—MARINE INSURANCE—CONSTRUCTION OF POLICY.
A clause of a marine cargo policy, "Freight warranted free from any claim consequent upon loss of time, whether arising from peril of the sea or otherwise," does not apply to excess freight paid for forwarding on stranding of the ship, for which the insurer is otherwise liable.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action at law by the Trojan Powder Company against the Firemen's Fund Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This action was brought upon a policy of marine insurance issued upon 6,000 cases of explosives shipped by the plaintiff in the action, defendant in error here, by the steamer Pleiades, of the California Atlantic Steamship Company, from San Francisco to Balboa, Isthmus of Panama, under a contract of carriage which provided that the freight, whether prepaid or to be collected, was to be considered as earned, vessel or goods lost, or not lost, at any stage of the transit, and that, on the happening of any of the contingencies mentioned in the contract of shipment, the carrier was to have the right to forward the freight to the port of destination on its own ship, and should receive extra compensation therefor, whether performed by its own vessels or those of others, among which contingencies were stranding, straining, and any accidents or perils of the sea. The plaintiff prepaid the freight, amounting to $4,950, and the Pleiades left San Francisco on her voyage with the explosives on board, but was stranded off the coast of Mexico on the 16th of August, 1912, and was then and there, together with her cargo, in danger of becoming a total loss. The plaintiff then undertook to abandon the said goods, which abandonment the defendant insurer refused to accept. The ship was subsequently floated, but because of her damaged condition was unable to proceed upon her voyage, and was taken back to San Francisco for repairs, where her cargo, including the insured explosives, was discharged into lighters. The repairs on the vessel were not completed until December 27, 1912. The explosives so shipped and insured had been sold to the Panama Canal Commission for use in the building of the

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canal, with the right on the part of the commission to refuse to receive the shipment if it did not arrive within a fixed time, and, there being no other market at that place, it was therefore important for the shipper to get the explosives to their destination. To do so it was compelled to, and did, on October 15, 1912, reship the said goods on another steamer of the same carrier, called Mackinaw, for which transportation it was compelled to and did pay to the steamship company additional freight in the sum of $4,050, for which latter sum the plaintiff brought the present action against the present plaintiff in error, the latter having refused payment on demand.

The insurance was in the sum of $35,000 upon the explosives laden on board the Pleiades for the voyage first mentioned, and it was expressly agreed that the insurance should commence at the time the goods should be laden on board the ship and continue until safely landed at Balboa. The policy also contained the usual "sue and labor" clause, and these further provisions: "And touching the adventures and perils which the said company is content to bear and does take upon itself in the voyage so insured as aforesaid, they are of the seas, * * * restraints and detainments of all kings, princes, and people, of what nation, condition, or quality soever, * * * and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance or any part thereof. * * * General average payable as per foreign statement or per York-Antwerp Rules of 1890, if in accordance with the contract of affreightment. * * * It is hereby agreed that the rights of assured shall not be prejudiced by the insertion in the bill of lading of the London Conference Rules of Affreightment 1893, or of the following clause: 'The act of God, perils of the sea, * * * restraint of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master mariners, or other servants of the shipowners.' Warranted free from average unless general, or the ship or craft be stranded, sunk, or burnt, each craft or lighter being deemed a separate insurance. Underwriters, notwithstanding this warranty, to pay for * * * any special charges for warehouse rent, reshipping, or forwarding for which they would otherwise be liable. * * * All questions of liability arising under this policy are to be governed by the laws and customs of England. * * * Freight warranted free from any claim consequent upon loss of time, whether arising from a peril of the sea or otherwise. * * *"

McCutchen, Olney & Willard, Edward J. McCutchen, and Ira A. Campbell, all of San Francisco, Cal., for plaintiff in error.

Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] It is obvious that the contract of affreightment evidenced by the bill of lading lay at the foundation of the insurance, the liability of the insurer to be governed by the laws and customs of England. It is conceded by the defendant in error that its recovery cannot be sustained on the "sue and labor" clause of the policy, since the reshipment freight charge for which the suit was brought was not paid by it in order to prevent the explosives insured from being lost by reason of any impending peril; but its contention is that in consequence of a peril insured against, that is to say, the stranding of the ship, the voyage insured was threatened with frustration, and the expense of reshipping the explosives was incurred to prevent such frustration. That the Pleiades was stranded, and the completion of her voyage thereby rendered impossible, is not questioned; nor is the further fact

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that the necessary repairs upon her were not completed until December 27, 1912—nearly four months subsequent to the interruption of the voyage insured.

[2] Neither by the law of England, as we understand it, nor by the contract of the parties, was the shipper obliged to wait for such a length of time before seeking to get its explosives to their destination. Respecting the law, the complaint in the case alleges, and the answer thereto admits, that it is the law of England that if, by reason of damage to the ship, she cannot be repaired without a very great loss of time, the master is at liberty to procure another ship to transport her cargo to the place of destination; and by the contract of shipment in the instant case the carrier was given the right to forward the explosives to their destination, either by one of its own vessels or that of another, together with the right to receive extra compensation therefor. That this contract carrier did so forward this freight by another of its own ships on October 15, 1912, and demand and receive from the plaintiff in the case additional compensation therefor in the sum of $4,050, for which the latter recovered judgment in the court below, is also a fact clearly shown by the record, and is, indeed, undisputed.

[3] As has already been said, it is conceded that the plaintiff was not entitled to recover under the "sue and labor" clause of the policy, and for the reason that has been stated. But we understand the reshipment charge in such a case as the present to be recoverable from the insurer, both by the established law as well as the established custom of England, as a "particular charge," as distinguished from a "particular average"; for in Arnould on Marine Insurance (8th Ed.) § 869, vol. 2, it is said:

"Another class of losses, which, though not specially enumerated in the policy, are nevertheless recoverable thereunder, is that which is embraced under the term 'particular charges.' The distinction between 'particular charges' and 'particular average' was first definitely established in our courts in Kidston v. Empire Insurance Co. [k], where the jury, after hearing the evidence of several average adjusters and other witnesses, found that there was in the business of marine insurance a well-known and definite meaning affixed by long usage to the term 'particular average,' as distinguished from the term 'particular charges'—viz., that 'particular average' denotes actual damage done to or loss of part of the subject-matter of insurance, but that it does not include any expenses or charges incurred in recovering or preserving the subject-matter of insurance, and that expenses incurred in warehousing and forwarding goods are not 'particular average,' but are termed 'particular charges.' Accordingly section 64, subsection 2, of the Marine Insurance Act states that 'expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average' [l]. They are recoverable from underwriters when incurred after the arising of a peril insured against, in order to prevent such peril causing a loss for which the underwriters would be liable, if it were so caused. In this event they are charges incurred 'in and about the defense and safeguard' of the subject-matter of insurance, within the suing and laboring clause. In certain cases they may also be recoverable from underwriters, apart from the suing and laboring clause, as losses occasioned by a peril insured against when they have been necessarily incurred in consequence of such a peril—as, for example, expenses of warehousing and forwarding cargo [m], when a peril insured against has occasioned the neces-

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sity of such expenditure [n]"—the small letters in brackets referring to notes citing the cases referred to by the author.

Again, in section 214, vol. 1, 8th Ed., of the same author, it is said:

"When, in consequence of a peril insured against, the voyage cannot be accomplished in the original ship, it seems that the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight which he would have had to pay in the ordinary course is a loss directly due to such peril. The practice of underwriters has been to pay such excess as particular charges [e], and as one of the objects of an insurance on goods is to guarantee that the goods shall reach their destination, it is submitted that this practice is correct in principle [f]. It is certainly not inconsistent with the provisions of the Marine Insurance Act [g]."

It thus appears not only that, both by the law as well as the prevailing custom of England, the underwriter in such a case as we have here is required to pay, as a "particular charge," the excess of expense to which the owner of the goods was put in order to get them to their destination, but we have the further declaration of the distinguished author that the practice is correct in principle and in no wise inconsistent with the provisions of the English Marine Insurance Act.

Counsel for the plaintiff in error refer particularly to section 64 of the latter act and conclude therefrom that "particular charges partake of the nature of recoveries under the 'sue and labor'" clause, and are subject to the rule that governs claims under that clause. We do not so understand the law. It is true that by the express declaration of the English statute particular charges are not included in particular average. The language of the section cited is as follows:

"(1) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.

"(2) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average."

We are unable to see from this that any inference should be drawn, as contended for the plaintiff in error, that particular charges should be likened to claims under the ordinary "sue and labor" clause, to sustain which it is necessary to show that the recovery sought was expended in order to prevent the insured property from being lost by reason of an impending peril insured against, and which "sue and labor" clause was expressly inserted in the policy in suit. On the contrary, Mr. Arnould, as has been shown, lays it down not only as the law but also the custom of England that particular charges include "another class of losses, which, though not specially enumerated in the policy, are nevertheless recoverable thereunder" when, as in the present case, the loss was occasioned by a peril insured against and when necessarily incurred in consequence of such peril.

The cases particularly relied upon by counsel for the plaintiff in error in support of their contention are Great Indian Peninsular Ry. Co. v. Saunders, 101 English C. L. R. 41, and Booth v. Gair, 15 Com. Bench Reps. (N. S.) 290, and they say that in the former the policy involved was practically identical with the policy involved in

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the present case. In that statement we think counsel clearly in error. In that case certain rails were shipped by the plaintiff by the ship Bombay on a voyage to Kurrachee or Bombay, for a certain sum paid in advance, ship lost or not lost—the plaintiffs having insured themselves by a policy in the ordinary form of a Lombard Street policy on the rails, "valued at £4500, warranted free from particular average, unless the ship be stranded, sunk, or burnt." The ship was by perils of the seas disabled, and obliged to put into Plymouth, England, in such a state that she was not worth repairing; but she was neither stranded, sunk, nor burnt. The rails were saved and were sent on other vessels to their destination, and in order to forward them to their destination it was necessary to pay freight to the extent of £825. 11s. 7d. The latter, the court said, "was an extra expense incurred by the shippers of the goods in consequence of the sea risk which had frustrated the voyage of the Bombay; and the question we have to determine is whether the insured can recover this sum on a policy containing" the warranty that has been mentioned. The court held that the warranty in that case was equivalent to a stipulation against total loss and general average only, and consequently included expenses incurred in relation to the goods, and further held that the expenses there paid by the owner for the purpose of forwarding the rails to their destination at a time when they were not in any peril of total loss, either actual or constructive, were not recoverable under the "sue and labor" clause which the policy there involved also contained.

That case was followed by Booth v. Gair, in which bacon was insured upon a voyage from Liverpool to New York, "free from average unless general, or the ship were stranded, sunk, or burnt." The vessel on her way, by perils of the sea, but without being stranded, sunk, or burnt, became disabled and put into Bermuda, where she was constructively totally lost. The bacon was landed in specie and was not totally lost, constructively or otherwise. No expenses appeared to have been incurred in saving the goods from a total loss, which was negative; but certain expenses were incurred in the way of extra freight, transshipment, warehousing, surveying, and cooperage, all of which were treated as expenses of forwarding the goods. It was in that case further proved that it was the practice of underwriters on goods to pay such expenses under like circumstances under the name of particular charges. The judgment was for the underwriters upon the ground that what the master did was in discharge of his duty in ordinary course, and that there was no peril creating a risk of a total loss from which the underwriter was saved by the expenses there in question.

What is above said regarding the cases of Great Indian Peninsular Railway Co. v. Saunders and Booth v. Gair is substantially taken from the opinion in the subsequent case of Kidston v. Empire Marine Ins. Co., L. R. I. C. P. 535 (14 Eng. Rul. Cases, 247), which latter case was an action upon a policy on charter freight, which included the usual suing and laboring clause, and the following warranty:

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"Warranted free from particular average, also from jettison, unless the ship be stranded, sunk, or burnt."

The cargo was guano, at a freight payable on arrival at the port of discharge, shipped from the Chincha Islands to the United Kingdom, by a vessel which, on going around Cape Horn, suffered damage so serious that she had to put into Rio, and was accordingly sold. The plaintiffs in the action gave no notice of abandonment, but, the guano having been landed and warehoused at Rio, the master procured another vessel to carry it to Bristol for an agreed price, which the plaintiff paid, receiving from the owners of the cargo the full charter freight. The master also incurred certain expenses for landing, warehousing, and reloading the guano at Rio. The action was brought to recover the expenses of transshipment and forwarding. In holding that the plaintiffs were entitled to recover, under the suing and laboring clause of the policy, the expenses so incurred and the freight, notwithstanding there had been no abandonment, and that the application of the suing and laboring clause was not excluded by the warranty against particular average, the court said, among other things:

"The word 'average,' so far from being a term of art (except in so far as according to the evidence usage may have limited its meaning to loss or damage to the goods themselves), or a word with a rigid or unchanging signification necessarily including expenses in the defense or safeguard of the subject-matter insured, is a word used in a great variety of phrases as applicable to different subjects-matter, and not with any fixed or settled application. It would be tedious to go through the various uses to which it is applied; and we need not do more than refer to the instances cited in argument, and more especially to the very learned note of Mr. Maclachlan in Arnould on Insurance (3d Ed., vol. 2, p. 739). Amongst the various uses to which the word has been applied, no doubt, that of 'small expenses' is one, as in the usual clause in a charter party. So, in the case of insurance itself, expenses must often be taken into account in determining whether there has been a loss or not, but only because a thing is lost in insurance law which cannot be got back, except at an expense equal to its value when recovered. The question here, however, is not as to the extension of which the term 'average' is capable, but of the sense in which it ought to be understood in the particular context with which it is to be reconciled, and if possible read so that effect may be given to every provision in the instrument. Nor is it to be forgotten that the suing and laboring clause, which for the reasons already given specially provides for this case, has been allowed to remain a part of the policy, and that a special provision as to a particular subject-matter is to be preferred to general language, which might have governed in the absence of such special provision. Generalia specialibus non derogant. Specialia generalibus derogant. In our opinion, quite apart from usage, the true construction of the policy, as reconciling and giving effect to all its provisions, is that the warranty against particular average does no more than limit the insurance to total loss of the freight by the perils insured against, without reference to extraordinary labor or expense which may be incurred by the assured in preserving the freight from loss, or rather from never becoming due, by reason of the operation of perils insured against, and that the latter expenses are specially provided for by the suing and laboring clause, and may be recovered thereunder."

In distinguishing and holding inapplicable to the case then before the court the cases of Great Indian Peninsular Ry. Co. v. Saunders and Booth v. Gair, the court in Kidston v. Empire Marine Ins. Co. further said that before those decisions—

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"the liability of the underwriters appears to have been universally admitted and acted upon, even in the cases where the expenses were incurred to forward goods existing in specie at the port of distress, and warranted free from particular average, so that no liability could accrue to the underwriters by their not being forwarded."

We think that neither of the three English cases above referred to is applicable to the case we have here, for the reason that, the Pleiades having been stranded, this case is brought within the exception to the warranty clause of the policy in suit, and for the further reason that that clause is followed by the express provision that the underwriters, notwithstanding the warranty, would pay "any special charges for warehouse rent, reshipping, or forwarding for which they would otherwise be liable." Nor are we able to sustain the contention of the plaintiff in error that the stranding of the Pleiades was not the proximate cause of the extra expense to which the insured was necessarily put. It was, as we view it, the sole cause.

[4] We have had some doubt as to whether the insured is not precluded from recovery by that clause of the present policy which reads:

"Freight warranted free from any claim consequent upon loss of time whether arising from a peril of the sea or otherwise."

The cases relied upon in support of the point are Taylor v. Dunbar, 4 Com. Pleas L. R. 206, and Russian Bank for Foreign Trade v. Excess Insurance Company, Limited, The Times Law Reports, 383, and subdivision (b), § 55, of the English Marine Insurance Act of 1906, which reads:

"Unless the policy otherwise provides the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against."

In the two decisions cited the loss sued for was occasioned by damage—in the one case to meat, and in the other to barley—resulting from delay in transit, to which loss the warranty relied upon directly applied. In the prseent case, however, the action is not based upon any loss growing out of any damage to any of the property insured, for there was none; its sole basis is the excess freight the insured was compelled to pay to the carrier to get the rails transported to their destination, which forwarding charges this policy as has been shown, expressly provides the insurer should pay. We therefore think the cases, as well as the the statutory provision cited, inapplicable to the present case.

The judgment is affirmed.

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THE BEAVER. THE NECANICUM. SAN FRANCISCO & P. S. S. CO. v. LEGGETT S. S. CO. (two cases).

(Circuit Court of Appeals, Ninth Circuit. October 7, 1918.)

Nos. 2969, 2970.

1. ADMIRALTY ⇐118—REVIEW ON APPEAL—FINDINGS OF FACT.
In an admiralty cause, findings of fact made by the trial court on conflicting evidence, for the most part taken in open court, will not be disturbed by the appellate court, except for manifest error.

2. COLLISION ⇐82(1)—"MODERATE SPEED" IN FOG—CONSTRUCTION OF RULE.
The speed of a vessel need not necessarily be reduced from her full speed to be "moderate," within article 16 of the International Rules (Comp. St. 1916, § 7854), providing that "every vessel shall in a fog, mist, falling snow or heavy rainstorms go at a moderate speed, having careful regard to the existing circumstances and conditions."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Moderate Speed.]

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Suit in admiralty for collision by the San Francisco & Portland Steamship Company, owner of the steamship Beaver, against the steam schooner Necanicum, the Leggett Steamship Company, claimant, with cross-libel. Decree for respondent on cross-libel, and libelant appeals. Affirmed.

McCutchen, Olney & Willard, Ira A. Campbell, and Edward J. McCutchen, all of San Francisco, Cal., for appellant.

W. S. Burnett, Denman & Arnold, and Thomas A. Thatcher, all of San Francisco, Cal., for appellee.

Before GILBERT and HUNT, Circuit Judges, and VAN FLEET, District Judge.

VAN FLEET, District Judge. The controversy arises from a collision occurring between the steamer Beaver and the steam schooner Necanicum on the coast of California. The Beaver, a passenger steamer of 2,997 net tonnage, 380 feet in length, and 57 feet beam, was proceeding south from Astoria to San Francisco, loaded with passengers and freight, while the Necanicum, a much smaller vessel, 175 feet in length, and 35 to 40 feet beam, was going north light, from San Pedro to Astoria, for cargo. The vessels came into collision shortly south of Point Arena, under circumstances very much in controversy. That a fog of greater or less density was prevailing at the time is established by the evidence on both sides; but as to all other material circumstances bearing on the disaster, excepting as to the respective rates of speed of the two vessels at the time, the evidence of the parties is as wide apart as the poles. It does appear without controversy that when the vessels last caught sight of each other in the fog, from 1½ to 2 minutes before the collision, the Beaver was proceeding at a speed of 14 7/10 knots and the Necanicum at 8¼ knots per hour.

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Both vessels suffered injury, and this injury resulted in cross-actions; appellant, as owner of the Beaver, libeled the Necanicum, and the owners of the latter brought an action in personam against appellant. These actions were consolidated for trial, and the cause was tried in open court—some 28 witnesses being examined, and a large volume of evidence taken. The court below filed an opinion in which, after discussing the circumstances, it says:

"There is in this case, as in all similar cases coming under my observation, much contradictory testimony as to the events occurring at the time of the collision. But this one fact seems to me to stand out clearly: That the Beaver was gravely negligent in proceeding at the rate of 14.7 knots per hour in the fog, and that but for such speed, and the resulting momentum due to her size and weight, the collision would not have occurred. Contradictory as the testimony is, there is nothing therein which tends in any manner to excuse the running of a large, heavy, and loaded passenger steamer at such a rate of speed in the fog then prevailing. This speed prevented the rectification, before it was too late, of whatever error arose from confused or contradictory signals."

And in its decree the court recited as the basis of its conclusion these additional facts:

"That the evidence fails to establish that the said steamship Necanicum, prior to and at the time of the collision alleged in the libel, did not have a proper and efficient lookout and proper and competent officers, or that she failed to alter her course or conduct herself in accordance with the passing rules or exchange of signals between her and the steamship Beaver, or that she failed to stop and reverse at a proper time before said collision; and further finds that the said collision was not in any way caused or contributed to by any neglect, error, default or misconduct of the steamship Necanicum, or her claimant, the Leggett Steamship Company; and further finds that the said collision was caused by the neglect and misconduct of the steamship Beaver in proceeding in the fog, prior to the collision, at an immoderate rate of speed, while the steamship Necanicum was proceeding at a moderate rate of speed for the conditions then prevailing."

In accordance with these findings, the trial court dismissed the libel of appellant, and in the cross-action held it to be responsible to the appellee in damages for the injury suffered by the Necanicum. Decrees were entered accordingly. The appeal is from both decrees.

[1] The case does not call for extended consideration. Much of appellant's argument is devoted to a discussion of the evidence in particulars as to which, it is urged, that it warrants a finding of the facts as to the circumstances attending the collision at variance with those found by the trial court, establishing the liability of the Necanicum and the exculpation of the Beaver; and it is urged that, as this is a trial de novo, it is the duty of this court to examine the evidence with that view, and substitute its own findings and conclusions on the evidence for those of the court below. We need not follow this argument in detail. It is sufficient to say that, recognizing our power in the premises, we do not regard the case as justifying that course. The entire mass of evidence upon which the trial court passed, with the exception of that of two or three witnesses for appellee taken on deposition, was heard in open court, with full opportunity for observation of the character and demeanor of the witnesses, and that evidence on all controverted facts was sharply conflicting. Such a case, notwith-

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standing a small portion of the evidence rests upon deposition, is to be regarded as well within the reason of the rule that the findings of the trial court should not be disturbed, except for manifest error. The Dolbadarn Castle, 222 Fed. 838, 138 C. C. A. 264; Sorenson v. Alaska S. S. Co. (Jan 7, 1918) 247 Fed. 294, — C. C. A. —; Central California Canneries Co. v. Dunkley Co., 247 Fed. 790, — C. C. A. —; Adamson v. Gilliland, 242 U. S. 350, 353, 37 Sup. Ct. 169, 61 L. Ed. 356; The Hardy, 229 Fed. 985, 986, 987, 144 C. C. A. 267. And we have examined the record sufficiently to satisfy us that there was evidence substantially tending to sustain the several findings and conclusions of the court below.

[2] This leaves but one other point to be noticed. It is contended by appellant that, as the court found that a fog prevailed at the time of the collision and it appeared without controversy that the Necanicum was proceeding at the time at her full speed, or substantially such, it results as matter of law that she was equally at fault with the Beaver, and that the court should have so held, and at least apportioned the damages. This contention is based upon the effect claimed by appellant of article 16, International Rules of the Sea (Act Aug. 19, 1890, c. 802, 26 Stat. 320, 326 [Comp. St. 1916, § 7854]), which, so far as here pertinent, reads:

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions."

Appellant's contention is, in substance, that under this rule, no matter what the other circumstances may be, nor how low soever the maximum rate of speed of a vessel may be, she must, in face of any one of the atmospheric conditions specified in the rule, reduce her speed below its maximum point or be necessarily held in fault in case of collision; that, in other words, "moderate speed," as there required, necessarily means less than full speed, and that a vessel going at full speed in such conditions of weather is violating the rule, no matter how slow that speed may be, and is guilty of negligence as matter of law. We are not disposed to accept this interpretation of the rule as it now exists. In support of its contention appellant cites some early cases from Judge Brown in the District Court. In the City of New York (D. C.) 15 Fed. 624, 628, that learned judge, discussing the effect of this maritime rule, as then existing, in a case of collision in a fog, says:

"The authorities are quite uniform in requiring a diminution of speed under such circumstances. Whatever 'moderate speed' may be, under given circumstances, having reference, as it doubtless does, to the steamer's ordinary speed and her ability to stop quickly, the density of the fog, and the means which vessels have of observing each other, so as to avoid danger, it is, at least, something materially less than that full speed which is customary and allowable when there are no obstructions in the way of safe navigation. To continue at full speed, therefore, as the steamer in this case substantially did, until the bark was in sight, was a clear violation of the statutory obligation to go at a moderate speed."

And again, in The State of Alabama (D. C.) 17 Fed. 847, 852, the same judge says:

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"To go at full speed in such a fog is not a compliance with rule 21, which requires steamers in a fog to go at moderate speed. * * * No steamer's speed is moderate in the sense of rule 21 so long as she is going at her ordinary full speed."

And see, to similar effect, The Pennland (D. C.) 23 Fed. 551; The Britannic (D. C.) 39 Fed. 395; The Normandie (D. C.) 43 Fed. 151, 157.

But not only do the later decisions fail to sustain this rather hard and fast interpretation, but the rule itself has since undergone modifications tending to give it, not only more comprehensive scope in its application, but greater elasticity and adaptability to conditions as they may arise. The pertinent language of the rule in its original form, as considered in the cases referred to by appellant, was that "every steam vessel shall, when in a fog, go at a moderate speed." It was in that form rule 21 of the International Code, adopted in 1863 by a British Order in Council, and in 1864 by the Congress of the United States (Rev. St. § 4233 [Comp. St. 1916, § 7963]). In 1879 a new or revised code was adopted in Great Britain, and thereafter, in 1885, by Congress (Act March 3, 1885, c. 354, 23 Stat. 438, 441). In this revision, the old rule 21 became article 13, and provided that "every ship, whether a sailing ship or a steamship, shall, in a fog, mist, or falling snow, go at a moderate speed." After the promulgation of article 13 by the British government, and before its adoption by Congress, it came under consideration in the Court of Appeals in England in The Elysia, 4 Asp. N. S. 540, 46 L. T. 840, where the court, in a collision case, in answer to the same contention that is made here, rejected it as untenable; Lord Coleridge saying:

"There are constructions of this thirteenth rule which have been suggested for our consideration, but I think the rule means what it says. It says that a ship, whether a sailing vessel or a steamship, must go at a speed which is perfectly moderate. It says nothing whatever about the capacity of a vessel for speed. If a ship be a slow ship, it does not follow that, because she is going at her greatest speed, which is a slow speed, she is to reduce her speed in proportion to a faster vessel. It is not, if her best speed is moderate, that she must reduce it; but, if her speed is more than moderate, she must bring it down to what is moderate. It would, indeed, be very dangerous to lay down any rule as to what is moderate and what is immoderate speed. A moderate speed in the Atlantic Ocean may be immoderate elsewhere."

And Lord Cotton said:

"Now, as to the consideration of the thirteenth rule, I have little to add to what has already been said by my learned Brothers. In my opinion the rule does not require that the speed is to be slackened by a naturally slow vessel. If the vessel was going at a moderate speed, it is not bound to go at a less speed."

And the latter judge adds, in substance, that what is a moderate speed must depend upon the situation and circumstances. Not only is this construction of the rule to be deemed to have been in the mind of Congress when it later adopted its language (I. C. C. v. B. & O. R. R., 145 U. S. 263, 284, 12 Sup. Ct. 844, 36 L. Ed. 699), but it is in harmony with the views subsequently expressed by the courts of this country (Quinette v. Bisso, 136 Fed. 825, 69 C. C. A. 503, 5 L. R. A. [N. S.] 303; The Colorado, 91 U. S. 692, 23 L. Ed. 379;

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The Chattahoochee, 173 U. S. 540, 548, 19 Sup. Ct. 491, 43 L. Ed. 801; The Umbria, 166 U. S. 404, 417, 17 Sup. Ct. 610, 41 L. Ed. 1053).

The rule in its present form was adopted in 1890 as a result of a convention of maritime nations held at Washington, and became effective by proclamation of the President March 1, 1895 (28 Stat. 1250, 1257), and it is significant that in this revision there was added to the text as it previously read, and presumptively to bring it more clearly in line with the construction theretofore given it by the courts, the words "having careful regard to the existing circumstances and conditions." And as to the effect of the rule in its present form, see Lie v. San Francisco & Portland S. S. Co., 243 U. S. 291, 37 Sup. Ct. 270, 61 L. Ed. 726.

It is apparent, therefore, we think, that the court below did not misapprehend the rights and obligations of the parties under this rule within the circumstances as found by it. Its decrees must therefore be affirmed; and it is so ordered.

EMMETT IRR. DIST. et al. v. THOMPSON et al.*

(Circuit Court of Appeals, Ninth Circuit. October 7, 1918.)

No. 3062.

1. WATERS AND WATER COURSES ⟸230(2)—IRRIGATION DISTRICTS—VALIDITY OF BONDS.

Under Rev. Codes Idaho, §§ 2396, 2397, providing that bonds of an irrigation district shall be authorized by a vote of the electors, shall be designated as a series, and may be issued and sold from time to time, but shall be dated January 1, or July 1, next following their authorization, they are properly signed by the officers of the district in office at the time of their issuance.

2. ESTOPPEL ⟸62(1)—IRRIGATION DISTRICTS—VALIDITY OF BONDS.

An irrigation district, which issued bonds under a contract made without fraud, and with full knowledge of the facts, requiring the other party in part payment to take up certain claimed liens on the property, is estopped to afterward question the validity of the bonds on the ground that some of the lien claims paid were invalid.

Appeal from the District Court of the United States for the Second Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit in equity by J. Paul Thompson and others against the Emmett Irrigation District and others. Decree for complainants, and defendants appeal. Affirmed.

J. M. Thompson, of Caldwell, Idaho, and Fremont Wood and Dean Driscoll, both of Boise, Idaho, for appellants.

Richards & Haga and McKeen F. Morrow, all of Boise, Idaho, for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The bonds here in suit are a part of an authorized issue of $1,100,000, par value, made by the appellant irriga-

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied February 10, 1919.

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tion district, and, except as to numbers, amounts, and dates of maturity, are identical. Each is a coupon bond, negotiable in form, and made payable to bearer, and recites upon its face, among other things, that it is one of a series of bonds aggregating $1,100,000 in amount and issued by the district by authority of an act of the Legislature of the state of Idaho entitled "An act relating to irrigation districts and to provide for the organization thereof, and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes, and for other and similar purposes," approved March 9, 1903, (Laws 1903, p. 150), together with acts amendatory thereof and supplemental thereto, and further recites as follows:

"And it is hereby certified that all things required by law to be done in and about the organization of said district and the issuance of the said bonds have been done, have happened, and have been performed, and that the issuance of this bond is duly and legally authorized by vote of the electors of said district at a special election duly called and held in accordance with the provisions of the said act and by resolution of its board of directors, and that all other acts, conditions, and things required by the laws and Constitution of the state of Idaho precedent to and in the issue and delivery of this bond have been done, have happened, and have been performed, and that said bonds are the valid, binding, and legal obligation of the said district; that all the real property included within said district is subject to the levy of an annual tax for the payment thereof."

The record shows that the irrigation works were constructed by a company styled Canyon Canal Company, Limited, under contract with the state of Idaho, pursuant to certain provisions of the statutes of that state and under the provisions of an act of Congress approved August 18, 1894 (28 Stats. Lg. 372, c. 301), and amendments thereto, known as the Carey Act (Comp. St. 1916, § 4685). Those statutory provisions are specifically referred to in the opinions of this court on the former appeal of the present case (227 Fed. 569, 142 C. C. A. 192), and in the recent case of Twin Falls Salmon River Land & W. Co. v. Caldwell, 242 Fed. 177, 155 C. C. A. 17, and need not, therefore, be again set out. The canal company sold to various settlers and prospective settlers rights to water under the system for the irrigation of their respective tracts of land, liens for the purchase price of which were given both by the act of Congress and the statute of Idaho.

For the purpose of acquiring the irrigation works and water rights of the canal company, and of extending and improving the same, the appellant irrigation district, shortly after its organization, authorized the issue of bonds in the amount of $1,100,000, par value, and under and by virtue of the statutes of Idaho (Revised Codes of Idaho, §§ 2401, 2403) instituted in the proper court of the state proceedings to have it judicially determined that the district had been legally organized, that the bonds had been properly authorized, and would be in the hands of purchasers legal and valid obligations of the district, the obvious purpose of which proceedings was to further the sale of the bonds by giving such legislative and judicial security to their purchasers. The confirmation proceedings resulted in a decree of the trial court adjudging the organization of the district and the issuance of the bonds to be regular and valid—the decree setting out, according to

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the express declaration of the Supreme Court affirming it, the "various steps taken for the organization of the district and of the issuance of said bonds." Emmett Irr. Dist. v. Shane, 19 Idaho, 332, 335, 336, 113 Pac. 444, 445.

The record shows that thereafter the district, through its board of directors, offered the whole amount of the bonds for sale, and that in response to due notice there was no bid. The canal company had sold water rights in the system to various settlers upon the lands under contracts on which there was payable to the company more than $600,000 in deferred payments, which contracts were liens both upon the lands of the settlers and their interests in the irrigation system. The canal company, in the course of building up the system, had issued bonds, notes, and other obligations, and given as security therefor a mortgage or trust deed to the American Trust & Savings Bank of Chicago on the irrigation system, including its water rights, and, as additional security, had deposited with the trustee the various water contracts it had entered into with the settlers. Some of the obligations of the canal company were due, and on others there was default in the payment of interest. There were also various existing liens upon the property for work and labor performed for, and materials furnished to, the canal company, and there was also some claim by a company called Trowbridge & Niver Company. Litigation and expense, therefore, confronted both the canal company and the district. In that condition of affairs the latter, on the 12th of September, 1911, entered into a contract with J. J. Corkill & Co., of Chicago, next referred to, prior to which, however, the district had acquired (through a holding company to which the canal company had conveyed it) the entire irrigation system.

The contract between the district and Corkill & Co., and a supplemental one between the same parties, as well as the facts in connection therewith, are, we think, after a careful examination of the record, fairly set forth in the following excerpt from the opinion of the learned judge of the court below:

"After reciting that the district was desirous of purchasing the irrigating system (to which, as we have seen, it already had title), and that Corkill was able to sell and deliver it, and further reciting that there were outstanding bonds and notes of the Canyon Canal Company aggregating $570,000, besides interest, secured by mortgages and water contracts, and that it was the desire of the district to pay all these obligations, and to lift all incumbrances upon and claims against the irrigation system, and to procure funds for the extension and improvement thereof, and reciting further that Corkill & Co. were able to give valuable assistance in making an exchange of the district bonds for such outstanding obligations, and were willing to purchase the bonds not required for that purpose, it was agreed that Corkill & Co. would use their best efforts to consummate the desired exchange, and would cause to be transferred to the district the entire irrigation system, and would further cause to be assigned to it an unsecured claim of the Trowbridge & Niver Company against the Canyon Canal Company, the precise nature of which is not explained. The Ft. Dearborn Trust & Savings Bank of Chicago was agreed upon as a depository, and with it the district was to deposit the entire issue of its bonds, for delivery from time to time as they were exchanged or sold by Corkill & Co. When the obligations of the canal company were finally discharged by exchange or payment, the water contracts which the canal company had deposited as collateral with the trustee of its bonds and notes were

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to be turned over to the district. These aggregated $525,469.62 principal, and $76,868.16 interest, and there was also in the hands of the trustee cash to the amount of $28,197.94, making a total of principal, interest, and cash of $630,535.72, all of which was to go to the district as soon as the canal company's obligations were discharged in the manner hereinafter recited.

"The $1,100,000 bonds were to bear date January 1, 1911, and the coupons maturing July 1, 1911, were to be detached before delivery to the depository. The depository was to hold the bonds and deliver them in the following manner, namely: Four hundred and seventy thousand dollars to Corkill & Co., or upon their order, in even exchange for $470,000 of the bonds and notes of the Canyon Canal Company, and Corkill & Co. were to pay to the holders of such outstanding bonds and notes any excess of accrued interest thereon, for which they were to be reimbursed out of the $28,197.94 cash in the trustee's hands, and $130,000 on account of the other $100,000 of bonds and notes and the accrued interest thereon, aggregating, principal and interest, $130,000. Two hundred and eighty thousand dollars of bonds were to be delivered upon payment to the credit of the district of cash equal to the par value thereof and accrued interest. The consideration for the other $220,000 bonds is not so clear. It was provided that they were to become the property of Corkill & Co. when the latter caused to be delivered to the depository proper instruments transferring to the district the irrigation system and the unsecured claims of Trowbridge & Niver Company, but they were to be held by the depository as security for the performance by Corkill & Co., of their obligations under the contract, among which was the obligation to purchase the $280,000 bonds in cash at par. These $280,000 bonds they were to take in installments, $50,000 in 30 days, $50,000 in 60 days, $50,000 in 90 days, and $130,000 on or before August 1, 1912. Provision was made for the delivery by the depository to Corkill & Co. of the $220,000 bonds, the details of which need not be stated, for in general the depository was at all times to retain of such bonds an amount equal to 25 per cent. of the then outstanding unexchanged obligations of the canal company, plus the amount of $280,000 bonds which Corkill & Co. had not taken and paid for in cash.

"The district further agreed to get from all landowners a written waiver of all errors and irregularities of procedure, together with consent that their lands be taxed to pay the interest and principal of the bonds. Corkill & Co. failed to purchase the whole of the $280,000 bonds within the time agreed upon, and on September 12, 1912, a supplemental agreement was executed, which, after reciting such default, provided for an extension of time to complete such purchase. It was also agreed that $5,000 of the $220,000 bonds, and $20,000 of the $280,000 bonds, should, by the depository, be returned to the district.

"There was still another contract between the parties, with a view to effecting the disposition of the bonds for cash; but it is unimportant at the present juncture, for generally it may be said that such bonds as are outstanding were disposed of under the contractual arrangement and for the considerations already explained. Of the bonds now out approximately $599,000 were exchanged in retiring the obligations of the Canyon Canal Company, as was contemplated by the agreement. Of the balance, $125,000 were sold for cash, $175,000 were delivered to Corkill & Co. on account of the $220,000, and $25,000 were, by agreement of the parties, returned to the district. The depository still has in its possession approximately $177,000. The contract was complied with in every respect, except that Corkill & Co. did not purchase for cash more than half of the stipulated amount of bonds; but admittedly this default does not affect the validity of the bonds which are actually outstanding, all of which were issued in compliance with the contract. It is further to be borne in mind that the issuance by the district of the bonds to the amount of $1,100,000 was duly authorized, and the district was not induced by any fraudulent practices on the part of Corkill & Co. to enter into the contract. The defenses are therefore limited to claims that the bonds are irregular in their form and in the manner of their execution, and that many of them, as appears from the contract and the explanatory testimony, were disposed of for an illegal consideration."

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[1] We agree with the court below that the objections made to the form of the bonds and the manner of their issuance are without merit. The provisions of the statute under which they were issued are quite different from those of the California statute considered by this court in the case of Wright v. East Riverside Irr. Dist., 138 Fed. 313, 70 C. C. A. 603, and therefore the decision in that case is not in point. The Idaho statute (Rev. Codes, §§ 2396, 2397) declares that the bonds authorized by the vote of the electors of the district "shall be designated as a series and the series shall be numbered consecutively as authorized," and that "all bonds and coupons shall be dated on January 1st or July 1st next following the date of their authorization." Providing, as the Idaho statute does, for the issuance of authorized bonds in series and for their sale from time to time, all, however, to be dated on January 1st or July 1st next following the date of their authorization, and there being no express statutory provision as to who should sign them, the obvious and necessary implication is that they were authorized to be signed by the officers of the district in office at the time of their issuance and delivery.

[2] The court below found and held that all of the parties to the contract between the irrigation district and Corkill & Co. knew all of the facts, and that there was no fraud practiced, notwithstanding the untrue recital therein that the district desired to purchase the canal system, the title to which had already been conveyed to it. "Undoubtedly," said the court, "there were outstanding bonds, notes, and contracts which were claimed to be charges upon the property. The district officers could at their option have questioned them at the time the contract was entered into, and declined to include any particular bonds or claims; but manifestly they either recognized their validity, or deemed their invalidity so doubtful that they were unwilling to assume the burden of a contest. The district has now had all of these liens and charges cleaned up, and has gotten the consideration for which the bonds were issued, and it cannot be heard to say that some of the claims might have been defeated if a contest had been instituted. In good conscience it would have to restore the consideration and put the parties in statu quo, and that it does not offer to do, and probably could not do. The transaction in this respect being within the scope of the directors' authority, their action is at this late date conclusive, in the absence of fraud, and no fraud is charged."

All this being true, and the record showing that a large part of the bonds in suit were used in the payment of the works of the irrigation system, as under section 2404 of the Revised Codes of Idaho it seems could be legally done, and the remainder of such bonds having subsequent to their delivery to the depository passed into the hands of purchasers for value, even if it be assumed that the consideration for some of the latter bonds was illegal, it appears from the record that the one could not be identified from the other. It hardly seems necessary to cite the numerous cases upon the subject of estoppel. How strictly that rule is enforced by the Supreme Court

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of Idaho in favor of holders of bonds of irrigation districts is clearly shown by the case of Page v. Oneida Irrigation District, 26 Idaho, 108, 141 Pac. 238. Indeed, we think that the application of the doctrine of estoppel and the decision of this court on the former appeal (227 Fed. 560, 142 C. C. A. 192) are enough to make necessary the affirmance of the judgment appealed from.

Judgment affirmed.

CITY OF SEATTLE v. LLOYDS' PLATE GLASS INS. CO.*

(Circuit Court of Appeals, Ninth Circuit. October 7, 1918.)

No. 3112.

1. EXPLOSIVES ⟸4—SUBJECT OF COMMERCE.
Dynamite, as a legitimate subject of commerce, while in transit to a foreign country, may be lawfully brought into any harbor.

2. COMMERCE ⟸10—CARRIAGE OF EXPLOSIVES—PORT REGULATIONS—NONEXERCISE OF POWER OF CONGRESS.
There is nothing in Rev. St. §§ 4278–4280 (Comp. St. 1916, §§ 8016–8018), relating to transportation of nitroglycerin in interstate and foreign commerce, which deprives a city of power to designate places in its harbor where explosives in course of transportation in interstate or foreign commerce shall be handled or kept.

3. MUNICIPAL CORPORATIONS ⟸736—TORTS—CREATION OF PUBLIC NUISANCE.
While a municipal corporation is not liable for a mistake in judgment, or even negligence, of its officers in designating a place for the storing of explosives, it has no right to create a public nuisance, and, if it does so, it is liable for the resulting damages.

4. MUNICIPAL CORPORATIONS ⟸849—LIABILITY FOR ACTS OF OFFICERS—CREATION OF PUBLIC NUISANCE.
A city ordinance, establishing harbor regulations, creating a fairway, and designating a powder dock for use exclusively for handling explosives, construed, and the city *held* liable for damages caused by an explosion of dynamite on a scow which the port warden without authority permitted to anchor in the fairway, where it had remained for 16 days.

5. MUNICIPAL CORPORATIONS ⟸741(1)—ACTIONS AGAINST—PRIOR PRESENTATION OF CLAIM.
Under a statute and ordinance requiring claims against a city to be presented and filed before bringing action thereon, an insurance company which, under the terms of its policies, has replaced glass broken by an explosion charged to have been due to the fault of the city, may properly file claims therefor in its own name.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action at law by the Lloyds' Plate Glass Insurance Company against the City of Seattle. Judgment for plaintiff, and defendant brings error. Affirmed.

A powder company of San Francisco, Cal., shipped to the Baldwin Shipping Company, at Vladivostok, 15 tons of gelatine dynamite, by a coastwise steamer called Loop, to be transferred at Seattle to one of the Japanese marus for transportation to its destination; the latter ship being expected to sail from Seattle about the time the Loop should arrive. On the arrival of the Loop at Seattle, however, it was found that that Japanese ship could not take

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied February 10, 1919.

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the shipment, and it was then arranged to ship the dynamite on the steamship Robert Dollar, which was expected to sail about a week later. For the reasons stated it became necessary to unload the explosive from the Loop, and it was placed on a scow of the Lillico Launch & Tugboat Company, which company was the agent of and acting for the powder company. This scow, with the explosive on board, was, on the 14th day of May, 1915, moored by the launch and tugboat company, without the knowledge of the port warden of the city of Seattle, to buoy No. 1 that the city had erected in the harbor, to await the arrival of the Robert Dollar, which was the next vessel carrying explosives bound for Vladivostok.

The city had, on March 1, 1915, pursuant to authority granted by its charter, enacted an ordinance, sections 7 and 8 of which are as follows:

"Sec. 7. All waters herein specified, subject to reservations for anchorage, shall be known as 'fairway,' and shall not be obstructed in any manner whereby navigation may be endangered or impeded, and shall include, subject to such reservations, the following described waters:

"All of Elliott Bay, lying easterly of a straight line drawn from Alki Point to West Point.

"All of the east and west waterways.

"All of the Duwamish river.

"All of the Duwamish waterway project.

"All of Salmon Bay.

"All of Lake Washington Canal, outside that portion which shall be under the supervision and control of the United States government.

"All of Lake Washington, Lake Union, and Green Lake, lying or being within the corporate limits of the city of Seattle, or within the jurisdiction and control of the city.

"All that portion of Shilshole Bay, lying easterly and southerly of a line from West Point to the intersection of the northerly boundary of the city of Seattle with the outer harbor line.

"All navigable waters in the projection of public streets, lying on the landward side of the outer harbor line, shall be fairway. It shall be unlawful for the master, or other person in charge of any vessel, to anchor, tie, or make fast such vessel in any such fairway for a longer period of time than reasonably sufficient to load or unload the same, except that the port warden may, in his discretion, grant any permit for the use of any such fairway for a longer period of time whenever in his judgment such use will not interfere with the use of the fairway by any other vessel, but only upon the payment of the anchorage charges herein provided for.

"Sec. 8. In aid of commerce and navigation anchorage for vessels is authorized in the following described waters:

"Elliott Bay Anchorage—Beginning at the northeast corner of Harbor Island; thence northerly and in a straight line to a point intersecting a line drawn along the north side of King street; thence west on said line to a point intersecting the east line of the west waterway; thence along said east line to the northwest corner of Harbor Island; also, beginning at a point of intersection of the outer harbor line with a straight line drawn along the west line of the west waterway; thence north to a point intersecting a straight line drawn along the north side of Washington street; thence in a westerly direction to the junction of the outer harbor line and the east side of the West Seattle Ferry dock."

Within that portion of Elliott Bay lying easterly of a straight line drawn from Alki Point to West Point, and within a half-mile from the path of shipping that comes into Seattle Harbor, a like distance from the wharves and docks of the city, and 1,300 feet from a fill in Elliott Bay known as Harbor Island, which at the time here in question was vacant land, the city erected buoy No. 1. The morning after the scow of the Lillico Launch & Tugboat Company, with the dynamite on board, was moored to buoy No. 1, the port warden of the city was notified of the fact, and in consideration of the payment of a fee prescribed by the city ordinance of $1 per day he issued a permit to the launch and tugboat company to so moor the scow, at the time knowing that it had on board the 15 tons of dynamite. The scow so remained moored to that buoy until the dynamite exploded, about 2 o'clock in

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the morning of May 30th, resulting in great damage, including the breaking of a large amount of plate glass owned by various persons in the city of Seattle, a part of which glass was insured by policies of insurance issued to such owners by the Lloyds' Plate Glass Insurance Company and the Globe Indemnity Company. Pursuant to the obligations imposed by those policies, the insurance companies mentioned caused the glass to be replaced, and filed claims against the city for the amounts paid by them for the replacing of such glass under their respective policies. Subsequently the Globe Indemnity Company assigned its claim against the city to the Lloyds' Insurance Company, which brought the present action against the city for damages, resulting in findings and judgment for the plaintiff, to review which the city brought the present writ of error.

Hugh M. Caldwell and Frank S. Griffith, both of Seattle, Wash., for plaintiff in error.

Bogle, Graves, Merritt & Bogle, Flick & Paul, and Hughes, McMicken, Ramsey & Rupp, all of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1, 2] It cannot be doubted that the dynamite, being foreign commerce in transit to its place of destination, was rightfully brought into the harbor of Seattle. Such substance has long been a legitimate subject of commerce. Actiesselskabet Ingrid v. Central R. Co. of New Jersey, 216 Fed. 72, 132 C. C. A. 316, L. R. A. 1916B, 716; The Ingrid (D. C.) 195 Fed. 596, and cases there cited. The contention of the appellant that the city was without power to designate the place or places within the harbor where such an explosive should be handled, kept, or stored we are unable to sustain. Neither section 4278 nor 4279 of the Revised Statutes (Comp. St. 1916, §§ 8016, 8017), embodying provisions of the act of Congress of July 3, 1866 (14 Stat. 81, 82, c. 162), nor the decisions of the Supreme Court reported, respectively, in Southern Ry. Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72, Northern Pac. Ry. Co. v. Washington ex rel. Atkinson, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237, and Southern Ry. Co. v. Reid, 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257, in our opinion, sustain it.

It is beyond question that, where Congress has legislated in respect to either foreign or interstate commerce, no state or other subordinate legislation upon the same subject is of any validity. But we find no legislation of Congress with respect to the place or places within any harbor of the United States where any kind of explosives shall be handled, kept, or stored. Section 4278 above cited makes it unlawful to transport, carry, or convey, ship, deliver on board, or cause to be delivered on board, certain specified kinds of explosives, including nitroglycerin, upon or in any vessel or vehicle used or employed in transporting passengers by land or water, between a place in any foreign country and a place within the limits of any state, territory, or district of the United States, or between a place in one state, territory, or district of the United States and a place in any other state, territory or district thereof; and section 4279 of the same Statutes makes it unlawful to ship, send, or for

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ward any quantity of such explosives by a vessel or vehicle of any description, by land or water, between a place in a foreign country and a place within the United States, or between a place in one state, territory, or district of the United States, and a place in any other state, territory, or district thereof, unless the same shall be securely inclosed, deposited, or packed in a certain prescribed way; and the next section—4280 (section 8018)—declares that the two preceding sections shall not be so construed as to prevent any state, territory, district, city, or town within the United States from regulating or from prohibiting the traffic in or transportation of those substances between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits for sale, use, or consumption therein.

In all this we see nothing in any way relating to the place or places in any harbor of the United States where any kind of an explosive in course of foreign or intrastate commerce shall be placed, kept, or stored; and while, as has been said, it is beyond question that where Congress has legislated in respect to either foreign or interstate commerce no state or other subordinate legislation upon the same subject is of any validity, yet we understand the law to be that, where Congress is silent, the state may legislate in aid of, but without burdening, both foreign and interstate commerce. Such we understand to be the effect of the last of the decisions above cited of the Supreme Court, where, at page 436 of 222 U. S., at page 142 of 32 Sup. Ct. (56 L. Ed. 257), the court cited, with apparent approval, its previous decisions in the cases of Atlantic Coast Line R. R. Co. v. Mazursky, 216 U. S. 122, 30 Sup. Ct. 378, 54 L. Ed. 411, and Western Union Tel. Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, saying, among other things, that—

"In those cases, and in the later case of Western Union Tel. Co. v. Milling Co., 218 U. S. 406 [31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815], the principle is expressed that 'there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those engaged in interstate commerce.' Such exercise of power, it was further said, was in aid of interstate commerce, and, although incidentally affecting it, did not burden it."

[3] We readily concede that municipal corporations, which are created by the state and invested with certain governmental powers for local purposes and for the public good, are not liable in damages for their failure to so legislate, or for any mistake in judgment in the matter of any such legislation. Decisions to this effect are very numerous. But we think it is clear that such a corporation has no right to create a public nuisance, and that, if it does so, it is liable for the resultant damage. See Bruhnke v. La Crosse, 155 Wis. 485, 144 N. W. 1100, 50 L. R. A. (N. S.) 1147; Fitzgerald v. Town of Sharon, 143 Iowa, 730, 121 N. W. 523; Mayor, etc., v. Furze, 3 Hill (N. Y.) 612; Hughes v. City of Fond du Lac, 73 Wis. 380, 41 N. W. 407; Hart v. Board of Chosen Freeholders of Union County, 57 N. J. Law, 90, 29 Atl. 490.

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The cases cited and relied upon by the plaintiff in error, in which it was sought to hold the city of Baltimore liable for damages resulting from an explosion in waters over which it had jurisdiction—Zywicki v. Jos. R. Foard Co. et al. (D. C.) 206 Fed. 975; Jos. R. Foard Co. v. State of Maryland, 219 Fed. 827, 135 C. C. A. 497; Gutowski v. Mayor, etc., of City of Baltimore, 127 Md. 502, 96 Atl. 630—were based upon the alleged negligence of that city in designating the place for the transshipment or keeping of the explosive, or negligence in not properly supervising the handling of it; the Circuit Court of Appeals of the Fourth Circuit saying in the second of the cases last referred to (219 Fed. 834, 135 C. C. A. 504):

"Assertion of liability of the city of Baltimore is made on the ground that it was negligent in designating the place where the accident occurred for the transshipment of dynamite, in that it was a place frequented by other vessels and that it was negligent in not properly supervising the loading of dynamite where an explosion would probably result in loss of life and property. This position is untenable. The general rule is that actionable negligence cannot be imputed to a city for mistake of judgment, or even negligence, of its officers in performing the governmental function of selecting a place for the loading of explosives from which it derives no profit."

And in the case of Gutowski v. Mayor, etc., of Baltimore, 127 Md. 502, 96 Atl. 630, the same obvious distinction was pointed out by the Supreme Court of Maryland, between such cases of negligence or failure on the part of the municipality and such a case as is here complained of, where the complaint in the case, as well as the decision of the court below, are based upon the ground that the defendant city, in authorizing and directing, through its port warden, this dynamite to be placed and kept at its buoy No. 1, created a public nuisance, in violation of its own ordinance designating another and different place for such purpose.

[4] About two months before the occurrences in question, to wit, on the 1st of March, 1915, the city enacted the ordinance referred to in the statement, by which the city, in the exercise of its police power, assumed control and jurisdiction over all navigable waters within its limits, and by which there was, among other things, created the fairway in the waters of the bay that has been described, subject to anchorage, and in which fairway the city subsequently constructed and maintained, among others, anchorage buoy No. 1. The ordinance made it unlawful for any master or person having charge of any vessel to anchor or make the same fast in the waters of the fairway or anchorage without first obtaining a permit therefor from the port warden of the city, and paying certain prescribed anchorage fees therefor; the port warden being thereby given power, and it being made his duty, to remove any vessel from any buoy, wharf, or anchorage for nonpayment of any such prescribed fees. It prohibited every master or other person in charge of any vessel from attaching the same to any city buoy until he should have obtained permission so to do from the port warden, provided that during the night or in bad weather such vessel might be attached to any vacant buoy, with the requirement that the person in charge thereof should notify the port warden not later than 8 o'clock of the next legal day

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of such act, stating the name and character of the vessel and the probable length of time it desired to remain at the buoy. It made the port warden the sole judge as to what vessel or vessels should occupy the city buoys, and conferred upon him power to revoke any such permit for a violation of any of its terms. It made various provisions respecting the handling, keeping, and storage of explosives within the harbor, and, among others, these parts of section 38:

"No person shall, on any pier or other structure, except on the powder dock or on powder boats within Seattle Harbor, store or have on hand for sale, or sell, or keep any powder, ignition caps, dynamite, or other like explosives, either by day or night.

"No vessel with a cargo or part cargo of powder, ignition caps, dynamite, or other like explosive arriving at Seattle Harbor, shall lie alongside of or make fast to any pier until the port warden shall have issued a permit so to do. * * * Any person, desiring a permanent berth at the powder dock for the transfer of powder, shall pay to the port warden a minimum charge of twenty-five (25) dollars per month when such vessel does not exceed fifty (50) net tons, which shall allow such vessel to lie thereat and discharge or handle in any one month not over twenty-five (25) tons of explosives over the same. Whenever any vessel shall handle more than twenty-five (25) tons of explosives over such dock in any one month, the regular one (1) dollar per ton rate shall be collected in lieu of such twenty-five (25) dollar rate.

"Every powder boat engaged in the transfer or handling of explosives and lying at the powder dock for such purpose, or for the transfer of explosives direct to vessels on the day of departure, as permitted herein, shall have on board a written permit from the port warden, known as a 'Monthly Powder Permit.' The port warden shall collect two (2) dollars for each monthly powder permit, and the terms of the permit shall comply with the provisions of this ordinance, which permit may be revoked by the port warden for cause without notice. * * *

"Every vessel carrying a cargo of explosives in any form, while lying at anchor, or at a city buoy, or alongside the powder dock, shall at all times, both by day and night, have on board a competent and sufficient crew, which shall at all times display the required signals and be ready to and have authority to immediately move such vessel when emergency requires, or when required by the port warden. * * *

"Every vessel, whether lying at anchor, or at a city buoy, or in any other position within Seattle Harbor, engaged in the transfer of explosives, shall have on board at the time of such transfer a written permit therefor from the port warden, which permit shall state the time and place of such transfer, and the amount of explosives to be handled. * * *"

Section 39 is as follows:

"The Harrison Street municipal pier is hereby designated for use temporarily as a powder dock, and for use exclusively for the handling of powder, dynamite, and other like explosives, and as a place for vessels carrying as cargo or part cargo such explosives. Any vessel shall be allowed to lie at said pier only after a written permit shall have been issued by the port warden."

The ordinance in question is not as clear as it might have been made, and, indeed, is in some respects somewhat perplexing; but we are of the opinion that there is not only nothing in it authorizing the port warden to permit any vessel engaged in transferring dynamite from one vessel to another in the harbor to tie up with it on board to buoy No. 1 in Elliott Bay fairway, but, on the contrary, that there are affirmative and express provisions in the ordinance prohibiting such action, namely, the provisions of section 39, by which the Harrison Street pier was expressly designated "for use

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temporarily as a powder dock, and for use exclusively for the handling of powder, dynamite, and other like explosives, and as a place for vessels carrying as cargo, or part cargo, such explosives," and that provision of section 38 expressly declaring that "no person shall on any pier, or other structure, except on the powder dock or on powder boats, within Seattle Harbor, store or have on hand for sale, or sell, or keep any powder, ignition caps, dynamite, or other like explosive, either by day or night."

It is true that the ordinance contains several provisions contemplating the anchoring within the harbor of the city of vessels having on board a cargo or part cargo of dynamite or other explosives, and contemplating the transfer by vessels of all or any of such explosives from one vessel to another within the harbor. Those provisions are the clauses which read:

"Every vessel lying at any powder dock or at anchor within Seattle Harbor, which has a cargo or part cargo of dynamite, ignition caps, blasting or sporting powder, or other high explosive or explosives in any form, shall between sunset and sunrise display" certain signals, and "shall at all times, both by day and night, have on board a competent and sufficient crew which shall at all times display the required signals and be ready to and have authority to immediately move such vessel when emergency requires, or when required by the port warden."

But neither of those provisions, we think, can be properly held to apply to the scow of the Lillico Launch & Tugboat Company, which took on board the 15 tons of dynamite from the ship Loop, and was permitted by the port warden to keep it for 16 days anchored to buoy No. 1 in the Elliott Bay fairway.

[5] The point is made on behalf of the plaintiff in error that the court below erred in admitting in evidence over its objection the claims filed by the insurance companies against the city pursuant to the provision of the city charter and a similar provision of a statute of the state of Washington, providing, as a condition to the bringing of an action against the city for damages, that a claim therefor be presented to the city council and filed with the city clerk. The contention on the part of the city is that such claims should have been filed by the parties whose glass was broken. But we think the conclusive answer is that the glass was at once replaced by the insurance companies pursuant to the provisions of the respective policies, which companies thereupon became subrogated, both by the terms of the policies as well as by the law, to all of the rights of their respective assured, and thenceforth the sole parties in interest.

The case of Haynes v. Seattle, 83 Wash. 51, 145 Pac. 73, said by the plaintiff in error to be "on all fours with the case at bar," we think not at all like the present one, for there a third party filed a claim against the city for the injured person. While the Supreme Court of the state of Washington has in many cases, and always, given effect to the provision of the charter of the city and of the statute, it has uniformly held that its requirements must be reasonable, and that a reasonable compliance with the provision is all that can be demanded. Falldin et al. v. City of Seattle, 50 Wash. 561,

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97 Pac. 658; Walters v. Seattle, 97 Wash. 657, 663, 167 Pac. 124. We think there is no merit in the point.

The judgment is affirmed.

MARYLAND CASUALTY CO. v. REPASS (two cases).

(Circuit Court of Appeals, Fourth Circuit. April 19, 1918.)

Nos. 1610, 1611.

1. SUBROGATION ⟸7(1)—RIGHTS OF SURETY—PAYMENT OF DEBT.
It is a general rule that a surety on payment of the debt is entitled to all the collaterals, securities, and other protection held by the principal creditor, to whom the debt is paid, emanating from the principal debtor, for whom the debt is paid.

2. SUBROGATION ⟸31(3)—PAYMENT OF DEBT BY SURETY—RIGHT TO ASSIGNMENT OF SECURITIES.
Unless in exceptional circumstances, the surety on a supersedeas bond given pending proceedings in error to reverse a judgment, on payment of the judgment after affirmance is entitled to an assignment of the same, where necessary to its efficient and prompt enforcement against the judgment defendant.

3. APPEAL AND ERROR ⟸1244—SUIT BY SURETY ON SUPERSEDEAS BOND—PARTIES.
A judgment defendant is not a necessary party to a suit by the surety on his supersedeas bond brought after affirmance of the judgment to enjoin prosecution of an action on the bond by the judgment plaintiff.

Appeal from and in Error to the District Court of the United States for the Western District of Virginia, at Roanoke; Henry Clay McDowell, Judge.

Suit by the Maryland Casualty Company against Sallie C. Repass, administratrix of the estate of Charles Repass, deceased. Decree for defendant, and complainant appeals. Reversed.

Action by Sallie C. Repass, administratrix, against the Maryland Casualty Company and the Big Vein Pocahontas Company. Judgment for plaintiff, and the Casualty Company brings error. Reversed.

D. Lawrence Groner, of Norfolk, Va., for appellant and plaintiff in error.

William H. Werth, of Tazewell, Va., for appellee and defendant in error.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

SMITH, District Judge. These two causes, although brought up, one by a writ of error, and the other by an appeal, yet as involving the same facts, and between the same parties, and dependent upon the same rule of law, were heard together. The facts are, that at the March term, 1916, the appellee, Sallie C. Repass, administratrix of the estate of Charles M. Repass, obtained a judgment in the District Court of the United States for the Western District of Virginia,

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for $7,000, with interest and costs. This judgment was obtained in an action against the Big Vein Pocahontas Company, as the sole defendant, to recover damages for the death of Charles M. Repass, an employé of that company. The Big Vein Pocahontas Company took out a writ of error from this court to that judgment, and in order to supersede execution thereof, filed its bond in an amount approved by the presiding judge of the District Court, with the Maryland Casualty Company, the appellant herein, as the surety on that supersedeas bond. The writ of error came on to be heard in this court, which affirmed the judgment of the lower court, and the mandate of this court affirming that judgment was duly certified and sent to the court below. The Big Vein Pocahontas Company, however, refused to pay the judgment, and the said Sallie C. Repass, as administratrix, thereupon, in lieu of issuing and enforcing execution on the judgment, demanded that the Maryland Casualty Company, the surety on the supersedeas bond, pay the judgment. Thereupon the Maryland Casualty Company, as surety on the supersedeas bond, tendered to Mrs. Sallie C. Repass the amount of the judgment, interest, and costs, and demanded that upon the payment thereof the said Sallie C. Repass as administratrix should assign the judgment to the Maryland Casualty Company, such assignment to be without recourse upon said Sallie C. Repass; but she refused to receive the money tendered on that condition, although the amount tendered was in full of everything she could claim under the judgment, and refused to execute an assignment; and on the 22d of March, 1917, the said Sallie C. Repass filed her declaration in a new action at law in the District Court of the United States for the Western District of Virginia against both the Big Vein Pocahontas Company and the Maryland Casualty Company, asking for judgment against them upon the supersedeas bond.

To this declaration the Maryland Casualty Company filed two special pleas. In the one plea it set up that it had requested the plaintiff Sallie C. Repass, administratrix, to issue her execution and levy the same on the property of the defendant the Big Vein Pocahontas Company, but that Sallie C. Repass had refused and continuously refuses to do so. The second plea was to the effect that the Maryland Casualty Company as surety on the supersedeas bond had theretofore tendered to Sallie C. Repass, administratrix, the amount of the judgment, interest, and costs, on condition that the judgment aforesaid and the lien thereof and all right of action thereunder by suit, execution, or otherwise be assigned to the Maryland Casualty Company without recourse against the said Sallie C. Repass, but that the said Sallie C. Repass had refused to make the assignment. On the 20th day of November, 1917, the cause having come on to be heard upon the declaration and these two pleas, the court below struck the pleas from the file, and adjudged that the plaintiff recover of the defendants jointly and severally the amount due under the supersedeas bond. In the meantime, viz. on the 28th of June, 1917, the appellant, the Maryland Casualty Company, filed its proceeding in equity against the said Sallie C. Repass, administratrix, to enjoin

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and stay the proceedings in the action instituted by her upon the supersedeas bond, on the ground that the Maryland Casualty Company was entitled as surety under the supersedeas bond if it paid the judgment in full to have the benefit by way of assignment of the original judgment against the Big Vein Pocahontas Company, which had been recovered by Sallie C. Repass, as administratrix, and to secure the payment of which the supersedeas bond was given, on which bond the Maryland Casualty Company was only a surety; that it was entitled to have this assignment, and that the court should decree that Mrs. Repass should receive the amount she was entitled to under the judgment, and execute and deliver to the Maryland Casualty Company an assignment of the judgment, and that any further proceeding in the action at law under the supersedeas bond should be enjoined.

When this bill was filed, an order was made in the court below on the same day restraining the law action until the further order of the court. On the 19th of September, 1917, after a hearing, the District Court ordered that the bill of complaint be amended by making the Big Vein Pocahontas Company a party defendant, and the said bill was so amended, and the answer of Sallie C. Repass filed to the amended bill. Sallie C. Repass in her answer practically admits the facts stated in the bill, but alleges that she was informed that there was a contract of indemnity or insurance which existed and was in force between the Maryland Casualty Company and the Big Vein Pocahontas Company, by which the Maryland Casualty Company undertook to protect and insure the Big Vein Pocahontas Company against liability in actions against it seeking to recover damages for the injury or death of its employés, which was the cause of action sued on, and upon which the original judgment against the Big Vein Pocahontas Company was recovered; that there was a controversy existing between the Big Vein Pocahontas Company and the Maryland Casualty Company, in which the Big Vein Pocahontas Company contended that the Maryland Casualty Company was liable by virtue of the contract of indemnity between them for the payment of the whole of the judgment, and that those parties intended to litigate that matter between them, and that the plaintiff was advised that it was not proper for her to intervene in that controversy by giving an assignment of the judgment to one of the parties whereby it might obtain a supposed advantage over the other. The Big Vein Pocahontas Company was duly served, and thereupon made a motion to dismiss the bill of complaint upon the ground that it appeared upon the face of it that the District Court for the Western District of Virginia was without jurisdiction to hear and determine the matters therein set forth, because the proceeding was not brought in the district of the residence of either the plaintiff or defendant, and next that it appeared upon the face of the bill that the Maryland Casualty Company was primarily bound or obligated to pay a portion of the judgment.

At the same time the defendant Sallie C. Repass, administratrix, also made a motion to dismiss the bill of complaint, and upon hearing both motions the District Court on the 20th of November, 1917,

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made a decree dismissing the complainant's bill as amended as against Sallie C. Repass, administratrix. The decree provided, second, that said bill having been dismissed as to Sallie C. Repass, it should also be dismissed as to the Big Vein Pocahontas Company, solely on the ground that, Sallie C. Repass having been dismissed, that left the proceeding in equity existing only as between the Maryland Casualty Company, a citizen of Maryland, and the Big Vein Pocahontas Company, a citizen of West Virginia, and the district in which the bill was filed being the residence neither of the complainant nor of the defendant, as the proceeding then existed, the bill should be dismissed for want of jurisdiction. From this decree of the District Court this appeal has been taken.

[1] The general rule of law is that the surety upon payment of the debt is entitled to all the collaterals, securities, and other protection held by the principal creditor to whom the debt is paid, emanating from the principal debtor for whom the debt is paid. In this case the debt is really the original judgment recovered in the action at law by Sallie C. Repass, administratrix, against the Big Vein Pocahontas Company in March, 1916. These two were the only parties to that action at law. The Maryland Casualty Company was not a party to it. Nor was it bound as a party by the judgment recovered in that action. After this judgment had been recovered the Big Vein Pocahontas Company took out a writ of error from this court, and for the purposes of that writ of error it filed a supersedeas bond upon which the Maryland Casualty Company was the surety. There can be no doubt that the Maryland Casualty Company on that bond was merely the surety; it was not a party to the action at law; no judgment had been recovered against it; the rule and practice of law requires that a supersedeas bond should be given with sufficient surety, and the bond in this case for a supersedeas was given by the Big Vein Pocahontas Company as the principal, with the Maryland Casualty Company, as surety. When this judgment was finally affirmed, and the mandate from this court was sent to the District Court, it became absolute. It is alleged in the amended bill of complaint herein that the Big Vein Pocahontas Company is solvent, and had, within the jurisdiction of the District Court for the Western District of Virginia, ample property both real and personal for the payment of the judgment, which property was susceptible of levy and execution. This allegation is in no way controverted upon the face of the pleadings as heard by the District Judge below, and as they appear in this court, and must be taken to be admitted. It would seem, therefore, that the natural and ordinary and quickest method of proceeding would have been for the appellee Sallie C. Repass, to have issued execution upon the final judgment against the Big Vein Pocahontas Company she held as made absolute by the decree and mandate of this court, and collected the money to which she was entitled thereunder, by the enforcement of this execution on the property of the Big Vein Pocahontas Company. It is rather difficult to understand why this was not done.

It is contended by the counsel for the appellee, Mrs. Repass, that she had her option to issue execution against the principal judgment

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debtor, or enforce her supersedeas bond, and that being informed that the principal judgment debtor would object to the enforcement of the execution and resist it, and from fear of any litigation that would result therefrom, he preferred for his client to begin an entirely new action at law upon the supersedeas bond to recover judgment against both the Big Vein Pocahontas Company, and the Maryland Casualty Company. He already had judgment against the Big Vein Pocahontas Company, and therefore no action on the supersedeas bond would as against that company by any judgment he could recover, improve the position of Mrs. Repass. The only object of that proceeding could have been to obtain judgment against the Maryland Casualty Company in addition to the judgment he already possessed against the Big Vein Pocahontas Company. Inasmuch as it is admitted that the Big Vein Pocahontas Company was quite able to respond to the execution if levied at once, this new action at law would seem to be a very circuitous method taken for the purpose of collecting the amount due on the original judgment. However that may be, the Maryland Casualty Company thereupon tendered the entire amount due under the original judgment, and simply asked that an assignment of that judgment be made to it. Under the general rule of law upon the payment of the original judgment the Maryland Casualty Company as surety would have been entitled to be subrogated in equity to the position of Mrs. Repass as the judgment creditor under the original judgment. Mrs. Repass alleges that the asking of the assignment was an unnecessary and useless condition because if the Maryland Casualty Company was really a surety (which she intimates was not the case), then by payment alone without any written assignment that company would become in equity entitled by way of subrogation to the benefit of the judgment. So far as Mrs. Repass was concerned the Maryland Casualty Company held no relation to her, except that of surety on the supersedeas bond. Her very action at law against it is predicated on its liability under that bond, and any supposed equities between the Maryland Casualty Company and the Big Vein Pocahontas Company upon a wholly different instrument with which she had nothing to do were no concern of hers.

The Maryland Casualty Company, however, sets up as special reasons why it needed a legal assignment that the judgment could only have the force of a lien if it was properly transcripted and entered in the county in which the property of the Big Vein Pocahontas Company was situate, and furthermore that, unless execution was issued under the law of Virginia within a limited time, no such lien could be procured; that in order that the Maryland Casualty Company should retain to itself the benefit of the lien to which this judgment was entitled, and the power of issuing execution thereunder, it was necessary to have some legal right to transcript and record the judgment, and issue execution and obtain a lien, which could not be obtained within the time that would be required upon a bill filed in equity to compel assignment or obtain consequent subrogation. The assignment asked of Mrs. Repass was an assignment which would leave the assignee without any right to recourse upon Mrs. Repass, and which in effect could only pass to the assignee

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the Maryland Casualty Company, such rights as Mrs. Repass held under the judgment, and only such rights as the Maryland Casualty Company would have the power to enforce as against its principal, the Big Vein Pocahontas Company. If the assignment were made and the Maryland Casualty Company undertook to enforce the execution, it would be quite competent for the Big Vein Pocahontas Company to file a proceeding in equity setting up any equitable grounds as it might possess, which should operate to prevent an enforcement of this judgment against it as in favor of the Maryland Casualty Company, and upon such equitable grounds being drawn to the attention of the court of equity it could stay the enforcement of the judgment in the hands of the Maryland Casualty Company until the equitable controversy existing between the Maryland Casualty Company and the Big Vein Pocahontas Company was settled, retaining, however, to the Maryland Casualty Company, until it was settled, all the rights and liens to which it would be entitled as the holder of the judgment paid by it, if the decree in the equity cause, if brought by the Big Vein Pocahontas Company, should be that the Maryland Casualty Company was entitled to retain and enforce the judgment.

With this equitable controversy between these two Mrs. Repass had nothing to do; she avers that she is not willing to volunteer or take any part or be connected with the controversies between these parties, and yet her very action and the allegations contained both in her declaration in the law case and her answer in the equity case are in result equivalent to an active participation in the matter on behalf of the Big Vein Pocahontas Company. Admittedly the original liability was that of the Big Vein Pocahontas Company, so far as Mrs. Repass was concerned. She sued for damages for the death of the deceased, Charles M. Repass, caused by the negligence of the Big Vein Pocahontas Company, and to that company, and to that company alone, until the giving of the supersedeas bond, she looked for payment. It is difficult to see how she could have failed to avail herself of her immediate, prompt, and ready remedy, by enforcing her execution to collect the amount due on her judgment, unless it was that she desired to force payment out of the Maryland Casualty Company, to the ignoring of the principal judgment debtor, the Big Vein Pocahontas Company.

[2] The right of the surety on a supersedeas bond, when he has paid that bond, to be remitted by subrogation to the benefit of the judgment for the payment of which the bond was given, cannot ordinarily be questioned. There appears no circumstance in this cause at this time why any different rule should be applied in this case. The request of the Maryland Casualty Company for an assignment of the character requested was under the circumstances of this case entirely reasonable, and should have been granted. What rights thereby accrued, or would accrue, to the Maryland Casualty Company, and what rights of enforcement it thereby acquired, so far as it was concerned, against the Big Vein Pocahontas Company, is a question or controversy solely between those parties to be adjudi-

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cated upon proper proceedings when the Maryland Casualty Company threatens or attempts to enforce that judgment.

[3] In the opinion of this court, the court below was in error in dismissing the bill of complaint, and was in error in requiring the complainant to amend its bill to make the Big Vein Pocahontas Company a party defendant. It should upon the bill of complaint, as between Mrs. Sallie C. Repass and the Maryland Casualty Company, have decreed that upon the payment by the Maryland Casualty Company, within a time to be limited in the decree of the District Court, into the court of the full amount of principal, interest, and costs accrued to date, that the defendant Sallie C. Repass, administratrix, should execute and file with the court an assignment in due form (but without recourse upon her) of all her right, title, and interest whatsoever in and to the original judgment recovered by her against the Big Vein Pocahontas Company, with the lien thereof, and all rights of enforcement thereof which she possessed, and that upon the filing of the same the amount paid by the Casualty Company should be thereupon paid over to her, and the assignment should be delivered to the Maryland Casualty Company, and that the order requiring the Big Vein Pocahontas Company to be made a party to those proceedings should be vacated, and that upon the payment in full of the said judgment an injunction should be issued perpetually enjoining the further prosecution of the action at law against the Big Vein Pocahontas Company and the Maryland Casualty Company, and enjoining the enforcement of any judgment entered therein.

The decree below is accordingly reversed in cause No. 1610, and the cause remanded to the District Court, to proceed in accordance with the principles of this opinion.

In cause No. 1611 the judgment entered up against the Maryland Casualty Company and the Big Vein Pocahontas Company is also reversed, as having been ordered when the action should have been stayed to await the decree in the equity cause under the principles herein announced, with direction that the action be stayed until the final action of the court in the equity cause.

Reversed.

HEALEY v. MORAN TOWING & TRANSPORTATION CO.

Appeal of CRANFORD CO.

(Circuit Court of Appeals, Second Circuit. May 24, 1918.)

No. 228.

1. SHIPPING ⊂=52—INJURY TO SCOWS—LIABILITY OF CHARTERER.

A subcharterer of two dumper scows, to be used in moving excavated material, under a contract requiring it to furnish sufficient depth of water at all times at the loading place, and to be responsible for injuries caused by negligence of its employés, *held* primarily liable for injury to the boats by grounding and by heavy boulders dropped into them without the customary precautions.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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2. WORDS AND PHRASES—"DUMPING BOARD."

A "dumping board" consists of an elevated structure of timber, which in part overhangs the water, to enable a scow to go under it for the purpose of taking on a load.

3. WORDS AND PHRASES—"TIPPLE."

That portion of a dumping board, which is hinged so that it may be tipped up after material is deposited on it from an inclined plane or slide over, and from which the material is deposited by gravity in the scow, constitutes a "tipple."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tipple.]

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty by Harriett A. Healey against the Moran Towing & Transportation Company and the Cranford Company, impleaded. Decree for libelant, and the Cranford Company appeals. Affirmed.

For opinion below, see The Olympia, 243 Fed. 236.

This cause comes here upon appeal from a final decree entered in the United States District Court for the Eastern District of New York on June 1, 1917. The libelant is the owner of the scow and dumper Olympia, a vessel without motive power, built and used for the carriage of cargoes through the waters of the harbor of New York and waters tributary thereto. The Moran Towing & Transportation Company is a corporation created and existing under the laws of the state of New York.

The libel states two causes of action. For a first cause of action the libel alleges that the Olympia was delivered under a charter to the respondent on September 3, 1914, at New York City, in a sound and seaworthy condition. That while the said scow was in the exclusive possession of the respondent under the charter, and was being used by it, she was injured on September 4, 1914, by an accident while taking on a cargo of material for respondent at the dock of the Cranford Company, in the borough of Brooklyn, New York City, and was returned to libelant in such injured condition to the damage of the libelant in the sum of $94. It is then alleged that after being repaired by libelant she went again into the possession of respondent under the charter, and while in respondent's exclusive possession and while being used by respondent, was again injured and damaged by an accident while taking on another cargo of material for respondent at the Cranford Company's dock aforesaid, in the borough of Brooklyn, and was again returned to respondent in such injured condition to the damage of libelant in the amount of $433.50. It is then alleged that after the Olympia was again repaired she went once more into the possession of the respondent under the charter, and while in the exclusive possession of the respondent on September 22, 1914, she was again damaged by an accident while taking on another cargo of material for respondent at the Cranford dock in the borough of Brooklyn, and was again returned to the libelant in an injured condition to the libelant's damage in the sum of $104. It is alleged that the aforesaid damages were not due to the fault or negligence of the libelant, but were solely caused by respondent. And damages are asked in the sum of $631.50.

For a second cause of action the libel alleges that the libelant was the owner of the scow or dumper Atlanta, a vessel without motive power, and used for the carriage of cargoes through the waters of the harbor of New York and its tributaries and that on July 29, 1914, the scow was delivered by libelant to respondent under a charter and in a sound and seaworthy condition, and that the scow while in respondent's exclusive possession and being used by it, was injured while taking on a cargo of material at the Cranford dock in the borough of Brooklyn. It is then alleged that while in this injured condition the vessel was returned to libelant and was repaired, the amount of the damages amounting to the sum of $111.11. It is then alleged

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that the damages aforesaid were not due to the fault or negligence of libelant, but were solely caused by the respondent. A decree under these two causes of action was asked in the sum of $742.61.

The respondent filed its answer in which is stated that it had chartered the scow Olympia and the scow Atlanta to the Cranford Company, and that if either scow sustained any damage it was while they were in the service of the Cranford Company, and not through any fault of the respondent, its agents or employés, but through the omission and carelessness of the master in charge of the respective scows, the employé of the libelant, or through the carelessness of the Cranford Company and its employés. The Cranford Company was brought in by petition of respondent under the fifty-ninth rule in admiralty (29 Sup. Ct. xlvi). The District Judge found the Cranford Company primarily liable. The damages were fixed by consent at $693.50, which, with the interest and costs, made a total of $868.50, and a decree was entered for that amount against the Cranford Company, and in case libelant should be unable to collect that sum from it then that libelant should have execution against the respondent. On this appeal the amount of the damages is not disputed, but the Cranford Company disputes liability.

Grout & McKinney, of New York City (Edward M. Grout and James F. McKinney, both of New York City, of counsel), for appellant.

Alexander & Ash, of New York City (Mark Ash and Edward Ash, both of New York City, of counsel), for appellee Healey.

Macklin, Brown & Purdy, of New York City (William F. Purdy, of New York City, of counsel), for appellee Moran Towing & Transportation Co.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

ROGERS, Circuit Judge (after stating the facts as above). It appears that the Cranford Company had a contract for the construction of a certain portion of a Rapid Transit subway in the borough of Brooklyn. It also appears that the Cranford Company then entered into a contract with the Moran Towing & Transportation Company, which contract is in writing and under seal, for the delivery of its excavated material at its Gowanus Canal dumping board to scows or dumpers of the latter. The agreement recites the subway contract and stipulates that in the subway work "it will be necessary to dispose of excavated material which will be composed of earth, sand, gravel and boulders." It declares that "the expression 'material' used in the contract shall be construed to include earth, sand, gravel, and such boulders as will not exceed what is commonly known as two-man stone size, and other unobjectionable material which may be taken in by the Cranford Company." It states that the Cranford Company has arranged "to transport its excavated material to its dock on the Gowanus Canal * * * so that the earth may be dumped from the dumping board there installed into scows." It also states that the Moran Company proposes to supply dumpers and scows "to receive such material at said dock" and "dispose of said earth, sand, gravel, and boulders." And it further states that the Cranford Company agrees to provide a floating depth of water at all stages of the tide, to keep the entrance to the dumping board free from obstructions, "use due care in boarding all boats, and be responsible for all damages

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caused by the carelessness or negligence of its employés." It agrees that the Cranford Company will provide berth at its docks for the loading of above-mentioned boats, where there will be sufficient water to float scows and dumpers at all stages of the tide. And the Cranford Company agreed "to have the entrance to dumping board free from obstruction, either floating or otherwise, so that ingress and egress may be readily had at all times."

The above are the pertinent provisions of the agreement between the Moran Company and the Cranford Company. And for the performance of this contract the Moran Company chartered from libelant the two dumpers, the Olympia and the Atlanta, and they were sent to the dumping boards to be loaded. While so engaged in September, 1914, the Olympia was damaged on two occasions by reason of heavy stones being dropped into the pockets by the Cranford Company while loading the dumper, and on one occasion by reason of her grounding at the dock of the Cranford Company while she was being loaded. The Atlanta was also damaged by the negligent dropping by the Cranford Company of a heavy stone in one of her pockets. The damages complained of consisted in the breaking of planks in the bottoms of the pockets by the dropping of the heavy stones, together with certain damage to the bottom of the Olympia by her grounding.

The libelant contends that the heavy stones which caused the injuries in the bottom of the pockets were much larger than two-man stones, and that the dropping of them into the dumpers without the usual precautions being taken of first dumping a quantity of dirt in the dumpers to break the force of the dropping, as is alleged to be the custom when heavy stones are dropped into a dumper, was negligence. And the injury to the Olympia by her grounding is claimed to be a violation of the express provision of the contract already quoted which made it the duty of the Cranford Company to provide a berth where there would be sufficient depth of water "at all stages of the tide."

[1-3] A dumping board, to which reference has been made, consists of an elevated structure of timber, which in part overhangs the water to enable a scow to go under it. A portion of the board (called a tipple) is hinged so that it may be tipped up after material is deposited on it from an inclined plane or slide over, and from which the material is deposited by gravity in the scow. Such a board has to be constructed a sufficient distance above the water that at high tide any style of scow may come under and take on a load. The customary height of the board at high tide is 12 to 14 feet, and at lower water the fall from the board to the bottom of the gates of a dumper is approximately 19 feet. The chief engineer of the Cranford Company testified at the trial that a 100-pound stone (one within the two-man limit of size) falling a distance of 16 feet would strike with an impact velocity of 3,200 foot pounds, which means that the force is sufficient to raise 3,200 pounds one foot. He testified that a stone so falling might break a plank, but whether it would or not would depend upon the thickness of the plank, the kind of wood in the plank, the shape

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of the stone, and various other matters. This testimony was quite indefinite, and of no value by itself in helping to a solution of the case.

The contract provided for boulders which were not to exceed "two-man stone size." If boulders were dumped which exceeded that size, and damage resulted, the Cranford Company was clearly responsible; and, if stones which did not exceed the "two-man stone size" were dropped, it was the duty of the Cranford Company to use reasonable care that injury might not result therefrom. There is testimony in the record, apparently from a disinterested witness, a foreman carpenter in a shipyard who signed the survey on the Olympia, that he saw in the Olympia at the time of her first injury a stone of about three feet in diameter which two men could not lift, but which five or six men might "if they could get a good grip on it"; and the captain of the Olympia testified that the stone weighed 600 or 700 pounds. He testified respecting the second injury the Olympia received that the stone weighed about 400 or 500 pounds; and the captain of the Atlanta testified that the stone which was dropped into her pockets was very large and weighed about a ton. We know of no reason for discrediting the testimony of these witnesses.

But if we assume that they were mistaken it would not relieve the Cranford Company from liability. The president of the Moran Company testified that the custom in New York was when stones were to be dumped to "take the cars that we are sure the boulder dirt is in, and make a cushion for any stones that we have to dump." They dumped a load of soft dirt into the pocket to form a blanket which would absorb the shock of the falling stones. The evidence on this point is very clear so far as the injury to the Atlanta is concerned. The captain of that scow was asked whether, when the stone came down there was anything in the pocket of the scow, any dirt; and he replied that there was nothing in it. Stones large enough to break the planks in the dumpers should not have been dropped without taking the usual precaution of first dumping a covering of soft dirt into the pocket. It is true that it does not affirmatively appear whether the precaution was taken in the case of the Olympia; but, as the injuries resulted from dropping large stones into her pockets, it may not be unfair to presume that the parties in charge carried on their work on both boats in the same way.

The fact that, after the Olympia was injured the first time by the negligent loading of the Cranford Company and repaired, the dumpers were returned to the latter, is said to constitute an insurmountable estoppel as against the Moran Company, and it is claimed that "it assumed the risk and cannot shift it." If that be true, then, if a person traveling on a railway train is injured by the negligence of its employés, and after he recovers therefrom again travels on the same railway, he assumes the risk of any injury arising from the like negligence. Surely such an argument would not be seriously advanced by any one, and certainly not by the distinguished counsel who made it.

In the argument in this court counsel for the Cranford Company contended that that company in any event is not liable for an item of $433.50 for the expense of the survey of September 14, 1914, made

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after the second injury to the Olympia covering the damage and the demurrage incident thereto. It is enough to say that under the assignment of error no mention is made of the matter now objected to. And no objection was raised at the trial in the court below. In the opinion of the District Judge he says:

"No fault was alleged in the method of making the repair, and it is necessary to assume, therefore, that the removal of these planks and their restoration was a proper item in repairing the damage caused by leakage."

It seems that when the dry dock people got possession of the boat they removed three planks from her bottom to get the water out of her. These planks the Cranford Company claims were perfectly good, and they say that the vessel was then found to be so out of repair from causes not the fault of the Cranford Company that 12 planks were put in her and other general repairs were made, for which the Cranford Company cannot properly be charged. But for the reason stated we are not at liberty to consider the point. This court is compelled to hold that the evidence shows that the injury to the Atlanta and the injuries to the Olympia were caused by the negligence of the employés of the Cranford Company in dumping the boulders into these scows without due care, as well as in permitting boulders larger than the contract permitted to be dumped at all. For the damages so caused the Cranford Company must respond in damages.

As to the injury occasioned to the bottom of the Olympia by grounding the case is equally clear. The contract expressly made it the duty of the Cranford Company to berth the boat at a dock having a sufficient depth of water to float her at all stages of the tide. The captain of the Olympia testifies that while she was being loaded he noticed she was lying with the bottom touching the bed of the water and that two or three times he told those engaged in loading the boat to stop because she was touching bottom and they continued loading, and then they sent for a tug to pull the scow out and that the scow could not "budge at all." There is no doubt that, when these boats were chartered to the Moran Company, they were in a seaworthy condition, and that that company was bound under its contract to return them in as good condition as it received them, reasonable wear and tear excepted. It did not do so, and is therefore liable. But as the damage to the boats was occasioned by the fault of the Cranford Company, which has been brought into the case under the fifty-ninth rule, the latter is primarily liable, with a right in the libelant to recover from the Moran Company, should she be unable to collect the amount of the decree from the Cranford Company.

Decree affirmed.

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MORSE et al. v. TILLOTSON & WOLCOTT CO.

(Circuit Court of Appeals, Second Circuit. June 10, 1918.)

No. 175.

1. CONTRACTS ⟸23—MEETING OF MINDS—ADDITIONAL AGREEMENT.
Where defendants accepted plaintiff's proposal to buy notes of a corporation to be organized by defendants, the notes to be secured by a mortgage on ships, plaintiff's demand for an abstract of title, and that the deal be not consummated until title was approved by its attorneys, did not warrant defendants in repudiating the agreement on the ground that there was no meeting of the minds, for the offer was impliedly conditioned that title was good.

2. CONTRACTS ⟸28(3)—ACTION—EVIDENCE.
In an action for profits which plaintiff claimed to have lost because of defendants' breach of an agreement whereby plaintiff was to purchase notes of a corporation to be organized by defendants, the notes to be secured by a mortgage on a fleet of ships, evidence *held* to warrant a finding that a binding contract had been entered into.

3. CORPORATIONS ⟸30(5)—ACTIONS—EVIDENCE.
In an action for breach of an agreement whereby plaintiff was to purchase notes of a corporation to be organized by defendants, the notes to be secured by mortgage on ships, *held*, that defendants could not escape liability on the ground the contract was one of promoters, which defendants were making as agents for a corporation then in existence, whose name was not disclosed.

4. CORPORATIONS ⟸218—CONTRACTS BY STOCKHOLDERS—PERSONS BOUND.
Where persons agree that a corporation shall do a certain thing, which they can compel it to do because of their ownership of a majority of the stock, the corporation is not bound by the agreement; but such persons bind themselves individually, unless the agreement specifies to the contrary.

5. APPEAL AND ERROR ⟸273(5)—REVIEW—SUFFICIENCY OF OBJECTIONS BELOW.
A general exception to a portion of the court's charge, which did not specifically point out the error relied on, is insufficient to warrant an appellate court in reviewing the same on error.

6. CONTRACTS ⟸346(3)—ACTIONS—DEFENSES—PLEADING.
Where defendants repudiated a contract that plaintiff should purchase notes of a corporation they were to organize, the notes to be secured by a mortgage on ships, and impossibility of the condition as to insuring the ships was not pleaded as a defense, it cannot be relied upon.

In Error to the District Court of the United States for the Southern District of New York.

Action by the Tillotson & Wolcott Company against Charles W. Morse and another. Judgment for plaintiff, and defendants bring error. Affirmed.

The plaintiffs in error, defendants below, will be hereinafter referred to as defendants, and the defendant in error, defendant below, will be referred to as plaintiff. The plaintiff is a corporation organized under the laws of the state of Ohio, with its place of business in the city of Cleveland. The defendants are citizens of the state of New York and residents of the Southern district thereof.

The action is for breach of contract. The complainant alleges that the plaintiff agreed to purchase notes of a corporation to be organized by defendants, which notes were to amount to $555,084, for the price of $518,000, and it al-

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leges that the defendants undertook that the transaction should be carried out by the corporation, and afterwards repudiated the agreement.

The answer is a general denial, except it states that "there were negotiations between the plaintiff and the defendants, for the purpose of agreeing, if possible, upon a contract under which the plaintiff was to make a loan upon the credit of some or all of the ships named in the complaint; but the plaintiff and the defendants failed to agree upon the terms of such loan, and no contract was entered into between the plaintiff and the defendants with respect thereto."

The case was tried before Judge Grubb and a jury, and a verdict was returned for the plaintiff in the sum of $31,416, with interest at 6 per cent. from March 16, 1916. The assignment of errors covers 27 printed pages. The complaint states three causes of action.

The first cause of action as stated in the complaint is that in the months of January and February, 1916, the defendants negotiated with the plaintiff for a loan to be made by it to the United States Steamship Company, or another corporation which was then being or had already been organized by the defendants and certain associates of the defendants, for the purpose of owning the steamships Huron, William Castle Rhodes, St. Paul, and Minneapolis, said loan to be evidenced by notes secured by mortgage upon said vessels; it was thereupon agreed between the plaintiff and defendants that the plaintiff should purchase notes of such corporation amounting to $280,000, in consideration of a loan by the plaintiff to such corporation of $266,000, bearing interest at 6 per cent. per annum, and secured by blanket mortgage upon said four vessels; that it was further agreed that the notes should mature in the amount and at the dates specified; that it was further agreed that the said notes should be executed by said United States Steamship Company, or other corporation organized by the defendants for such purpose, and that a blanket mortgage should be executed securing same by such corporation covering all of said vessels, and that there should be proper insurance covering the period of transit to the coast, rebuilding and refitting of the said ships upon arrival at the coast, and for all subsequent operations; that defendants repudiated their agreement on March 16, 1916, and plaintiff has been prevented by the defendants from making such loan to the said United States Steamship Company, or any other company owning and operating said steamships; that the plaintiff has been damaged in the sum of $14,000, being the profit or commission that would have been earned by it upon said loan.

The second cause of action as stated in the complaint, repeating the previous allegations, alleges that during the pendency of the negotiations the defendant applied for a further loan to be made on the security of three other vessels, to wit, McCullough, Owego, and Chemung, said loan to be evidenced by notes secured by mortgage upon said vessels; that it was thereupon agreed between the plaintiff and defendants that the plaintiff should purchase notes of such corporation, or other corporation which was then being or had already been organized by the defendants for the purpose of owning the said steamships, amounting to $450,000, in consideration of a loan by the plaintiff to such corporation of $412,500, bearing interest at the rate of 6 per cent. per annum and secured by blanket mortgage upon said three vessels; that it was further agreed that the said notes should mature in the amount and at the dates specified; that it was further agreed that the said notes should be executed by said United States Steamship Company or another corporation organized by the defendants for such purpose, and that a blanket mortgage should be executed securing same by such corporation covering all of said vessels, and that there should be proper insurance covering all the operations of said steamships; that in the course of the negotiations the steamship Chemung was sold, and, with the consent of the plaintiff, the stipulated notes were reduced by $175,000, making the net amount of the notes $275,000, and the net amount of the loan $252,084, yielding a profit or commission to the plaintiff of $22,916; that on March 16, 1916, the defendants repudiated their agreement and refused to complete the transaction, and the plaintiff has been damaged in the sum $22,916, together with the legal services and expenses incurred in the drafting of the mortgage of $443, making a total of $23,359.

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The third cause of action as stated in the complaint, repeating the previous allegations, is that in the months of January and February, 1916, the defendants negotiated with the plaintiff for a loan to be made by it to the United States Steamship Company, or another corporation which was then being or had already been organized by the defendants and certain associates of the defendants, for the purpose of owning the steamships Huron, William Castle Rhodes, St. Paul, Minneapolis, McCullough, Owego, and Chemung, said loan to be evidenced by notes secured by mortgage upon said vessels. It was thereupon agreed between the plaintiff and defendants that the plaintiff should purchase notes of such corporation, of which the defendants should procure the execution, amounting to $730,000, in consideration of the loan by the plaintiff to such corporation of $678,500, bearing interest at 6 per cent. per annum, and secured by blanket mortgage upon said vessels; that it was further agreed that the said notes should mature in the amount and at the dates specified. It was further agreed that the said notes should be secured by the said United States Steamship Company, or another corporation organized by the defendants for such purpose, and that a blanket mortgage should be executed covering all of said vessels and that there should be proper insurance covering the period of transit to the coast, rebuilding and refitting upon arrival at the coast of such ships as were upon the Great Lakes, and proper insurance for all of said vessels for their subsequent operations; that in the course of the negotiations the steamship Chemung was sold, and with the consent of the plaintiff the amount of the stipulated notes was reduced by $175,000, making the net amount of said notes $555,000, and the net amount of said loan $518,084; that the plaintiff has been damaged in the sum of $37,359, being the amount of the profit and commission which it would have earned upon said loan as reduced, as aforesaid, together with legal services and expenses incurred in the drafting of the mortgage of $448.

The plaintiff has obtained a verdict in the sum of $31,416, with interest at 6 per cent. from March 16, 1916, and judgment has been entered in the sum of $33,810.51.

Beck, Crawford & Harris, of New York City (James M. Beck and Joseph W. Goodwin, both of New York City, of counsel), for plaintiffs in error.

Everett, Clarke & Benedict, of New York City (A. Leo Everett, of New York City, of counsel), for defendant in error.

Before ROGERS and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

ROGERS, Circuit Judge (after stating the facts as above). The action is upon a contract which, if made, was made by letters, by telephone communication, and by conversations. The existence of the contract was denied by defendants, who, admitting the negotiations, claimed that they never reached the stage where both parties agreed to the substantial terms, and the question whether the contract existed was therefore submitted to the jury under appropriate instructions. The parties began their negotiations on January 28, 1916, in Cleveland, Ohio, and on that day a letter was drawn up and signed by Mr. Tillotson, as president of the Tillotson & Wolcott Company, the plaintiff herein. The last paragraph of the letter read:

"An acknowledgment of this letter will be considered an acceptance, and we will then proceed to have the appraisal and classification made."

At the end of the letter there is indorsed thereon on the following day the words: "Accepted January 29th, 1916. B. G. Higley"—

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the latter being one of the defendants herein. The important portions of the letter are as follows:

"Referring to our conversation of this afternoon, we understand that you and your associates have recently purchased four steamers, formerly owned by the Mutual Transportation Company, for the sum of $560,000, the steamers being the Huron, the William Castle Rhodes, the St. Paul, and the Minneapolis, and that you propose to make such changes as are necessary to fit them for the ocean trade. * * * We further understand that these boats are to be placed under a new corporation and that you desire to borrow 50 per cent. of their sound value as determined by appraisers of our selection and meeting with your approval, and for this purpose we will want Mr. Horatio N. Herriman of this city, or some representative of the American Ship Building Company.

"We are willing to make you a one year loan, to be dated February 1, 1916, payable with interest at the rate of 6 per cent. per annum payable semi-annually, at the Guardian Savings & Trust Company, Cleveland, trustee, and to pay you ninety-five and accrued therefor—subject to the following conditions: (1) The mortgage is to be the usual marine form, and is to provide that full fire and marine and P. & I. insurance be carried. (2) The vessels are to receive Lloyd's classification before the loan is made. (3) All excess earnings, pending the payment of the loan, are to be deposited with the trustee. In order to save you interest, we are willing to have the mortgage provide that all or any part of the bonds may be called at 101 at any time after three months by giving thirty days' notice. (4) All proceedings incident to the issuance of the mortgage are to be under the supervision of Messrs. Goulder, White & Gray of Cleveland, who will give us their opinion.

"We understand that your corporation will be affiliated with or a part of United States Steamship Company, recently organized under the laws of the state of Maine, and United States Steamship Company, organized under the laws of the state of New York. It is mutually agreed that we shall have the right to name a Cleveland director."

A few days after this letter was signed Tillotson learned that Charles W. Morse, the defendant, was associated with Higley in the enterprise, although Morse's name was not in the list of his associates as given in the above letter of January 28th. Thereafter most of the correspondence and telephone communications that Tillotson had concerning the matter were with Morse or his office, and there were a good many letters, a good many telephone messages, and some telegrams. On February 3d Higley gave a letter to a Mr. Sherman and a Mr. White, the president and treasurer of the several corporations which he stated had entered into contract for the purchase of the steamships named, and he added:

"They have the authority to execute necessary papers for obtaining mortgages on each of the several ships. We would thank you, if you could arrange to give them a check for 50 per cent. of the valuation of each boat, you to be protected by bill of sale pending completion of mortgage. If you wish this all in one company, we have organized the United States Steamship Company of New York, and the matter can be arranged in a like manner through that corporation. I believe we have conformed to all you require in this matter and hope you will expedite the same."

On the same day Higley wrote a second letter which was as follows:

"Confirming your letter of the 28th of January, the separate paragraphs contained therein regarding the four Lake boats: The first condition is all right. The second condition, we will need the loan before the Lloyds classification is made, but will not put the vessel to sea until it is classified. We believe

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that all other conditions are correct. Regarding the three other boats, the McCullough, Chemung, and Owego, the above conditions do not apply."

On February 4th Morse telegraphed Tillotson that he wanted to arrange loan Monday morning and "can give you bill of sale of each ship pending legal matters and insurance." And thereupon Tillotson wrote Higley:

"It would be impossible for us to effect a loan on Monday for several reasons: (1) The trust deed and bonds could not be prepared so soon. (2) We have not yet received the details of the insurance policies. As I stated to you while you were here, this insurance matter is almost the most important thing pertaining to the loan. We must have a policy that is absolute in its terms and one which will meet the approval of our counsel. * * * It will be necessary, in our judgment, to have one mortgage on the three boats, and so, in order to save time, it may be best to use the United States Steamship Company of New York organization."

On February 18th Tillotson wrote Morse as follows:

"Our position has been the same from the very first time that we talked to Mr. Higley, which was over two weeks ago. In order to hasten events, at your and Mr. Higley's request, Mr. House and I visited New York a week ago Wednesday; and in each instance we have maintained the same position, that we must have fleet mortgages, one on the Chemung, Owego, and McCullough, the other on the four other boats. Had the insurance been obtained, the papers could have been prepared before this and our money would have been forthcoming. In order to save time, now, we strongly recommend that you cause the company to be organized, with the men whose names you gave us while we were in New York as officers and directors; let this company take over the McCullough and the Owego, and the Chemung later when she is ready. Upon the approval of our counsel of the companies and the policies of the proceedings incident to the organization of your company, we will advance the proportion of funds required and later the proposition of the Chemung. This can all be done by Monday or Tuesday, and it is the only feasible way to do it. We had hoped that you would send some one here to-day authorized to act for you, in order to facilitate matters for you."

On the same day Morse wrote the complainant, stating that they had organized the United States Steamship Company which would operate the vessels, and giving the names of the persons who had consented to serve on the board of directors and who were to be elected the next day. The letter continues:

"We are sending to you to-night Mr. Hexamer, of Parsons & Co., who will hand you this letter and give you all the information regarding insurance. We can't see where we could need anything more, but pending these affairs we would like to have $87,500 deposited to-morrow, and we will give you bill of sale from the Erie Railroad Company direct to you or anybody you may name for the ship, which guarantees title. If it is not direct from them, they must guarantee the title, as that is the agreement with us. We can fix the Owego at your convenience. The four Lake boats, Huron, Minneapolis, St. Paul, and William Castle Rhodes, we would like to take over next week and have you advance on the same. The Salvage Association will send a man to-morrow to Buffalo to get a valuation on the four ships that are there. For these four ships we paid $560,000, and we presume you will lend $280,000 on the four, which with the $450,000 on the other boats makes $730,000 altogether."

On February 21st Tillotson wrote Morse:

"Your letter of February 17th was just received this morning. There are two things that I do not seem to be able to impress upon you. Our requirements are: First. That the issue is to be a fleet issue; that is, one mortgage of

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$450,000 on the three boats. We must know promptly what the name of the company will be which is to make the mortgage. Second. That the vessels must be insured to their full insurable value, Mr. Hexamer reports that he can probably place very close to the appraised value on each boat. Three weeks have elapsed since we first discussed this matter with Mr. Higley, and the bonds should have been out long before this. Mr. Hexamer has Mr. Goulder's requirements—one of them being that you will have to get the abstracts at once and send them on for approval. With the title established, the mortgage can probably be drawn within two or three days, and we will take one temporary typewritten bond pending the printing of the definite bonds. Full insurance must accompany; the insurance policies must be ready when the mortgage is ready for record."

On February 26th Morse wrote Tillotson:

"We would like to borrow on these ships, on each ship or on the four ships together, as you prefer, one-half of whatever they are valued at, not to exceed $70,000 on each ship, as we paid for them $140,000 apiece. We have already settled for the Owego and the McCullough, and made a payment on the Chemung, so we feel no hurry about these ships. The price we paid for the Owego is $325,000. for the McCullough $175,000, and for the Chemung $325,000. The Chemung will not be finished until the 1st of April. If you want to lend 50 per cent. on these three ships for one year at 6 per cent. and 5 per cent. commission, we would take the money on all seven. We would agree to deposit with you monthly from the earnings of the vessel one-twelfth of the amount of the loan with the right to take the bonds up. The four Lake boats we would like determined on Tuesday and we would like you to pay the money over right away. The three Erie boats that are here you can arrange at your convenience. We would prefer not to issue bonds, except possibly to the Trust Company on loan. But you can do as you like. The insurance as you know is already provided for. The organization of the company is fixed as we have before written you, and if you do not sell bonds you can take the name of the steamships in anybody's name which you may designate, or you can take it in the name of the steamship company we have organized and take a mortgage back with a note of the company."

In reply Tillotson wrote Morse on February 28th:

"We have explained to your counsel that it would be impossible for us to advance money on any boats until our counsel has seen the abstracts on them and the mortgage has been prepared. We have been ready for two weeks to make the loan, which has been the result of so much telephone conversation and correspondence. Mr. Eaton knows exactly what is required. We will pay you, as heretofore indicated, $412,500 for $450,000 of bonds on the Chemung, Owego, and McCullough, payable on or before one year after date. The mortgage is to be in the usual marine form and is to provide for full insurance, as detailed to Mr. Eaton, and a sinking fund of one-sixth of the next maturing interest and one-twelfth of the principal to be deposited with the trustee each month; the payments into the sinking fund for principal to be used, if you desire, for retiring all or any part of the bonds upon thirty days' notice at 101. We assume that the four Lake boats can be sent through the canal, and that they can be fully insured pending their arrival at some point for reconstruction. With this assumption, and the assurance that the necessary changes are to be made and paid for, in order that the boats can be classified, so as to receive full marine insurance for coastwise trade, and Mr. Goulder or his firm advise us that the title is good, we will advance up to $280,000 on bonds at 92 and interest, assuming, of course, that your estimates of value are sustained. While the Guardian Savings & Trust Company will, I think, if necessary, advance the money pending the preparation of the mortgage, it is only a question of a few days when this can be done. Mr. House assures me that he very much prefers to have it done in the usual order. It is, of course, understood that all other details of the proposal submitted to Mr.

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Higley, including the payment of costs incident to the issue, etc., are to be carried out."

On March 7th Tillotson wrote Morse:

"You can imagine our surprise when we learned from Mr. Eaton that the Chemung had been sold and that you were reducing the amount of bonds by $175,000. This action is entirely agreeable to us provided we do not lose thereby, and we, of course, shall expect that the $15,000, or thereabouts, which was the discount on $175,000 bonds against the Chemung, be paid to us."

On March 16th, Eaton, one of the attorneys for defendants, wrote the plaintiff company as follows:

"On my return to New York after my conversation with you yesterday, I find that it is impossible for us to meet the conditions imposed by the Guardian in connection with the proposed loan about which we have been negotiating, and we are therefore reluctantly obliged to accede to your suggestion that the proposition be canceled. This is a matter of regret to Mr. Morse, as I realize it is to you, but under the circumstances there is nothing further that can be done."

In reply to the above, Mr. Milligan, the vice president of the plaintiff company, wrote:

"We have your letter of March 15th, signed by Mr. Eaton, to the effect that you are obliged to cancel your sale of bonds to us. In view of the fact that Mr. Tillotson had this matter in charge, your letter will be referred to him upon his return from the South this week."

And on March 21st Morse wrote Milligan:

"Your favor of the 20th at hand. We know of no sale of bonds to you which you mention in your letter, and we know of no cancellation on our part. We surely tried hard enough to do business with you and regret very much that we could not."

If a contract existed, it evidently was intended that it should be canceled by the letter of March 16th. Milligan, to whom the letter was addressed, had his attention called to the statement that defendants were "reluctantly obliged to accede to your suggestion that the proposition be canceled," and he was asked when on the stand whether he had made any such suggestion. And his reply was: "Absolutely not." The writer of the letter of cancellation testified that in an interview in Cleveland, on March 2d, with the president of the plaintiff company, the latter said to him that the whole matter was in quite unsatisfactory shape, and "that they did not seem to be making any progress at all toward bringing the transaction to a close, and he added that that was the more unsatisfactory to him because he did not suppose that he had any definite contract with Mr. Morse in regard to it." But the president of the company was then recalled to the stand and asked whether he had ever made any such statement, and denied absolutely that he ever did. He was then asked, "How certain are you that you did not make such a statement?" The answer was, "I am very positive, sir." There was here a disputed question of fact, and evidence which justified the jury, if they believed it, in concluding that the contract, if one existed, was canceled by the defendants.

[1] The defendants assert that the minds of the parties never met, that one of the conditions of the agreement was that the attorneys for

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the plaintiff were to be furnished with abstracts of title to the ships and that they were to examine them, and that the deal was not to be consummated until the title was approved. In the letter dated February 28, 1916, written by the president of the plaintiff corporation the writer stated that, when the attorneys "advise us that the title is good, we will advance up to $280,000 on bonds at 92 and interest." And there is no evidence in the case that, when defendants on March 16th canceled the agreement, the plaintiff's counsel was satisfied that the titles were good or that he had rendered any opinion on that subject. It will no doubt be conceded that an offer to sell implies that the title is marketable. And if an offer to sell is made by A. and accepted by B., subject to the title being found good upon examination, it hardly seems that the words "subject to the title being found good" import any new term into the acceptance, so as to prevent a meeting of the minds upon the offer as made.

In Hussey v. Horne-Payne, L. R. 8 Ch. Div. 670 (1878), an offer was made to sell land for a specified sum of money, and the offer was accepted "subject to the title being approved by our solicitors." The defendants afterwards declined to complete the sale, the title not yet having been approved, and the plaintiff claimed specific performance. The Vice Chancellor had held that the offer had been unconditionally accepted, and the demurrer was overruled. The case was carried to the Court of Appeal, where it was reversed, and the demurrer was sustained. In his opinion Jessel, M. R., said:

"The expression 'subject to the title being approved by our solicitors' appears to me to be plainly an additional term. The law does not give a right to the purchaser to say that the title shall be approved by any one, either by his solicitor, or his conveyancing counsel, or any one else. All that he is entitled to require is what is called a marketable title, or, as it is sometimes called, a good title. Therefore, when he puts in 'subject to the title being approved by our solicitors,' he must be taken to mean what he says; that is, to make it a condition that solicitors of his own selection shall approve of the title."

The case was carried to the House of Lords (L. R. 4 A. C. 311), where it was affirmed, but upon different ground. The House of Lords did not agree with the Court of Appeal upon the point upon which that court decided the case. Upon that point the Lord Chancellor (Earl Cairns) declared that he was disposed to look upon the words "subject to the title being approved by our solicitors" as meaning—

"nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning in fact the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser. Of course, that would be subject to any objection which the solicitor made being submitted to decision by a proper court, if the objection was not agreed to."

The thing sold in that case happened to be land; but the decision would have been the same, had it been bonds or ships.

Counsel for defendants, however, in this connection rely upon Village of Ft. Edward v. Fish, 86 Hun, 548, 33 N. Y. Supp. 784 (1895), which was afterwards affirmed by the Court of Appeals (156 N. Y. 363, 50 N. E. 973). In that case the plaintiff, the water commissioners of the village, had entered into an agreement with defendant to sell to

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him certain water bonds, which they were to issue, for less than par. The agreement contained a provision stating that it was not to be binding on the party of the second part unless certain attorneys, which it named, "approve of the regularity and validity of said bonds in writing." The attorneys in question telegraphed the commissioners:

"Think that the present board of trustees must reorganize as water board and give new bonds before bonds can be issued."

The water commissioners, regarding this as an adverse opinion from the attorneys as to the regularity and validity of the bonds, telegraphed to defendant that they withdrew from the agreement. They then sold the bonds to the state comptroller. This was on July 28, 1893, and on August 4, 1893, the defendant notified the water commissioners that the clause in the contract requiring the approval of the attorneys was for his benefit, and that he waived such approval and demanded delivery of the bonds or payment of damages. The court held that the contract to sell the bonds for less than par was illegal and void. The court, however, added that, when the plaintiff on July 28th was informed by the attorneys of their refusal to approve the bonds, the "plaintiff then (if not before) was freed from any obligation to defendant under the contract." "On that date defendant was not bound to take the bonds. It follows that plaintiff was not bound to deliver them." The court admitted that the provision requiring the approval of the bonds was for the benefit of defendant and probably might have been waived by him. "But he did not make such waiver," said the court, "until after plaintiff, as it lawfully might, had acted on the assumption that the contract was at an end. The waiver was too late."

We do not challenge the correctness of the conclusion reached, and the case may easily be distinguished from the case at bar in important particulars, only one of which it is necessary to mention. It is evident that no contract at any time existed in the New York case between these parties, for the writing expressly declared that:

"This agreement is not to be binding on the party of the second part unless [the attorneys] approve of the regularity and validity of said bonds in writing."

As the attorneys named never approved the bonds, of course the party of the second part never was bound; and, if the party of the second part was not bound, the party of the first part was not bound. There is a clear difference between an agreement to sell "subject to the approval" of title by counsel and an agreement which declares that the entire writing is not to be binding unless a certain thing happens which never happens. Hussey v. Horne-Payne was not referred to in the opinion in Village of Ft. Edward v. Fish. But, if we are wrong in thinking that any real distinction exists between Hussey v. Horne-Payne and Village of Ft. Edward v. Fish, we prefer to follow the former in its application to the facts of this case. An acceptance which in terms is conditioned on what the law implies is a good acceptance, as it introduces nothing new into the contract. See Anglo-American, etc., Co. v. Prentiss, 157 Ill. 506, 42 N. E. 157; Ottumwa, etc., Co. v. Ainley, 109 Iowa, 386, 80 N. W. 510; Hubbell v. Palmer, 76 Mich. 441, 43 N. W. 442; Page on Contracts, vol. 1, p. 78.

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[2] The plaintiff does not claim that the writing of January 28th was a completed draft of the contract. It is not pleaded as such. The transaction was difficult and complicated, and a number of items remained to be gone over and agreed upon, and they were not all definitely settled until the mortgage agreement was drawn. The plaintiff contends that when that was drawn every doubtful or disputed point had been resolved and finally determined, and nothing remained to be added to it or subtracted from it. The writing of January 28th between Tillotson and Higley was that the plaintiff should purchase bonds to be secured by a mortgage on the four boats known as the Lake boats, and that this mortgage was to be drawn under the direction and approval of certain specified attorneys of Cleveland. In the interview on March 2d between the plaintiff's attorney, Mr. White, and defendants' attorney, Mr. Eaton, of Boston, Mr. Tillotson said:

"Now, we have agreed upon all the details of this loan, and we want you [White] to get right busy and draw the mortgage, and Mr. Eaton [representing defendants] is out here for the purpose of getting these details cleaned up and out of the way just as fast as possible."

He also at that time declared that the agreement was to put all the boats under one mortgage. All this was said without Mr. Eaton's contradiction. And White and Eaton worked together for several days, and drew up the mortgage, and it contained all the terms, securing notes to the amount of $730,000, which was reduced afterwards to $555,000, because of the sale of the Chemung. Mr. White had been employed for 17 years in the business of drawing such mortgages, and had drawn 200 or 300 of them. He testified that there were no unusual terms in the mortgage as finally agreed upon. He was asked on the stand whether Mr. Eaton objected to any provisions as unusual. He answered:

"No; there was, of course, in framing the language, some discussion as to just the wording, or verbiage, or things of that kind; but the drawing of the mortgage from the start to the finish was simply a friendly collaboration, without any differences."

Mr. White was asked whether Mr. Eaton called up his principals during the course of these four or five days of negotiations. His answer was:

"Mr. Eaton used the long distance phone a number of times. He would, of course, retire to another room, and I had no means of knowing with whom he conversed, except as he would come back and say that he had received word of something or other, and then we would go on working with the mortgage."

Then he was asked:

"Did he make decisions after going to the telephone which he was not able to make before going to the telephone?"

To which he replied:

"I don't know whether he was able to before or not; but when we were discussing the different phrases of the mortgage, I know he would go to the telephone, and then come back, and we would go on, and those points would be arranged, but whether he received authority from any one I don't know."

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And Mr. Eaton, when on the stand, admitted that he was talking over the telephone with Mr. Morse in New York. After these two attorneys had completed the mortgage, Mr. Eaton said that Mr. White told him that he (White) wanted—

"to go over it with Mr. Tyler, who had had a great deal of experience with these mortgages for Mr. Tillotson, and I told him of course I would want to take it back to Mr. Morse and to Mr. Blodgett [Eaton's partner] at my end of the line."

Mr. Morse was asked on his direct examination whether he ever authorized Mr. Eaton to make any contract in his behalf, and he answered:

"I told him to go to Cleveland and to stay there until he got the money."

The jury could draw their own conclusions from such a reply. The mortgage, however, was taken to New York and submitted to Morse, and some days later there was a meeting in New York, at which two of the plaintiff's attorneys and Morse and other of Morse's associates were present. One of these attorneys was asked at the trial what, if any, objection was raised by Morse or any of his associates as to the terms of the mortgage agreement. He replied, "Absolutely none." He afterwards corrected himself, by saying that Morse wanted to have individual mortgages given, instead of a fleet mortgage; but that was not consented to, as being contrary to what had been originally agreed upon. And the jury was instructed with unusual particularity as to the circumstances under which they would be authorized, if reasonably satisfied from the evidence, to find that the minds of the parties had met upon the terms of the mortgage.

This court is of the opinion that the defendants were not prejudiced by the instructions, and that there was sufficient evidence to warrant the verdict which was reached. It is evident that the jury did not accept all that Mr. Eaton and Mr. Morse testified to; but that was their privilege. Mr. Eaton's testimony in certain particulars was flatly contradicted by others; and Mr. Morse admitted on the stand that he had been convicted of a crime. The mortgage as drawn by the respective attorneys was not in the nature of an offer submitted by one party to another, and which was not responded to by the offeree. The offer had been made and accepted prior thereto, with certain details left open, which had been determined when the mortgage was drawn.

The action was brought upon the theory that a contract had been made between the plaintiff and the defendants for a loan upon the credit of the ships named in the complaint, and that the use of the corporate form for executing the mortgage on the ships was for the convenience of defendants, so that they should not have to assume any personal liability. That seems to have been the theory of defendants themselves, when the answer to the complaint was filed; for after stating that there were negotiations between themselves and the plaintiff, for the purpose of agreeing, if possible, upon a contract, it declares that they failed to agree, and no contract was entered into.

[3, 4] But at the argument in this court the defendants advanced the proposition that the contract was a contract of promoters, which the

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defendants were making as agents for a corporation then in existence, whose name was disclosed to the plaintiff, and that therefore the plaintiff could not recover. They still adhered, however, to their contention that the negotiations did not result in any meeting of the minds. We find it quite impossible to concur with counsel in the view that defendants were acting as agents for a principal, disclosed or undisclosed. They acted for themselves, as clearly appears from the letter of January 28th. Unless defendants were bound by that letter, there was no obligor on the promise to the plaintiff, for at that time the corporation which was to take over the boats had not been agreed upon. But before March 16th, when the contract was canceled, it had been determined what corporation should take over the boats, and the cancellation was made by Eaton, who does not pretend that he had been authorized formally or informally by the corporation to cancel. The inference is that Eaton was acting for Morse, and neither Eaton nor Morse could have been acting at that time as a promoter for the corporation, for it was already formed, and neither could have been acting for the corporation, for it never gave either authority to represent it in the matter. Moreover, where two or more persons agree that a corporation shall do a certain thing, which they can compel it to do, because they hold a majority of the stock, or otherwise, the corporation is not bound by their agreement, but they bind themselves individually, unless it is expressly agreed that the other party is looking to the corporation, and not to the promoters. See Harrill v. Davis, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153; Fentress v. Steele & Sons, 110 Va. 578, 66 S. E. 870.

[5] In the brief submitted by defendant's counsel upon the argument in this court, and upon the oral argument, stress is laid upon the fact that the judge instructed the jury to say whether there was a meeting of the minds "as to each material stipulation in the contract," and again as to the "substantial terms of the contract." If this were error, the question cannot be raised in this court, for it was not properly excepted to at the time. The exception taken was to a statement which included the matter now objected to, along with other matter, without directing the court's attention specifically to the point now made. The objection was, "I take an exception to your honor's remarks." Under the circumstances it was not sufficient. We may call attention, however, to the fact that the court in the charge directed attention specifically throughout the charge to the essentials of an agreement to sell something in the future, and as to what the minds of the parties must have met in agreement upon. What more the court should have said upon that point to a jury whose province it was to determine whether a contract existed is not apparent to us; but, if it was to counsel, it was his duty at the time to call the attention of the judge specifically to it, which he did not do.

[6] One of the assignments of error relates to that portion of the charge to the jury in which it was said:

"As I understand it, the impossibility of performance with reference to the insurance feature is not made a matter of defense to the action, except as it reflects on the matter of evidence as to whether the parties did agree on the contract as it is claimed by the plaintiff, and therefore the question in the

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main would be whether or not there was a meeting of the minds between the two parties as to each material stipulation in the contract."

We are unable to see error in the above statement. It is said that the agreement was impossible of performance, inasmuch as it was impossible to insure during the war, in the manner specified, vessels intended to be used in the trans-Atlantic service. There was some evidence that the insurance required could not be obtained, and there was also evidence that it could be; a marine insurance agent testifying as follows:

"There has been no time since the war broke out when such an insurance could not be secured in accordance with the claims specified in that article 3."

Impossibility of performance may or may not discharge from the obligation of a contract, according to circumstances; and where performance is possible when the contract is made, and becomes impossible subsequent to the making, it is very generally held that the promisor is not discharged. But impossibility of performance does not appear to have been pleaded, and so could not have been relied upon as a defense to the action, except in the particular referred to in the charge. As respects that phase of the subject, there was a question of fact for the jury.

There are other assignments of error, which we have considered, but do not find it necessary to prolong this opinion by considering in detail.

Judgment affirmed.

In re STRINGER.

(Circuit Court of Appeals, Second Circuit. April 10, 1918.)

No. 224.

1. BANKRUPTCY ⇐143(4)—ASSETS—SEAT ON STOCK EXCHANGE.
   Seat or membership in Stock Exchange, Merchants' Exchange, or Board of Trade, while in the nature of a personal privilege, is property which creditors may reach, and which on bankruptcy of the member or holder will pass to his trustee.
2. BANKRUPTCY ⇐149—FIRM PROPERTY—EVIDENCE.
   Seat in Stock Exchange, though in the name of a partner, *held* a firm, instead of an individual, asset.
3. BANKRUPTCY ⇐178(1)—FRAUDULENT TRANSFER—WHAT CONSTITUTES.
   For one not shown to be insolvent to organize a partnership, and convey to such firm individual property, such as seat on Stock Exchange, is not a transfer in fraud of creditors.
4. BANKRUPTCY ⇐219—PROCEEDINGS.
   Under Bankruptcy Act, § 5h (Comp. St. 1916, § 9589), relating to bankruptcy of one member of a firm, partnership property may, by consent of the partner or partners not adjudged bankrupts, be administered in partnership proceedings of one of the partners.
5. BANKRUPTCY ⇐219—PARTNERSHIP.
   Under Bankruptcy Act, § 5h (Comp. St. 1916, § 9589), declaring that in the event of the bankruptcy of one or more, but not all, of the members of a firm, the partnership property is not to be administered, unless by

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consent of the partner or partners not adjudicated bankrupts, the firm property may be administered on bankruptcy of the sole surviving partner, both individually and as sole surviving partner.

Petition to Revise and Appeal from the District Court of the United States for the Eastern District of New York.

In the matter of the bankruptcy of G. Franklin Stringer, individually and as sole surviving partner of Stringer & Co. The referee held that certain property was firm property, and his action was sustained by the District Court. From such order Mary E. Lewis and others appeal, and also petition to revise. Petition to revise dismissed, and order appealed from affirmed.

This cause comes here upon petition to revise an order entered in the District Court on January 11, 1918. The facts appear in the opinion.

Henry M. Stevenson, of New York City, for petitioners.

A. Gordon Murray, of New York City, for trustee.

Before ROGERS and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

ROGERS, Circuit Judge. A voluntary petition in bankruptcy was filed by the bankrupt on January 12, 1915. Matters connected with this bankruptcy have been heretofore adjudicated in several reported cases in the District Court. 230 Fed. 177; 233 Fed. 799; 234 Fed. 454; 244 Fed. 629. When the matter came before this court a year ago, we decided that the claims of Mary E. Lewis, H. Leroy Lewis, and the H. J. Lewis Oyster Company were not entitled to share in the distribution of the firm assets of Stringer & Co. The case is reported in 240 Fed. 892, 153 C. C. A. 578.

It appears now that the referee has declared an additional dividend of 10 per cent. to the firm creditors of Stringer & Co., but that he has been stayed from paying it until it can be determined whether the sale price of a New York Stock Exchange membership is an asset of the firm of Stringer & Co. or the individual property of G. Franklin Stringer. The referee has held that it is an asset of Stringer & Co., and his action has been sustained by the District Judge; and the question which is now presented to this court is whether the District Judge fell into error in holding that the seat on the Stock Exchange is to be held as an asset of Stringer & Co. or the individual property of G. Franklin Stringer, as a liquidating partner of Jewell & Stringer. The decision of this court in the former case said nothing whatever as to the disposition of this asset; that question not having been presented to us at that time. The petitioners in the present case are the same parties whose claims were presented in the first case and held not to be claims against the assets of Stringer & Co. The petitioners, having been excluded as to certain of their claims from the firm assets, are now here as exceptants, objecting to the decision of the lower court that the seat on the Stock Exchange is a firm asset, and they seek to have it decided that the asset is an asset of Stringer individually.

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[1] Before considering that question, it may be pointed out that a difference of opinion has existed in the courts as to whether a seat or membership in a stock exchange, or merchants' exchange, or board of trade, is property which, if fraudulently conveyed or assigned, may be reached in equity by creditors. That the creditors cannot reach it seems to have been held in Barclay v. Smith, 107 Ill. 349, 47 Am. Rep. 437, Weaver v. Fisher, 110 Ill. 146, Pancoast v. Gowen, 93 Pa. 66, and In re Sutherland, Fed. Cas. No. 13,637. But, whatever may have been thought at one time on this subject, the Supreme Court of the United States has settled the matter that membership in a stock exchange is property which passes to a trustee in bankruptcy as assets of the bankrupt's estate. Page v. Edmunds, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318; Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264. And see In re Page, 107 Fed. 89, 46 C. C. A. 160, 59 L. R. A. 94 affirming (D. C.) 102 Fed. 746. While such property is peculiar, and in its nature a personal privilege, yet such value as it may possess, notwithstanding the restrictions to which it is subject, is held to be susceptible of being realized by creditors. This court in Re Hurlbutt, Hatch Co., 135 Fed. 504, 68 C. C. A. 216, held that a seat in the New York Stock Exchange passed to a trustee in bankruptcy.

[2] It appears that the records of the Stock Exchange disclose that Edward H. Jewell became a member of the Stock Exchange in December, 1902; that on May 23, 1912, his membership was transferred to G. Franklin Stringer; that the latter was a member of the firm of Stringer & Co., which traded on the Exchange; and that Stringer's membership was transferred on August 26, 1915, for $55,000, which amount the Exchange paid over to Stringer's trustee in bankruptcy on September 13, 1915, after deducting therefrom $1,704.90, being claims against the firm of Stringer & Co. It is not disputed that the seat was originally an asset of the firm of Jewell & Stringer. Then, when that firm was dissolved, the seat was transferred to Stringer in his individual name on the books of the Exchange. The record shows that a rule of the Stock Exchange requires a membership in that organization to be an individual membership, and not a firm membership. The firm has no right to appear on the floor of the Exchange, but the membership as an asset of the firm is liable for any debt contracted by any member, and the Exchange regarded and treated Stringer's membership as an asset of the firm of Stringer & Co., and it is stipulated that at the time Jewell transferred his membership in the Exchange to Stringer the latter "became the board member of Stringer & Co., and was published as such in Stock Exchange publications." For the two years and nine months that Stringer & Co. continued to exist this seat was utilized by it in its business. It appears that the understanding between Stringer and his son, who constituted the only other member of the firm, was that Stringer should furnish the whole of the capital and the son was to put no money into the business. He was to contribute only his services, and was to share to the extent of 25 per cent. in the profits or losses; and an affidavit in the record states that:

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"The membership in the Stock Exchange that had become the property of G. Franklin Stringer was thus contributed to Stringer & Co. as a part of its capital which the bankrupt had promised to furnish."

As Stringer & Co. was a stock brokerage firm doing business on the Stock Exchange by virtue of Stringer's membership therein, and as the obligations incurred by that firm on the Exchange were liabilities against the seat held by Stringer, the conclusion that the seat was an asset of the firm seems justified upon the facts disclosed.

[3] It is said, however, that when the membership in the Exchange became the individual property of Stringer, by virtue of Jewell's transfer of his seat to Stringer, the latter had no right to convert it into an asset of Stringer & Co., and that the attempt to do so was fraudulent and void as to creditors. I am unable to concur in any such conclusion. This court decided in the former case that Stringer took the assets of Jewell & Stringer as his separate property, free from the liens of the firm creditors. There is no attempt made in this case to have this court reverse its former decision upon that point. So that I begin this case at that point, and say that it is established that Stringer took the assets of Jewell & Stringer, including this seat on the Exchange, as his individual property, free from the liens of the creditors of the old firm. It was also decided in the former case, and it is not controverted in this, that at the time the old firm was dissolved, and the new firm was organized, it does not appear that Stringer was insolvent. As the assets then were Stringer's individual property, and he is not shown to have been insolvent at the time, how can it be said that he did not have the right to organize the new firm of Stringer & Co., of which he was a member, and put these assets into it? This court, in the Matter of Braus, 248 Fed. 55, — C. C. A. —, held that where one who does not know whether he is solvent or insolvent organizes a corporation, and transfers his property to it in return for its capital stock taken at full valuation, the transaction is not in itself to be regarded as a hindering and delaying of creditors within the meaning of the statute of Elizabeth; and I am not prepared, therefore, to hold that it is in itself within the meaning of that statute a hindering and delaying of creditors for one, not shown to be insolvent at the time, to organize a partnership and to embark his property in the partnership enterprise. I am unable to distinguish the two cases in principle.

This court cannot hold that one who puts into a partnership his individual assets is to have the transaction treated as though it were a voluntary transfer of his assets to some third person, which can be declared fraudulent as to creditors unless he retains in his individual possession sufficient remaining assets to pay the whole of his debts. I know of no case which asserts that doctrine, and if there be any we are concluded by our decision in the Matter of Braus from following it, if we were so disposed. If A. transfers his property to B., he puts his property beyond his creditors, for the creditors of A. cannot levy upon the property of B. If, however, A. and B. form a corporation or a partnership, into which A. puts his property, he does

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not thereby put the property beyond the reach of creditors. They may levy in the one case on A.'s shares of stock, and in the other on the firm property to the extent of A.'s interest. That is the law of this court as established in the Matter of Braus.

[4, 5] There has been no adjudication of bankruptcy of the firm of Stringer & Co., and prior to the filing of the petition now under consideration the firm of Stringer & Co. had been dissolved by the death of the bankrupt's son. The death of the son, who, with Stringer Sr., constituted the only two members of the firm, occurred on January 9, 1915. The voluntary petition in bankruptcy was filed by the bankrupt herein on January 12, 1915, and on the same day he was duly adjudicated a bankrupt, individually and as sole surviving partner of Stringer & Co. We are told by the petitioners that the proceeds of the Stock Exchange seat cannot be distributed among the creditors of Stringer & Co. for the reason that that firm is not in bankruptcy. There is no doubt that as a rule partnership affairs are not to be administered by the trustee of the individual bankrupt without the consent of the remaining members.

The Bankruptcy Act (Act July 1, 1898, c. 541, § 5h, 30 Stat. 547 [Comp. St. 1916, § 9589]) expressly declares that in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt, the partnership property is not to be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt. It follows, of course, that by the consent of the partner or partners not adjudged bankrupt the partnership property may be administered in the bankruptcy proceedings of one of the partners. In re Filmar, 177 Fed. 170, 100 C. C. A. 632; In re Harris (D. C.) 108 Fed. 517.

We know of no reason why, under the circumstances of this case, the court having jurisdiction over Stringer as an individual and as sole surviving partner of the firm of Stringer & Co. has not complete jurisdiction over the partnership estate; there being no surviving and solvent partner who is entitled to administer upon the partnership estate, and no administrator, so far as it appears, of such a partner. See In re Pierce (D. C.) 102 Fed. 977. Under the circumstances as disclosed by the record in this case it is quite immaterial that the firm of Stringer & Co. has not been adjudicated a bankrupt. We know of no reason why the court below should not distribute the funds in the trustee's hands and which belong to the firm creditors of Stringer & Co.

My Associates concur in the result, on the ground that the case presented by the petition cannot be distinguished from In the Matter of Braus.

The petition for review is dismissed, and the order appealed from is affirmed.

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In re BROWN et al.

BROWN et al. v. W. H. KENWORTHY & SON et al.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1918.)

No. 3173.

1. BANKRUPTCY ⇐=68—INVOLUNTARY PROCEEDINGS—OCCUPATION OF DEBTOR.
In determining whether an alleged bankrupt is chiefly engaged in farming, all his activities are to be taken into consideration, the relative amount of time devoted to each, and the comparative amount of revenue received and indebtedness incurred in each.

2. BANKRUPTCY ⇐=68—INVOLUNTARY PROCEEDINGS—OCCUPATION OF DEBTOR—"CHIEFLY ENGAGED IN FARMING."
An alleged bankrupt, who, although conducting a large farm, also built and operated a packing house, creamery, and poultry yards, buying live stock and poultry, and who contracted the larger part of his indebtedness in connection with business other than farming, *held* not chiefly engaged in farming.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Engage.]

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

In the matter of A. L. Brown and the community consisting of A. L. Brown and Emma Brown, his wife, alleged bankrupts; W. H. Kenworthy & Son and others, petitioners. The alleged bankrupts and the Dexter Horton National Bank of Seattle appeal from an order of adjudication. Affirmed.

For opinion below, see 251 Fed. 365.

Herr, Bayley & Croson, of Seattle, Wash., for appellants Brown et al.

Peters & Powell, of Seattle, Wash., for appellant Dexter Horton Nat. Bank of Seattle.

Kerr & McCord, of Seattle, Wash., and Stephen V. Carey, of Spokane, Wash., for appellee National Bank of Commerce of Seattle.

Walter M. Harvey, of Tacoma, Wash., for petitioning creditors.

R. P. Oldham, of Seattle, Wash., for appellee Seattle Nat. Bank.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The question which this appeal presents is whether the court below erred in confirming the master's report and adjudging that the appellant A. L. Brown was not chiefly engaged in farming or the tillage of the soil on December 28, 1917, the date of the alleged act of bankruptcy, for which his creditors by their petition sought to have him adjudged bankrupt. Brown was a citizen of Seattle, a lawyer, and the president of the Amos Brown Estate, a corporation, in which he and his mother and sisters owned all the shares; the estate consisting of city property of the value of $2,350,000. As such president he received a salary of $3,000 per an-

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num. He acquired 2,100 acres of land, situate about 60 miles from Seattle, and he and his wife had their home thereon, while at the same time they maintained apartments in Seattle, where much of their time was spent. The farm was stocked with a large number of cows, bulls, stallions, horses, swine, and poultry. Brown expended large sums of money in improving the farm. He erected thereon numerous buildings, including a stallion barn, an extensive packing house, with cold storage rooms, a creamery, and poultry houses. The packing house cost from $50,000 to $60,000, and the creamery and poultry houses about $30,000. Both the packing house and the creamery were of capacity vastly in excess of the needs of the farm. In 1915 he engaged in the business of selling his products directly to consumers by means of the parcels post. He secured the services of a government inspector for his packing plant. He slaughtered cattle and hogs, and, aside from beef, the manufactured product of the packing house included ham, bacon, sausage, and pickled pigs' feet. He bought cattle, hogs, and chickens from others to the extent of from 38 to 40 per cent. of the products which passed through the packing house. The evidence was that during the year 1917 the gross income from his several industries was about $222,000, of which about $95,000 was the gross income from the farm; that the feed purchased amounted to $37,648, while the feed raised on the farm was $17,600; that the gross expense of his operations was about $250,000, of which about $22,000 was the cost of operating the farm; that the total cost of labor was $46,391, of which the farm labor cost was $16,000. When obtaining a loan from a bank in July, 1917, Brown stated to the president of the bank that he was advertising a sale of his cattle, that he realized that in order to make money he must make it from his packing plant, and that he was making no money out of the stock, and for that reason he was going to dispose of it. On February 26, 1918, Brown wrote to his creditors as follows:

"In closing this letter I want to impress you with the fact that for the past several years I have been educating the farmers for many miles around in the raising and furnishing me with more and better products; I agreeing to take it all. They are now demanding that I still furnish them a market for their products. As a manufacturing plant I have been buying for a long time about 95 per cent. of the farm products we sold. We have daily calls for hundreds of dollars worth of Brown Farm Products, which we cannot furnish (no capital to purchase the raw products with)."

It is true that Brown testified that he did not mean by his letter that he had been buying 95 per cent. of the farm products which he sold, but that he meant he had only "enough stuff to fill 5 per cent. of the orders we were then getting." But the explanation does not seem to explain the language of the letter. At the close of the year 1917, Brown's debts exceeded $1,000,000, and his accounts payable were about $49,000. He had borrowed from the Amos Brown Estate about $500,000, and he owed to various banks and other creditors for loans $424,000. He testified that the money obtained on the most of these loans went to the Amos Brown Estate.

[1] In determining whether one is chiefly engaged in farming,

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all his activities are to be taken into consideration. American Agricultural Co. v. Brinkley, 194 Fed. 411, 114 C. C. A. 373, Ann. Cas. 1915C, 100; Harris v. Tapp (D. C.) 235 Fed. 918. It is proper to consider the relative amount of time he devoted to the several lines of endeavor in which he was interested, and it has been held that the comparative amount of revenue received from each may be taken into account, as well as the relative amount of indebtedness which he has incurred in his different lines of business. Hart-Parr Co. v. Barkley, 231 Fed. 913, 146 C. C. A. 109; In re Disney (D. C.) 219 Fed. 294. One who is engaged chiefly in farming is within the exception, although as incidental thereto he raises live stock for sale and engages extensively in the creamery and poultry business. In re Thompson (D. C.) 102 Fed. 287; Gregg v. Mitchell, 166 Fed. 725, 92 C. C. A. 415, 20 L. R. A. (N. S.) 148, 16 Ann. Cas. 510. But it is otherwise if the incidental business assumes such proportions as to become the principal business. Bank of Dearborn v. Matney (D. C.) 132 Fed. 75. And one who is engaged chiefly in farming is within the exception, although he may be engaged in other lines of business of less importance wholly disconnected with farming. Couts v. Townsend (D. C.) 126 Fed. 249; Wulbern v. Drake, 120 Fed. 493, 56 C. C. A. 643.

[2] With these principles in view, we are not convinced that the evidence is such as to justify us in disturbing the conclusion of the court below. The main portion of Brown's debts were incurred on behalf of the Amos Brown Estate, and a very considerable portion of his time, especially during the year 1917, was devoted to the business of that estate. In addition to that, the evidence indicates that Brown's principal interest at the farm was in developing the business of his packing house, creamery, and poultry yards, and in purchasing live stock and poultry from others, and selling directly to consumers the products of his plants. In re Brown (D. C.) 132 Fed. 706; In re Mackey (D. C.) 110 Fed. 355; In re Disney (D. C.) 219 Fed. 294.

The judgment is affirmed.

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COOPER v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1918.)

No. 3119.

PUBLIC LANDS ⟸29—RESERVED LANDS—RIGHTS OF HOMESTEAD APPLICANT.

Where the statute opening an Indian reservation to settlement authorized the Secretary of the Interior to reserve land for town sites and the proclamation issued pursuant thereto in terms applied only to unreserved land, no rights on a tract reserved for a town site can be acquired by a homestead application.

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action by the United States against C. A. Cooper. Judgment for the United States, and defendant brings error. Affirmed.

C. A. Cooper, of Plummer, Idaho, and W. H. Batting, of Cœur d'Alene, Idaho, for plaintiff in error.

J. L. McClear, U. S. Atty., of Boise, Idaho, and John R. Smead, Asst. U. S. Atty., of Idaho City, Idaho.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The government brought this action in the court below to oust the defendant thereto (plaintiff in error here) from the S. E. ¼ of section 18, township 46 north, range 4 west of Boise meridian; the defendant being in possession of the land and claiming the right to such possession under the homestead laws. A jury was waived and the case submitted to the court upon the agreed facts. Those showed that the piece of land in question is within that portion of the Cœur d'Alene Indian reservation in Kootenai county, Idaho, which the act of Congress of June 21, 1906 (34 Stat. 335, 337, c. 3504), provided should be opened to settlement and entry by proclamation of the President, and which proclamation should prescribe the time when and the manner in which the lands might be settled upon, occupied, and entered by persons entitled to make entry thereof. That act of Congress also provided at the page last cited:

"That the Secretary of the Interior shall reserve from said lands, whether surveyed or unsurveyed, such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause any such reservations, or parts thereof, to be surveyed into blocks and lots of suitable size, and to be appraised and disposed of under such regulations as he may prescribe, and the net proceeds derived from the sale of such lands shall be paid to said Indians as provided in section 7 of this act."

Pursuant to the authority thus vested in the Secretary of the Interior, the latter, on July 15, 1907, withdrew the whole of section 18, township 46 north, range 4 west, of the Cœur d'Alene Indian reservation, for the Plummer town site. Pursuant to the authority vested in the President by the act of June 21, 1906, and other acts of Congress relating to other Indian reservations, the President, on May 22, 1909 (36 Stat. 2494), issued his proclamation by which he did

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thereby "prescribe, proclaim, and make known," among other things, that:—

"All the nonmineral, unreserved lands classified as agricultural lands, grazing lands and timbered lands in the Cœur d'Alene Indian reservation in the state of Idaho, under the act of Congress approved June 21, 1906 (34 Stat. 335), shall be disposed of under the provisions of the homestead laws of the United States and said acts of Congress and be opened to settlement and entry in the following manner and not otherwise"—specifying the conditions and requirements.

By act of August 4, 1916 (39 Stat. 435, c. 268), entitled "An act authorizing the Secretary of the Interior to subdivide a part of the town site of Plummer, Idaho, and for other purposes," that officer was authorized and directed to cause to be subdivided that part of the town site of Plummer, Cœur d'Alene reservation, Idaho "(which town site was created under the act of June twenty-one, nineteen hundred and six, Thirty-fourth Statutes at large, pages three hundred and twenty-five and three hundred and thirty-seven), described as the southeast quarter of section eighteen, township forty-six north, range four west, into streets or roads and into tracts of not exceeding five acres each, and to cause the tracts to be appraised, except such as are hereinafter reserved for the town of Plummer, and sold at not less than their appraised value." The act last referred to also made various provisions for the benefit of the town of Plummer, in the way of waterworks, schoolhouses, and a park.

It is agreed that the southeast quarter of the section so reserved for the Plummer town site has never been subdivided into lots and blocks, and that on May 12, 1910, the plaintiff in error, Cooper, tendered to the United States land office at Cœur d'Alene, Idaho, a homestead application therefor, the serial number of which was 04640, which application was rejected by the local land office, an appeal from which rejection was taken May 13, 1910. On the 18th of the next month—June 18, 1910—the Commissioner of the General Land Office affirmed the action of the local land officers, on the ground that the quarter section applied for was embraced within the town site of Plummer. The stipulation contained a recital of these further facts:

"January 7, 1911, the General Land Office called upon the local land office for a report in connection with Cooper's case, and on February 16, 1911, the local office reported that no appeal had been taken on the General Land Office decision dated June 4, 1910. March 11, 1911, the General Land Office finally rejected the tendered application No. 04640, so filed May 12, 1910, and closed the case."

More than four years thereafter, to wit, August 20th, 1915, the plaintiff in error, Cooper, "filed a new homestead application, Serial No. 09792," for the land in question, which application was rejected by the officers of the local land office, from which ruling the applicant filed on the same day an appeal to the Commissioner of the General Land Office, by which officer the applicant was allowed to file written arguments in support of his appeal. Thereafter, and on September 15, 1916, the Commissioner rendered his decision, holding that the land, being included within the town site of Plummer,

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was not subject to homestead entry, thereby sustaining the ruling of the local land office. The applicant being allowed an appeal to the Secretary of the Interior from that decision of the Commissioner, such appeal was taken November 29, 1916, where it remains pending.

If the land in suit could be properly regarded as public land, subject to disposal under the general laws of the United States, we should be obliged to reverse the judgment appealed from, and to direct a dismissal of the action, on the authority of the cases of United States v. Devil's Den Cons. Oil Co. and Lost Hills Mining Co. v. United States, 251 Fed. 548, 163 C. C. A. 542, recently decided by us, and cases there cited. But, as will have been seen from the abovementioned legislation, and from the proclamation of the President, it was only "nonmineral unreserved lands classified as agricultural lands, grazing lands, and timber lands in the Cœur d'Alene Indian reservation" that were authorized to be disposed of under the provisions of the homestead laws of the United States, and according to the agreed fact the whole of the section embracing the quarter section here in suit was, by express statutory authority, duly reserved for town-site purposes by the Secretary of the Interior July 15, 1907. The land in controversy was not, therefore, subject to sale or other disposal under general laws at the time of either of the homestead applications of the plaintiff in error, and that only lands of the latter character ever were subject to homestead entry is too well settled to admit of question,

The judgment is affirmed.

FEDERAL MINING & SMELTING CO. v. ANDERSON.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1918.)

No. 3129.

1. MASTER AND SERVANT ⟸278(10)—MASTER'S LIABILITY FOR INJURY TO SERVANT—UNSAFE PLACE TO WORK.
   The finding of a jury that an injury to plaintiff, whose arm was broken by a piece of steel while he was operating a cage in defendant's mine, was due to the negligence of defendant in permitting the steel to be piled so near the shaft that it was struck by the cage, *held* sustained by the evidence.

2. NEGLIGENCE ⟸134(2), 136(9)—CIRCUMSTANTIAL EVIDENCE—INFERENCES—JURY QUESTION.
   The cause of an accident may be inferred from circumstances, and such inferences are for the jury to draw.

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action at law by Andy Anderson against the Federal Mining & Smelting Company. Judgment for plaintiff, and defendant brings error. Affirmed.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Featherstone & Fox, of Wallace, Idaho, for plaintiff in error.

Plummer & Lavin, of Spokane, Wash., and Therrett Towles, of Wallace, Idaho, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. [1] The defendant in error recovered in the court below a verdict and judgment for personal injuries alleged to have been sustained by him by reason of the negligence of the defendant to the action, plaintiff in error here. The plaintiff was employed in the operation of a cage of one of the defendant's mines, and while the latter was being lowered in the shaft, with the plaintiff on it, in passing the 1,000-foot level of the mine on its way to the 1,800-foot level, a piece of steel protruding from the level was struck by the cage and knocked against the arm of the plaintiff, inflicting the injury for which he sued and recovered. Lack of negligence on the part of the defendant, contributory negligence by the plaintiff, and assumption of risk by the latter were set up in defense—the latter in these words:

"That if the said plaintiff was injured on the 28th day of May, 1917, as alleged in plaintiff's complaint, he was injured by and through one of the risks of the employment and one of the risks he assumed, especially the risk of being injured in the course of his employment by some object falling down said shaft."

It was stipulated by the parties that the defendant company "at one time promulgated" this rule:

"Drills, timber, or other material must not be placed within five feet of any shaft, opening or winze."

And there was much testimony given tending to show a general disregard of the rule by the miners, including the plaintiff, and there was a good deal of testimony regarding the condition of the shaft and gates.

The trial court instructed the jury, among other things (to which instructions no exception was taken), that the plaintiff was not entitled to recover by reason of the condition of the shaft or gates, but that they might consider the condition of the shaft and of the gates, and the practicability of operating the hoisting device—

"in determining whether or not the plaintiff was guilty of contributory negligence; that is, of a want of proper care in having those gates open at the time the injury occurred, if you find that he did have them open."

The court also in its instructions said that there was but one primary ground of alleged negligence upon which it could find in the plaintiff's favor, if at all, that negligence being—

"according to the plaintiff's claim, that the defendant company permitted steel to be piled or left near the edge of the shaft, and that one of these pieces, by reason of the carelessness of the company in that respect, came so near the edge, indeed, projected over the edge there a little way, so that when the cage descended it struck the end of it and threw it upon him and broke his arm."

There were certainly some circumstances testified to tending to show that the accident occurred that way, while some of it tended to

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show the contrary; and the court by its instructions left it to the jury to say whether the accident did result from the piece of steel as alleged by the plaintiff, and further whether—

"that steel came to the edge of the shaft by reason of the habitual placing of it there and leaving it there."

[2] That the cause of an accident may be inferred from circumstances does not admit of doubt. Perkins v. Northern Pac. Ry. Co., 199 Fed. 712, 719, 118 C. C. A. 150. Such inferences are for the jury to draw. "Twelve men," said the Supreme Court in Railroad Co. v. Stout, 17 Wall. 657, 664 (21 L. Ed. 745), "of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer—these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment, thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge. In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed it is for the jury, and not for the judge, to determine whether proper care was given, or whether they establish negligence."

The judgment is affirmed.

TAIGMAN v. DESURE et al.

(Circuit Court of Appeals, Second Circuit. March 13, 1918. On Application for Reargument, April 12, 1918.)

No. 75.

1. PATENTS ⇐327—VALIDITY—CONCLUSIVENESS OF DECREE—PERSONS CONCLUDED.

One not a party to an infringement suit, and not technically a privy thereto, although allied in interest with defendant, is not bound by a decree affirming the validity of the patent alleged to have been infringed.

2. PATENTS ⇐328—INVENTION—ANTICIPATION.

Patent No. 984,327, claims 15 and 16, for a motor-control apparatus, which serves to exactly control the operation of electric motors, to start and stop the same, or to vary the speed, and patent No. 1,044,944, claim 3, for a pulley brake for motor-controlled apparatus, particularly adapted for a brake mechanism on a motor-actuated sewing machine, *held* to show invention, and not to have been anticipated.

3. PATENTS ⇐81—INFRINGEMENT SUIT—PRIOR USE.

Defendant, who admitted infringement of a patent, otherwise valid, and defended on the ground of prior public use, has the burden of establishing such use beyond a reasonable doubt.

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4. PATENTS ⟸81—INFRINGEMENT—PRIOR USE—EVIDENCE.
In a suit for the infringement of patent No. 984,327, claims 15 and 16, and patent No. 1,044,944, claim 3, evidence *held* insufficient to sustain the defense of prior public use.

Appeal from the District Court of the United States for the Southern District of New York.

Bill by Max Taigman against Samuel Desure, trading as D. & D. Electric Company, and another. From a decree for complainant, holding the first patent valid and infringed, and dismissing the bill for infringement as to the second patent, the parties cross-appeal. Decree sustaining the first patent, and holding it infringed, affirmed, and decree dismissing bill for infringement of the second patent reversed, and cause remanded, with directions.

The plaintiff alleges that he is the owner of an undivided two-thirds interest in letters patent No. 984,327, issued to David Wald, Otto C. Britsch, and the plaintiff on February 14, 1911; the plaintiff's two-thirds interest in the latter patent being his own individual one-third interest arising from the grant of the patent, together with the interest of Britsch, which plaintiff acquired by assignment. He also alleges that he is the sole owner of United States letters patent No. 1,044,944, granted to him on November 19, 1912. The defendant Wald, as the owner of a one-third interest in letters patent 984,327, was requested by plaintiff to join in the suit, and, having failed to do so, was made a defendant.

The suit was brought for infringement of both patents. An injunction and accounting was asked. A decree was entered in favor of the plaintiff, holding the first patent valid and infringed as to the claims in issue, and dismissing the bill for infringement of claim 3 of the second patent, without costs. There are cross-appeals.

C. P. Goepel, of New York City, for appellants.
Hillary C. Messimer, of New York City, for appellee.
Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The first patent in suit, No. 984,327, is for a motor-control apparatus, and has reference more particularly to apparatus of this class which serves to exactly control the operation of electric motors, to start and stop the same, or to vary the speed. The second patent in suit, No. 1,044,944, is for a pulley brake for motor-controlled apparatus, and is particularly adapted for a brake mechanism on a motor-actuated sewing machine. These two patents were before this court in Taigman v. Forsberg, 223 Fed. 787, 139 C. C. A. 607. We then held that the patents disclosed invention and were not shown to have been anticipated.

[1, 2] In this suit defendant Desure relies on additional proof as to prior public use. He also sets up in his answer a number of patents which are prior in time to those in suit, although at the trial, among all of those pleaded, he relied upon only two—the Miller & Marx patent, No. 703,942, dated July 1, 1902; and the Beswick patent, No. 828,083, dated August 7, 1906. The District Judge has entered a decree in favor of the plaintiff, in which the first patent is held valid and infringed as to the claims in issue, with costs, and the bill for the infringement of claim 3 of the second patent is dismissed, without costs.

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In the course of his opinion the District Judge, in referring to the opinion of this court when the case was here before, declares that "subsequent events have proved that the Circuit Court of Appeals was right in its conclusion as to the facts." In the former action we reversed the decree of the District Court, because we were convinced that the testimony was not sufficient to establish the fact that the inventions of the patents were in public use more than two years before the patents were granted. It was this alleged public use that the defendant in the first case had relied on to defeat the plaintiff's suit. A number of patents had been set up in the answer in the former suit, but no reference was made to any one of them by the defendant at the trial.

In the present suit the defendant did not elect to stand entirely on the alleged prior use. While relying on the prior use, he does not now deem it safe to pass unnoticed the patents of the prior art. Both of the patents now relied upon were cited in the answer in the first suit, although counsel did not then deem it important to offer them in evidence. Both were before the Patent Office at the time the patents in suit were granted. Furthermore, the Miller & Marx patent is on the Diehl box, now obsolete, and the Beswick patent is on the Beswick box, which is also now obsolete.

The plaintiff relies on claims 15 and 16 of the first patent, No. 984,327, and on claim 3 of the second patent, No. 1,044,944. Claim 15 of the first patent reads as follows:

"In apparatus of the class described, a casing having an end wall provided with an opening therein, resistances within said casing, contacts within said casing and electrically connected with said resistances, said end wall adjacent to said opening having an enlargement, presenting a bore, a spindle in said bore, and a contact arm having a hub mounted upon said spindle, and extending through said opening into said casing, and adapted to engage said contacts."

And claim 16 of the first patent reads as follows:

"In apparatus of the class described, a casing having an end wall provided with an opening therein, resistances within said casing, contacts within said casing and electrically connected with said resistances, said end wall adjacent to said opening having an enlargement, presenting a bore, a contact arm having a hub mounted upon said spindle and extending through said opening into said casing and adapted to engage said contacts, said arm, at the outside of said casing having an extension, a lever pivotally mounted upon said casing and operatively engaged by said extension of said arm, and a brake shoe carried by said lever and adapted to brake a motor controlled by the apparatus."

Claim 3 of the second patent reads as follows:

"The combination in a motor-controlled apparatus, of a revolving element, a switch arm, a brake lever having a brake shoe at one end adapted to engage said element and having its other end loosely positioned in and actuated by said arm, and means independent of said switch arm for varying the movement of said shoe relative to said element."

It is noted that paragraph 8 in the answer in this suit, which names certain patents issued prior to the patents in suit and asserts that the apparatus of the patents in suit and the apparatus of the prior patents so named are substantially identical in character, is a mere repetition of paragraph 8 in the answer in the former suit. Desure was not a party

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in form at least to that suit, and it has not been proved that he was technically a privy to it, although he was allied in interest with the defendant therein. The decision in that case is not conclusive as against him. It is proper, however, to say, and good practice requires us to hold, that this belated reliance upon references which were pleaded in the former suit is not to be viewed with favor; for upon pleadings that presented the issues we have definitely held that both these patents reveal invention.

An examination of the physical exhibits discloses the fact that defendant's box is a Chinese copy of that of the plaintiff. The defendant's device is identical with that of the plaintiff, and has all the properties which are ascribed to the latter in his two patents in suit. Infringement is clear, and is not contested. The question presented is whether the plaintiff's patents are valid. Is there anything in the prior art or in the prior use which invalidates them?

The patents in suit describe a device for the control of individual sewing machines operated by an electric motor. It consists of an ordinary rheostat inclosed in a box, operated by a lever which, when released, allows a spring to relax, which brings a brake into action. The rheostat has been said to be as old as applied electricity. It is necessary in order that the current may be gradually applied, by forcing the current to traverse several electrical resistances before the direct contact or circuit is made. The brake is also old, and used to stop the machine quickly, rather than to permit it to idle down.

It will not be necessary to refer to more than four of the patents relied on by the defense. The Miller and Marx patent, No. 703,942, of July 1, 1902, and the Beswick patent, No. 828,083, of August 7, 1906, were mentioned in the answer and so may be relied upon as anticipations. The Bradbury patent, No. 17,460, is a British patent, which was applied for on August 8, 1902, and was accepted on August 8, 1903. It was not named in the answer, and was therefore received in evidence only as illustrating the prior art.

The Miller and Marx patent, No. 703,942, was issued on July 1, 1902, or almost nine years prior to the patent in suit. It is described as an invention which had for its object to provide an efficient electric motor power-transmitting device, more especially intended to be applied to sewing machine stands or tables, for the purpose of driving the sewing machines mounted thereon. The defendant claims that the device is identical in functional operation with that of the patent in suit. The Miller and Marx patent and the patent in suit both employ a box or casing having what is known as an electric rheostat having resistances to determine the strength of the electric current, and a pivoted contact arm passing over the contact points electrically connected with the various resistances. When the contact arm is in one of its extreme positions, no electric current flows, as the circuit is broken; and when the contact arm is in its other extreme position, the entire current may pass, as it does not flow through any portion of the resistance. Between these extreme positions, the pivoted arm engages contacts connected with resistances so graduated that, as the contact arm is moved from one extreme position to the other, the current pass-

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ing through the circuit is increased or decreased. By moving the contact arm over the contacts, sufficient strength of current may be utilized, and, when a motor is connected in the circuit, the speed of the motor depends on the strength of the current; and it also provides a brake shoe. The Diehl box was made under this patent. This box was never sold separately from the motors. In the Diehl box the lever arm is pivoted to the cover, instead of to the base, with the result that, when the cover was removed for repairs the integrity of the box was destroyed. Then, again, the pivot point of the controller arm is inside of the box, which renders it necessary to leave an open slot in the end of the box, to permit the travel of the end of the contact arm.

The Beswick patent, No. 828,083, was granted August 7, 1906. It was for an invention designed to provide a compact portable attachment, which would be complete, self-contained, and capable of being readily set up and connected "to drive a sewing machine, polishing wheel, small lathe, or the like, and which will further serve when in position as a support for the table or bench upon which the machine is mounted." The Beswick box manufactured under this patent like the Diehl box, was never sold separately from the motor, and it could not be used, even with a Beswick motor, without the complete combination, including a metal frame cast for the purpose; and in the Beswick box, as in the Diehl box, the pivot point of the controller arm is inside the box.

The material difference between the starting boxes of the prior art and Taigman's box is the arrangement of the latter and the co-ordination of parts produced within a narrow compass in a container adapted for any kind of a machine on any kind of a stand. The Taigman box worked on all kinds of motors, and superseded both the Diehl box and the Beswick box. The record establishes the fact that Taigman was the first to give to the public a successful starting box for sewing machine motors, which was a unit complete in itself, adapted for attachment to any sewing machine stand, and for use in any sewing machine motor; and in the Taigman box the objectionable features previously pointed out in the Diehl and Beswick boxes have been overcome. The cover is removable without disturbing the integrity of the structure. The contact or controller arm is pivoted in one of the end walls, so that no open space is required for the movement of the projecting end of the arm, and there is no danger that sparks will escape therefrom. And it is very important that no sparks should escape from the control box, as they might readily set fire to the dress of the operators or the material upon which they were at work.

Claims 15 and 16 of the first patent require the contact arm to be pivoted in the end walls of the structure. That this might be accomplished it was necessary to enlarge the end wall near the opening for the reception of the contact arm, so that the spindle forming the pivot for the arm might be accommodated; and this feature of the device is not disclosed in the prior art.

As respects claim 3 of the second patent, the Miller and Marx patent does not disclose any brake. The Beswick patent shows a brake, but one mounted entirely separate from the starting box, and not form-

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ing a part of the immediate combination. In the British patent we find a brake, and the brake and the control elements form a unit. But they are adapted for use on top of the sewing machine stand, and are intended to be operated by hand. The brake in this patent is supposed to operate on the fly wheel of the sewing machine rather than on the pulley of the motor. It is not intended to be connected with the treadle of the motor, and no means are shown for adjusting the brake.

The Wald, Britsch, and Taigman patent, No. 1,000,864, of August 15, 1911, was admitted, not as constituting a part of the prior art as to the first patent in suit, for it was not filed until April 15, 1911, but as against the second patent. Figure 8 of patent No. 1,000,864 discloses claim 3 of the second patent in suit, and the file wrapper of patent No. 1,000,864 shows that this feature was claimed in original claims 9 and 10 of the application. It appears, however, that before the patent was issued these two claims were canceled; and when the plaintiff made his application for the second patent in suit it was rejected on the Wald, Britsch, and Taigman patent, No. 1,000,864. The plaintiff thereupon filed an affidavit that he was the sole inventor of the device set forth in claim 3, and that it had been included in the former application by mistake, and Wald and Britsch also at the same time filed affidavits disclaiming the invention of claim 3 of the second patent in suit, or any part thereof.

It is plain that under the circumstances the disclosure made in connection with patent No. 1,000,864 cannot be used to invalidate claim 3 of the second patent in suit. Application for patent No. 1,000,864 was filed April 15, 1911, and application for the second patent in suit was filed April 3, 1912.

On the whole record, we hold that what Taigman did shows invention. He accomplished something which the prior patentees failed to accomplish, and contributed a practical advance to the art, which, though it may be slight, is sufficient to entitle him to maintain the validity of both patents, unless it appears that they are invalidated by prior use.

[3, 4] Several witnesses were called to show that, more than two years prior to the grant of the first of the patents in suit, the Taigman box was in public use. But the testimony upon which defendant relies to establish such use is not convincing or impressive. Such testimony was introduced in the first suit, and was regarded by this court as insufficient and too uncertain to establish the invalidity of the patent. In the present suit the defendant has called more witnesses than in the former suit, but their testimony remains open to the same objection. The witness Wald, called by the plaintiff, is mentioned in the opinion of the District Judge, who heard him give his testimony, as an "honorable, upright, and scrupulous" man, who impressed him most favorably. Wald, who was one of the original patentees of the first of the patents in suit, and should have known the truth as to any prior use, was asked: "Mr. Wald, have you any knowledge of the invention, which is the subject of the patent in which you are one of the joint patentees, having been sold, or publicly used, more than two years before you filed your application for that patent?" To which he an-

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swered: "Not to my knowledge." The witness stated that neither directly nor indirectly did he have any financial interest in the patent at any time.

The District Judge, mindful of the criticism which the failure to call him in the first trial had called forth, expressed a desire to hear what the plaintiff, if he were available, could say on the subject of the prior use. His counsel thereupon stated that he was available, but that he was a man who did not thoroughly understand English, and that he was of a very excitable temperament, and that, as his business had been seriously interfered with by the acts of the infringers, if called to testify it was likely to excite him to a high degree. The District Judge stated that in the interest of winding up the litigation he thought it desirable to have him in court to be interrogated by the court as to the prior use. He accordingly appeared as a witness and was questioned by the District Judge. He stated that he had sold starting boxes prior to 1909, as he had all kinds of boxes, but that he had not sold any boxes like his patent prior to 1909, as his box had not been completed prior thereto.

Freedman, who was called by the defendant, testified also in the first suit, and we characterized his testimony in that suit as unreliable and improbable. In the present suit his testimony makes an equally unfavorable impression. The District Judge states that his present testimony "was absolutely unreliable," and states that he is convinced that he was trying to tell the truth, but that he had met with an injury which had gravely affected his memory. Desure, who also testified in the first suit, testified in this, and we characterized his former testimony as "loose," and pointed out why his testimony could not be accepted as establishing the prior use. That, of course, has no bearing upon his testimony in the present suit, with which we are now solely concerned. His testimony in this case on the direct is very brief. He states that he bought four starting boxes from Taigman in May, 1907, and that they were exactly like one of the exhibits which was asserted to be a Taigman box. But, after stating it was "exactly" the same as that box, he added: "The top was a little more straight. I cannot recollect whether this had a piece of wire, or had that thing in there (indicating)." Counsel for plaintiff did not deem his testimony of sufficient importance to cross-examine him upon how nearly the two boxes corresponded. In this he was contradicted by Taigman, who testified positively that his box was not completed until 1909. It could not, therefore, have been given away or sold prior to that time, if Taigman told the truth, and his testimony impresses us as that of a truthful man. As to the testimony of certain other witnesses, who thought they had Taigman boxes in 1907, the District Judge was far from satisfied that their memory was sufficiently reliable for the purpose of fixing dates which would defeat the patent.

The burden was upon defendant to establish prior public use and to establish it by proof beyond a reasonable doubt. This in our opinion defendant has not done. While we are not prepared to go quite so far as the District Judge went, and say that the prior uses were affirmatively disproved to our entire satisfaction, we think that the testimony

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as to prior use is not sufficient to establish the fact beyond a reasonable doubt, which is what the law requires in such cases.

As respects claim 3 of the second patent, the lower court has held the prior use clearly established. In this view of the matter this court is unable to concur. In our opinion, the burden of proof has no more been sustained by the defense as respects the second patent than it was as to the first, either as to the exact mechanism of the device or as to its having been in prior use for the statutory period. So far as the proof is concerned, we are unable to see any difference between the use under the first patent and the use under the second. The one seems to us to be as good as the other.

The decree is therefore affirmed, with costs, in so far as it holds claims 15 and 16 of the first patent valid and infringed. It is reversed, with costs, in so far as it dismisses the bill for infringement of claim 3 of the second patent.

On Application for Reargument.

PER CURIAM. Defendant having contended that the second patent in suit (1,044,944) is anticipated by the prior Wald patent (1,000,864), and it appearing that the file wrapper and contents of said second patent in suit should in our opinion be put in evidence herein, as being material and relevant to said contention, it is ordered that the mandate herein contain the following directions:

Let the decree below as to the second patent in suit be vacated, and the issue as to that patent be remanded, with directions to reconsider said second patent, but only as to the anticipation alleged by said Wald patent; the court below, having considered the evidence offered in respect of such alleged anticipation, to make such final decree as to the validity and infringement of said second patent in suit as to law and justice may appertain.

Neither party shall recover costs in this court, costs below to be in the discretion of the District Court, and the directions as to costs, heretofore given, are modified accordingly.

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MATTEAWAN MFG. CO. v. EMMONS BROS. CO.

(Circuit Court of Appeals, First Circuit. September 12, 1918.)

No. 1319.

1. PATENTS ⟸112(5)—SUIT FOR INFRINGEMENT—DECISIONS OF PATENT OFFICE—WEIGHT.
When a court is asked to overturn a decision of the Patent Office on a question of fact, the proof should be clear and convincing.

2. PATENTS ⟸328—VALIDITY—METHOD OF STICKING FUR TO FELTED HAT BODY.
The Baglin patent, No. 508,462, for a method of sticking fur to a felted hat body, claims 1 and 2, *held* void for lack of invention.

3. PATENTS ⟸37—INVENTION.
It is not invention to apply an old force through known instruments used in their accustomed manner to known objects and producing known effects.

4. WORDS AND PHRASES—"CARROTED FUR."
"Carroted fur" is fur that has been treated by a solution of nitrate of mercury, so as to remove the water-repellent substance covering the fibers of the fur, causing the scales upon their surface to protrude to a greater extent than they do upon those of raw or uncarroted fur, and the body of the fiber itself to absorb moisture, making it more pliable and in this condition more easily to interlock with other fibers of fur, or of wool.

5. WORDS AND PHRASES—"STICKING"—"FELTING."
The processes of "sticking" and "felting," as applied to the manufacture of fur felt hats, only differ in the extent to which the fibers become interlocked. In the former process, only a part in length of the fur fibers becomes interlocked with the wool fibers, while in the latter process the fur fibers become interlocked with the wool fibers, or with other fibers of fur, for their whole length.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit in equity by the Matteawan Manufacturing Company against the Emmons Bros. Company. Decree for defendant, and complainant appeals. Affirmed.

Fritz v. Briesen, of New York City (Briesen & Schrenk, of New York City, on the brief), for appellant.

Louis W. Southgate, of Worcester, Mass. (Charles T. Hawley, of Holden, Mass., on the brief), for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and ALDRICH, District Judge.

JOHNSON, Circuit Judge. This is an appeal from the District Court of Massachusetts dismissing the bill of the plaintiff, which alleged infringement by the defendant of United States patent No. 508,462, issued November 14, 1893, to W. H. Baglin, whose title, by assignments, passed to this plaintiff February 2, 1909. Claims 1 and 2 of the patent are those which it is claimed were infringed, and this court has found them to be true method claims "whose validity and scope could only be

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determined on final hearing." 185 Fed. 814, 108 C. C. A. 46. They are as follows:

"1. The herein-described method of sticking fur to a previously felted hat body, which consists in applying a layer of fur to the felted hat body and then subjecting the material to a combined pressing and vibrating jigging action, substantially as described.

"2. The herein-described method of sticking fur to a previously felted hat body, which consists in applying a layer of fur to the felted hat body and then subjecting the material to a combined pressing and vibrating jigging action, with heat, substantially as described."

The only difference between the two claims is that in the second the words "with heat" are added after the words "jigging action"; but nothing novel is claimed for the use of heat in the alleged method.

The validity of the patent was attacked on the ground that it was abandoned under section 4894 of the Revised Statutes (Comp. St. 1916, § 9438), which reads as follows:

"All applications for patents shall be completed and prepared for examination within two years after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

Baglin filed an application for the patent on February 21, 1882. This application was placed in several interferences, and for more than seven years no action was taken in the Patent Office; but on December 9, 1890, the Commissioner of Patents entered an order for Baglin to show cause why his application should not be considered abandoned by failure to prosecute within two years, within the meaning of section 4894. In response to this order affidavits were filed, and on them the Commissioner of Patents held that Baglin's delay was unavoidable.

[1] The learned judge in the court below held, on the authority of Hays-Young Company v. St. Louis Transit Company, 137 Fed. 80, 70 C. C. A. 1, that the evidence introduced by the defendant was not sufficient to overcome the prima facie presumption in favor of the correctness of the commissioner's ruling, and we agree with him. We think that, when a court is asked to overturn a decision upon a question of fact by an executive officer of the government to whom the law has intrusted its determination, the proof introduced should be clear and convincing; and we do not find sufficient evidence to show that the decision of that preliminary question by the commissioner was so clearly wrong as to justify this court in setting it aside.

After the resumption of interference proceedings a decision was rendered in favor of Baglin and the patent issued November 14, 1893.

[2] The question presented for our consideration, and the only one which we find it necessary to consider, is whether the claims upon which the plaintiff relies are void for want of invention.

In manufacturing hats of wool and fur a layer of fur is placed or blown upon a felted hat body made of wool, the fibers of which have been compacted by a combined pressing and vibrating motion, usually with heat. The first step in the process is to make the layer of fur

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stick to the hat body of felt, or to so unite them that, being subjected to pressure, scalding, and rolling, they may further unite.

Baglin, by his patent, claimed nothing new in the use of fur and wool to make a hat, or that there was anything novel in making the individual fibers of the fur, because of the scales upon them, penetrate the felted wool and stick to it until they could be made to penetrate still further by the pressing, rolling, and scalding processes to which the combined felt and fur were afterward subjected. Previous to his patent the preliminary sticking of the layer of fur to the hat body had been accomplished by hand with the use of brushes and hot water, by laying the hat body with the fur upon it on a perforated table through which steam was injected into the felted body, and by the dextrous use of a brush causing the fibers of the fur to penetrate the felt body to such an extent that the layer of fur and the felt body could thereafter be treated together, and a closer union of the fibers of the fur and those of the felt obtained. A jigging machine had long been in use in the manufacture of hats in felting fur and wool separately and in combination.

Baglin in his invention claimed to effect the old result of the preliminary sticking of the fur to the felt body by "a combined pressing and vibrating, jigging action," thus accomplishing by use of a jigger what had previously been done by hand by the use of brushes. For the success of this movement pressure was necessary, and with it a vibratory movement of the brush in the hand of the operator, because it is apparent that the skilled operator must have seen the necessity of separating the fibers of the fur by the short, vibratory movements of a brush before striking the fur with it to make the preliminary penetration of the felted hat body.

It is not claimed that Baglin invented the jigger or any new machinery, but that the process which he discovered was new. It had long been known that the exterior surfaces of hair fibers, as well as those of wool, were covered with scales, which all point in the same direction—away from the root or butt end, towards the tip of the fiber—and that because of these scales the fur fibers could be made to penetrate into a felted body, whether completely felted or only partially felted, and after this penetration they could not be removed.

In Burr v. Duryee, 1 Wall. 531, 17 L. Ed. 650, the structure of the fur fibers and the use of the same in the manufacture of hats is fully discussed, and it is there pointed out that the reason why the fibers of fur or of wool may be made to combine by pressure is due to the scales upon their surfaces, so that they may be made to interlock and combine. It is true that, by the use of the jigger, the process of sticking can be carried on more rapidly than by exerting the pressure by hand or with the old brush which had been long used; but the process is the same, and dependent upon the natural properties of the fur fibers, which, under pressure, can be driven into the interstices between the wool fibers, so that the fur will become sufficiently attached to the hat body to allow the two together to be subjected to other processes.

It is plain that the action of the jigger is not necessary to effect the result of sticking the layer of fur to the felt, and that what is meant

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by "vibrating jigger action" is a vibrating action similar to that produced by a jigger; all of which movements counsel for the plaintiff admits in argument can be performed by hand, and we think were so performed before Baglin's patent issued.

We are unable to distinguish this case from Marchand v. Emken, 132 U. S. 195, 10 Sup. Ct. 65, 33 L. Ed. 332, in which a patent was held to be void for want of invention, which covered a method of making hydrogen peroxide that differed only from the prior method of making the same in that the liquids which were used to make the hydrogen peroxide were stirred by a revolving screw, mechanically operated, and given "a peculiar motion—one which cannot be given by hand—a continuous movement of rotation, horizontally in opposite directions from the center, or radially and vertically, or nearly so, according to the shape of the vessel." All the other steps were old. The novelty claimed was imparting to the liquid undergoing chemical change a rotary or eddying movement produced by the revolving screw. The court there held that "no intuitive faculty of the mind had been put forth in the search for new methods, creating what had not before existed or bringing to light what lay hidden from vision," and said:

"There is here no sufficient foundation upon which to rest a claim which, if construed as broadly as the complainant insists it should be, practically makes all pay tribute who stir the mixture in question by machinery, and by hand also, provided substantially the same movement can be produced by hand-stirring, and this seems to be a disputed question upon the proof"—citing Hollister v. Benedict Mfg. Co., 113 U. S. 59, 72, 5 Sup. Ct. 717, 28 L. Ed. 901; Dreyfus v. Searle, 124 U. S. 60, 8 Sup. Ct. 390, 31 L. Ed. 352; Crescent Brewing Co. v. Gottfried, 128 U. S. 158, 9 Sup. Ct. 83, 32 L. Ed. 390.

Nor can we distinguish this case in principle from Wright & Colton Wire Cloth Co. v. Clinton Wire Cloth Co., 67 Fed. 790, 14 C. C. A. 646.

If the plaintiff's patent is valid upon the ground that he has invented a new process, then not alone those who perform the operation of "sticking" fur to a hat body by a combined pressing and vibrating jigger action by use of machinery, but also those who by use of these movements effect the same result by hand, must pay tribute to the patentee. A combined pressing and rubbing by hand of the fur fibers against the felted hat body for the purpose of effecting a preliminary sticking of the fur to the felted body, it is admitted, is old in the art of making napped hats, and this is all that is effected by the use of the jigger.

[4] It was strongly urged in argument that the learned judge who heard the case below erred in his finding "that the use of vibrating jiggers for performing entirely analogous operations and securing entirely analogous results is proved to have been familiar in the art before Baglin's application," and that he had failed to distinguish between the art of "felting" and "sticking"; that in the former, carroted fur is used—that is, fur that has been treated by a solution of nitrate of mercury so as to remove the water-repellent substance covering the fibers of the fur, causing the scales upon their surface to protrude to a greater extent than they do upon those of raw or uncarroted fur, and the body of the fiber itself to absorb moisture, making it more pliable and in this condition more easily to interlock with other fibers of fur,

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or of wool; while in the latter, where a napped hat is to be made, raw or uncarroted fur, which has not been so treated, is used.

While we do not doubt that the word "stick" means to those skilled in the art the preliminary union of the fibers of the fur with a felted hat body, and that sticking as a useful art may be the subject of a patent, it is nevertheless true that the manufacture of napped hats is old in the arts and that the method pursued by the manufacturer was to felt the roots of the fur fibers with the felted hat body. Burr v. Duryee, supra.

[3, 5] We think the process of sticking is analogous to the process of felting, and that the two processes only differ in the extent to which the fibers become interlocked. In that of sticking, only a part in length of the fur fibers becomes interlocked with the wool fibers; while in felting the fur fibers become interlocked with the wool fibers or with other fibers of fur for their whole length. It is not invention to apply an old force "through known instruments, used in their accustomed manner to known objects and producing known effects." All the forces applied by Baglin and covered by his claim were old. The jigger itself was a well-known instrument and used by him in its accustomed manner. The objects to which it was applied and the result produced were old. The old vibrating jigger was applied by Baglin to another use beside that of felting, and in its new use it introduced no new method in the art of sticking.

We therefore think, as did the learned judge in the court below:

"That the claims of the plaintiff are void for want of invention in that they purport to cover only the use of an old device for accomplishing by machinery the same pressure and rubbing which was formerly effected by hand."

The decree of the District Court is affirmed; the appellee to recover costs in this court.

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UNITED STATES v. SCHULZE.

(District Court, S. D. California, S. D. October 11, 1918.)

No. 1495.

1. CRIMINAL LAW ⟸371(1)—EVIDENCE—INTENT.
Where the question of the intent and meaning of a defendant in using certain language is in issue, as in a prosecution for uttering pro-German sentiments, contrary to the Espionage Act, evidence that he used similar language on other occasions is admissible to show his mental attitude, but not as evidence of the fact that he used the language charged.

2. WAR ⟸4—ESPIONAGE ACT—"SUPPORT OR FAVOR."
Under the provision of Espionage Act June 15, 1917, § 3, as amended by Act May 16, 1918, § 1, that "whoever shall by word or act support or favor the cause of any country with which the United States is at war * * *" shall be guilty of an offense, although not so stated in terms, intent is an essential element of the offense, as the words "support or favor" import willfulness and intent.

3. WORDS AND PHRASES—"SUPPORT."
"Support" means to vindicate, to maintain, to defend, to uphold with aid or countenance, and should be construed in practically the same sense as "favor."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Support.]

4. WORDS AND PHRASES—"FAVOR."
"Favor" means to regard with favor, to aid or to have the disposition to aid, to show partiality or unfair bias towards, and should be construed in practically the same sense as "support."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Favor.]

Criminal prosecution by the United States against Charles G. Schulze. On motion for new trial. Denied.

Robert O'Connor, U. S. Atty., and Lyle W. Rucker, Asst. U. S. Atty., both of Los Angeles, Cal.
A. J. Morganstern, of San Diego, Cal., for defendant.

TRIPPET, District Judge. At the time of the ruling on the motion for a new trial I promised the attorneys to file a written opinion, and this is in compliance with that promise. The defendant was convicted under an indictment charging him with violation of that part of section 3 of what is known as the Espionage Act (Act June 15, 1917, c. 30, 40 Stat. 217, as amended by Act May 16, 1918, c. 75, § 1) which reads as follows:

"Whoever shall by word or act support or favor the cause of any country with which the United States is at war, or by word or act oppose the cause of the United States therein, shall be," etc.

The language of the statute does not read, Whoever with intent to favor the cause of Germany uses certain words; but the statute is, Whoever by word favors the cause of Germany. The statute does not by its terms require that the words should be knowingly and willfully spoken.

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[1] The defendant moves for a new trial on the ground that the court admitted evidence that the defendant uttered pro-German sentiments on various occasions during the time from 1915 to the time the indictment was returned, over the defendant's objection. These statements of the defendant were admitted under the rule of evidence thus stated by Mr. Stephen:

"When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved, if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue, or is or is deemed to be relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner." Article 11, Stephen's Digest of the Law of Evidence.

There is no question here as to whether such evidence was admissible for the purpose of proving that the defendant said the things which the indictment charges he said. The court limited the effect of the evidence on the ruling admitting the evidence, and also in the instructions to the jury, to the purpose set forth in the above quotation from Stephen.

[2] The defendant argues that the government was not required to prove intent; that the mere utterance of the words constitutes the crime, and therefore this evidence was improperly admitted for the purpose of showing intent. (The word "intent" herein is used in the sense of malice, design, plan, purpose, and attitude of mind of the defendant.) The defendant argues that, where a statute denounces a certain thing as a crime, without specifying that the doing of the thing shall be done with a certain intent, then it is not necessary for the government to prove intent. The defendant's attorney illustrates his position by this:

If a defendant commits rape, prior acts cannot be introduced, because the crime is complete by committing the act, and the necessary intent is presumed; while, if the defendant commits assault with intent to commit rape, then prior acts may be proved to show the intent. In the section of the statute under consideration, nearly all the crimes denounced by this section specify that intent shall be a part of the crime. The word "intent" is used five times in this section, and the word "willfully" nine times. When the statute comes to prohibiting the use of words favoring the cause of Germany, it does not use the word "intent" nor the word "willfully."

The defendant says that the mere uttering of the words constitutes the offense. If that be true, then the witnesses who testified committed the crime denounced in the statute, because these witnesses on several occasions repeated the words of the defendant. Shall they be put to their purgation? If the mere uttering of these words by these witnesses made a prima facie case against them, then how can they defend themselves? Is the answer that they would defend themselves by proving that they did not intend to commit the crime, or that they were justified by reason of the fact that they were repeating this matter for the purposes of informing the authorities, or because they were compelled to? If so, why is that a

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defense? Can a person commit rape, and defend on the ground that he was repeating an act that some one else had done? If the spoken words per se constitute the offense, then these witnesses could not defend by showing want of intent, any more than the defendant could defend by showing want of intent, when charged with rape. If these witnesses could defend by showing want of intent, it illustrates the necessity of reading into this statute the necessity of proving intent.

Intent is a necessary element of this offense, notwithstanding the absence of the words "willfully" and "intent." Words spoken in one set of circumstances may mean an entirely different thing from words spoken in another set of circumstances. If the American army are advancing and the Huns are retreating, and I say, "We cannot always hope to win," that is pessimistic. If the Huns are advancing, and the Americans are retreating, and I say, "We cannot always hope to win," that is optimistic. In order for the government to prove the crime, the government must give color to the words. One cannot look at these words uttered by the defendant, and say that they necessarily favor the cause of Germany. Some of the sentences would not convey that meaning at all, without intent being shown.

The government has charged that the defendant made the statements to support and favor the cause of Germany. The government was entitled to prove all the words uttered, and entitled to prove that each and every one of those words uttered were spoken to favor the cause of Germany. It might well be that the government would not be able to prove the entire charge, but might be only able to prove a part of the things uttered. Now, if that part proved, standing alone, unaided by the attitude of mind or the purpose of the defendant, would not show that the defendant uttered the words to favor the cause of Germany, then the government would have failed. The government did not know and could not tell which of these statements the jury would conclude that the defendant had said.

The government must negative in its proof the possibility of the words having been uttered without intending to support the cause of Germany, or opposing the cause of the United States. For example, the court uttered every word set out in the indictment at various times during the trial, in discussing this question. Then did the court commit a crime by uttering these words? The purpose of the defendant must be made manifest, and this can only be done by showing the circumstances and by proving the attitude of mind of the defendant.

[3, 4] The words "support or favor" import willfulness and intent. The common understanding of the meaning of these words is this: Support means to vindicate; to maintain; to defend; to uphold by aid or countenance. Favor means to regard with favor; to aid or to have the disposition to aid; to show partiality or unfair bias towards. These words should be construed in practically the same sense, "ejusdem generis." All the dictionaries give a definition of favor as a disposition to aid. This makes the attitude of mind or intent

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an issue. Both words require action and purpose. One could not have the disposition to aid or show unfair bias towards, without intending to do so. To use the words willful and intent in the sentence defining this crime would be tautology.

The statute must have a sensible interpretation. To go no deeper than the words of the statute would be to stick in the bark. "For the letter killeth, but the spirit giveth life." Are we not justified in quoting Hamlet: "There is nothing either good or bad but thinking makes it so." The Supreme Court says:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1 Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, 'for he is not to be hanged because he would not stay to be burnt.' And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder." United States v. Kirby, 74 U. S. (7 Wall.) 482, 486 (19 L. Ed. 278).

The Constitution provides:

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. * * *" Article 3, § 3.

It will be seen from this quotation that neither the word "willful" nor "intent" is used in the Constitution in defining treason. Intent is an indispensable element in the establishment of treason, and prior acts have always been admitted for the purposes of showing intent. Fries Case, 3 Dall. 515, 1 L. Ed. 701, Fed. Cas. No. 5,126; U. S. v. Burr, Burr's Trial, 1 Robertson, 472, Fed. Cas. No. 14,694; Respublica v. Weidle, 2 Dall. 88, 1 L. Ed. 301; United States v. Pryor, 3 Wash. C. C. 234, Fed. Cas. No. 16,096; Regina v. Deasy, 15 Cox's Crim. Cases (Eng.) 334; Regina v. Frost, 9 Car. & P. (Eng.) 129, 38 Eng. Com. Law, 70; Regina v. O'Brien, 7 State Trials (N. S.) 1, 75.

In the case of Fries, supra, the court said:

"However indisputably requisite it may be to prove by two witnesses the overt act for which the prisoner at the bar stands indicted, yet evidence may be given of other circumstances, or even of other overt acts, connected with that on which the indictment is grounded, and occurring or committed in any other part of the district than the place mentioned. Although the prisoner be not on his trial, nor is he now punishable, for any other than the overt act laid, other overt acts and other circumstances, parts of the general design, may nevertheless be proved, to show the quo animo—the intent—with which the act laid was committed." U. S. v. Fries, Wharton's State Trials, 82, 585, 594.

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The court further said in the Fries Case:

"The intent is the gist of the inquiry in a charge of treason, and is the great and leading object in trials for this crime. The description of crimes contained in the act commonly called the Sedition Act [1 Stat. 596] lose their character, and become but component parts of the greater crime, or evidences of treason, when the treasonable intent and overt act are proved." Fries Case, 3 Dall. 515, 1 L. Ed. 701, Fed. Cas. No. 5,126.

In the trial of Burr, acts of treason elsewhere than as charged were held admissible, since they; "by showing a general evil intention, render it more probable that the intention in the particular case was evil." See 1 Wigmore on Evidence, § 367, note.

"In sedition (including seditious riot and seditious libel), other acts and utterances are receivable, under the present principles, to evidence seditious intent." 1 Wigmore on Evidence, § 367, p. 445.

See Respublica v. Weidle, 2 Dall. 88, 1 L. Ed. 301; R. v. Hunt, 1 State Trials (N. S.) 171; Regina v. O'Brien, 7 State Trials (N. S.) 1, 75.

My brother, Judge BLEDSOE, sat in the first trial of this case and the same evidence was admitted. Judge BLEDSOE advises me that, after a further consideration of the matter, he is clearly of the opinion that the evidence was properly admitted in the case.

Motion for a new trial will be denied.

THE JELLING.

THE WILLIAM COBB.

(District Court, E. D. North Carolina, New Bern Division. September 27, 1918.)

No. 93.

1. SALVAGE ⇐=29—AMOUNT OF AWARD—RESCUE OF DISABLED VESSEL AT SEA.
An award of $4,000, made to a steamship worth, with her cargo, $2,700,000, for the rescue of a schooner and cargo worth $12,000, from a point 50 miles off the North Carolina coast, where, after being driven 600 miles and disabled by a storm, she would have soon sunk, and was in effect abandoned by her crew, who came in a boat with their effects on board the steamer when she approached.

2. SALVAGE ⇐=26—ELEMENTS OF COMPENSATION—COST OF SERVICE.
While the actual expense and loss of time of a salving vessel do not constitute claims for which payment may be demanded, they are items to be considered in fixing the amount of salvage compensation.

3. SALVAGE ⇐=26—ELEMENTS OF COMPENSATION—VALUE OF PROPERTY SAVED.
Although the value of the salving vessel and of the time lost from her voyage may be large, yet the salvage award must be governed to a large extent by the value of the property saved.

In Admiralty. Suit for salvage by Carl F. Andersen, master of the Danish steamer Jelling, and others, against the schooner William Cobb. Decree for libelants.

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John D. Bellamy, of Wilmington, N. C., and J. P. K. Bryan, of Charleston, S. C., for libelants.

Julius F. Duncan, of Beaufort, N. C., for vessel owner.

J. O. Carr, of Wilmington, N. C., and Harrington, Bingham & Englar, of New York City, for cargo owner.

CONNOR, District Judge. The Danish steamer Jelling, owned by the Steamship Company Dannebrog, 2,639 gross and 1,673 net tonnage, 284 feet long, 42 feet beam, value about $2,000,000, Carl F. Andersen, master and agent, was on October 25, 1917, under charter to the Ward Line, at the rate of $40,000 a year, carrying a cargo of hemp, mahogany, cedar, etc., of 1,200 tons, valued at $700,000, on a voyage from Progreso to New York, passing up the coast of North Carolina, off Cape Lookout.

The Schooner William Cobb, an American vessel of 435 tons gross and 345 net, about 200 feet long and 30 feet beam, of the appraised value of $6,500, was carrying on October 25, 1917, a cargo of lump coal (500 tons) of the value of about $5,400. She sailed from Newport News, Va., October 11, 1917, for Ponce, Porto Rico. On the 18th day of October, when 150 miles southeast of Bermuda, she encountered a severe storm, described by members of her crew as a "tropical hurricane," which "brought the seas right over her decks continually," lasting about two hours, followed by heavy wind and rain, which continued about eight days. A member of her crew says:

"Her condition was getting worse. The crew didn't have to work night and day for the first three days, but after that they didn't know what it was to sleep. We had both hand pumps and gasoline pumps working. We had trouble with our pump continually; that was the aft pump. The forward pump was in good condition. We were kept working continually. We were pretty well puzzled as to where we were drifting, because we could not get a sight for four or five days. At times we did not know where we were. We went along doing as seamen should for the safety of navigation, pumping out our vessel and getting what sleep we could. There were times when we had no sleep, working as much as 22 out of the 24 hours to save our vessel. We watched for five days for a vessel to come along, but we couldn't see anything. One vessel passed us; we had signaled her, but she had never stopped. * * * On October 25th the vessel was leaking badly. We had already pumped her out at 3:30 in the morning, but the water was coming in at the rate of about six inches an hour. * * * The storms were so terrific at times that it was hardly possible for us to work our big pump. The sails at times, before we were able to get them in, had done away with one of our jibs, and another time it broke one of our brooms. The sails would not act at all. We merely kept up what sail we could to steady our ship; one gaff and one boom were broken."

Another member of the crew says:

"The storm was severe, and naturally the ship was leaking a little bit, and the storm makes her leak more, and the leaking was in the bow. Naturally by the storm we couldn't keep up to the wind, and we had to keep up to the wind for our course; but we couldn't do it because, every time a sea would come over, all the water would come through the bow, so we had to keep her off, and run her before the wind to keep her from sinking. We were trying to keep her from sinking for about seven days, pumping day and night. The storm took the flying jib. The foregaff was broken. The pump, before we left port, was not in proper order. The captain's mistake; he forgot. He took the measure for the top plunger, but when we went ashore he forgot to

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bring it; for the pump to pump, we had to get on top and hold a broom down to hold the pump down. The hand pump could not keep the water down."

Capt. Sabean says that:

"The storm raged with great severity for about 36 hours. It continued to blow with severity, but not so great, up to the 23d of October; pumped both day and night to keep the water down; did this up to two days before the 25th. A couple of days before the 25th one of the pumps was put out of commission."

On the morning of October 25, 1917, the schooner was on the North Carolina coast, about 50 miles from Cape Lookout, and about 600 miles from where she first encountered the storm. The steamer, Jelling was on her voyage to New York. The schooner was showing her distress —signal flag upside down. Capt. Sabean says:

"Between 2 and 3 o'clock on the morning of the 25th we sighted the steamer. I ordered my torch to be burned in order to communicate with the steamer. She came down on us about 3:30 a. m. * * * I shouted, and, as near as I could make out, the captain asked me what was the trouble. I said back that my vessel was in a sinking condition and would like to have some assistance, if not to be taken off my vessel. Some of my crew shouted out that the vessel was sinking, and I said, 'Don't shout out that we are sinking, because we are not, but sing out, if you want to say anything, and say we are in a sinking condition.'"

Capt. Andersen, of the Jelling, says that about 2 o'clock on the morning of the 25th of October, his second officer, on watch, sighted on the port bow a distress light of an unknown ship; called his attention, he being asleep; came at once; determined the vessel's course from the distress light; steered towards the schooner for about an hour; ten miles away, closing up under the stern of the vessel, heard some one shouting; could not understand what was said; used my megaphone, asking, "What is your trouble?" Answer came, "We are sinking and want to be taken off"; turned my vessel around, and distress signal was again shown on schooner's stern; came again close, and through megaphone asked, "Are you in imminent danger there? I will help you off, or can you wait until daylight?" The captain answered back, "Yes." Some of the crew said, "No; we want to be taken off right away." Turned my ship around and came near the ship's stern again. Still very dark, and very high sea; found that the schooner had lowered her boat and the crew got into it; asked, "Are you coming over in your own boat?" "Yes," was the reply; answer, "All right; we will stand by you." The boat was between the steamer and the schooner, on the off, or port, side of the steamer; ordered the boat to go round on her lee side, where there was smooth water.

Capt. Sabean, concurring substantially in the statement of Andersen, says that he told his men to put their clothes in the boat; there were provisions and water in the boat; to lighten her, ordered the water vessels thrown overboard; put his own clothes, chronometer, compass, charts, and some other little instruments; did this in case the captain would not give his tow line; would have to leave his vessel, because he did not think it safe to stay aboard, if he could not get any assistance, as his after pumps had been put out of commis-

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sion by the storm and his gasoline was about gone; had no way to get to a port and was about 50 miles from this port. I said:

"We will leave our side lights up, leave her sails up, and have a light on her stern, so nothing will collide with her. We will not set the vessel on fire, will not destroy her, until I can see what the captain will do for me. If he doesn't give me any assistance, will not tow her; we would come back and spill what gasoline we had forward, and touch a match to her and burn her up."

The testimony in respect to the action of both captains, up to this point, is corroborated by all of the witnesses. Among other things taken over in the boat were the clothes of the crew and a parrot. When the small boat reached the lee side of the steamer, by direction of the captain and officers of the Jelling, several of the crew went on her by the ladder, and others were hoisted up with the boat by the tackle of the Jelling. The contents of the boat were taken off. There is some, although not material, difference of opinion in regard to the condition of the sea when the boat went to the side of the steamer. There was some swell, but "not heavy." The boat encountered no difficulty in going to the side of the steamer, as directed.

[1] Eliminating, for the moment, the testimony in regard to which there is some contradiction, it is conceded that the captain and crew of the schooner were invited to come on board—were given coffee and sandwiches; that the men were very weary and much exhausted by their experience on the schooner, and went to sleep. They reached the steamer at about 4:30 o'clock in the morning. Capt. Sabean says, after he boarded the steamer, and the small boat was hoisted up:

"I went up on board, shook hands with the captain, stopped there a few minutes on the main deck, and he and I went up on the second deck, where his chart room was. In his chart room, he and I went over the position we were in and our nearest port, and I approached the question to him that I would like for him to put a line to my vessel; but he didn't give me any decided answer about it. A short time after the subject was brought up again about doing something for my vessel, and in the conversation we were having the captain said, 'I will not put a line to your vessel unless you give me full charge.' I said, 'Captain, can't we make some arrangements; I am helpless, don't want to lose my vessel, and by having some gasoline and your assistance my fore pump will keep my vessel afloat, if it helps this vessel to reach port.' He said, 'No, captain, we cannot make any arrangements; the courts will have to decide that.' I said, 'If we could make an agreement, why would we have to settle in the court?' He said, 'I have got two owners; the vessel is owned by some people, and she is chartered by other people, and I would have to let them decide.' I said, 'I am willing to pay you a reasonable price to take my vessel in, or I will pay you at the same rate, whatever your vessel may be now earning, for the time of the service.' We could not come to any agreement, and rather than not have him put any line on my vessel at all, I agreed, or had nothing more to say at that time about saving my vessel, but let him go ahead and put his line aboard if he would."

Capt. Andersen says that, after the captain and crew of the schooner came on the steamer, he made up his mind to keep around her until daylight to investigate her condition. At about 6 o'clock he sent his chief officer, third engineer, a carpenter, and three seamen to the schooner to investigate conditions, take soundings in her bilges, and see if there was any possibility of saving her. They returned

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about 7 o'clock and reported that she was an old vessel, in good condition, but had five feet of water in her hold and leaking heavily; thought it would be difficult to save her under the circumstances; the motor pumps were out of order; none of them were working; that he thought it would be possible to repair the forward motor pump and get it to run. He called his officers together on the bridge and consulted them in regard to trying to save the vessel. They agreed to try to do so. He says that, up to this time, nothing had been said to him by Capt. Sabean about saving, or towing, the schooner.

"When he saw I had a meeting of my officers about 7 o'clock, he came to the lower bridge and said, 'Are you going to save her?' I replied, 'I don't know, captain; I might do it.' He asked me how much towage would cost. I said, 'I don't know.' He said, 'Well, could you take her in for $5,000 or $6,000, which I could pay if you started towing her?' I said, 'Captain, you are aboard her now, and I don't know if I will save her; but, if I do take her in tow, the costs must be left with the proper authorities, if I get the ship into a safe port.' He had never asked me to tow her in any way. I personally decided to take that vessel in tow; he had never offered, or asked me, such a question about turning her over. When the captain came on board, it was about 7 o'clock, he asked me; but I told the captain that, if he and his crew was on board the ship, then I could not take the ship in tow, as there could not be any salvage money near the value of the cost of my ship, and delay and expense, and that I would not tow her into port under the present condition, if he stayed on board the ship. He never asked me for any gasoline."

There is evidence tending to corroborate both captains in regard to this conversation and the time at which it occurred. The weight of the evidence brings me to conclude that the conversation took place at the time fixed by Andersen. When the crew reached the steamer at 4:30 in the morning, they were physically exhausted; after getting coffee and sandwiches, they went to sleep. I am of the opinion that, when they left the schooner, they did not expect to return, or that it would be saved. The thought of towing, I think, came when Sabean found that Andersen had sent his men to examine the schooner and her condition, and heard the discussion and decision of Andersen and his officers to try to save her. This was natural and proper. Upon finding that there was a chance of saving his ship, it was his duty to the owners to try to make terms with the salvors. Andersen instructed his officers and seamen to get their breakfast and go aboard the schooner. At about 9 o'clock, they went aboard her with one day's rations and 10 gallons of gasoline.

Loeber, second officer of the Jelling, went to the schooner with Nielson and three sailors. He says:

"The pumps were in poor condition—would not work; told Nielson to go to work on them; took the sails down; foregaff was broken in two places; main boom was broken; at the aft pump water was about 4 feet 6 inches; at forward pump, about a foot and a half over the keelson; caulked the hand pump; water was rushing in; the two sailors worked the hand pump. The steamer came near, and we connected the hawser to the schooner and proceeded to tow under slow speed, in order not to part the hawser line; proceeded to Beaufort, the nearest port; she was leaking heavily, and the men were working the pumps; at about 11 o'clock proceeded under faster speed. At about 2 o'clock afternoon, reached Cape Lookout light vessel; water pump-

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ed down to two feet, and sea had become smooth; from 9 o'clock a. m. until noon thought schooner could not be saved, and came very near abandoning her; water poured in so rapidly. At about 6 o'clock p. m. flashed for a pilot in bay of Cape Lookout; came at 6:35; the schooner was anchored at 7 o'clock; pilot advised not to enter bar during dark hours; second officer came on board steamer for consultation; said two feet water still in bilges; would have to pump all night; needed more gasoline, which was given him; got two pilots for both schooner and steamer. At 7:35 a. m. passed over bar of Beaufort; at the same time the schooner grounded and the hawser parted. In order to keep the vessel in position, her starboard anchor was dropped, with 15 fathoms cable. The pilot proposed to send a tug to save the schooner when it came at high water, but I told him that I would come back with my steamer and take her in myself. He said that it was a dangerous job; the tide was running at four knots, and the channel was very narrow, and the ship could not swim. Proceeded in the harbor with steamer; turned her around; came around and returned in the harbor; went over the bar again, and came back and anchored just ahead of the schooner standing at the bar; got a new tow line on schooner. The vessels were then in a very critical position, both vessels, about 10:30, as the wind changed from northeast to southeast, with a strong wind. At 11 o'clock ordered to cut the cable on the schooner; its motor windlass would not lift the anchor; when released from her anchor, the Jelling proceeded slowly ahead, the schooner floated, and at 11 a. m. she was anchored in Beaufort harbor. The cable was cut, because the vessel was in such a position that the anchor, which was standing from the starboard towards aft, could not be lifted with the schooner's motors and windlass. It was in bad condition—the steamer was in a critical condition and had to cut the cable; otherwise, it would have been stranded on the bar, and the schooner might have stranded as well, and possibly we would have torn a hole in her."

There was some contradictory evidence in regard to condition of the sea; it was "choppy"—not unusually rough. The schooner was turned over to the marshal on the 28th at 8 o'clock a. m. The captain and crew of the schooner remained on the steamer until she came into Beaufort. They were not requested, nor did they offer, to assist in bringing the schooner into port. The steamer consumed about 35 tons of coal in handling the schooner, worth $8 a ton, and 50 gallons of engine oil. The hawser was worth $355. A rail on the starboard side of the steamer was broken, worth about $50. The board of each of the crew of the schooner was worth $1.50 a day. The schooner was appraised at $6,500, and released upon bond. The coal was sold at public auction for $11.25 per ton, weighing 490½ tons, aggregating $5,518.12.

Libelants insist that the schooner was abandoned by her crew, and was, at the time she was taken in charge by the crew of the Jelling, a derelict. Respondents insist that the crew did not abandon her; that they intended, when they left to go to the Jelling, to secure her services in towing the schooner into port; that with a supply of gasoline they could have kept the water down. The evidence tends strongly to show that, in the absence of aid, the schooner would have sunk in a short time—a few hours. I am constrained to think that this fact was recognized by her captain and crew; that they were exhausted physically, and knew that their pumps were in "bad condition." They did not, in my opinion, formed upon considering all of the testimony and their conduct, expect to return to the schooner, except possibly to burn her, to prevent her becoming a menace to navigation. I do not doubt that, but for the action of the captain

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and crew of the Jelling, she would have, in a few hours, been a total loss. It is not very material to inquire whether, under the conditions disclosed, she was a derelict. She was certainly in imminent peril—as her captain said, "in a sinking condition"—when overtaken by the Jelling on the morning of October 25th.

In view of the small value of the property saved, much less than libelants supposed at the time they undertook the work, as compared with the value of the steamer Jelling and her cargo, the amount of her earnings per day under the charter, and the time consumed in bringing the schooner into port, there is but a small margin for a bounty to the libelants. While but little aid is derived from adjudged cases, each depending largely upon the peculiar conditions, I find a very satisfactory statement of the principle or rule by which courts are guided in making awards, under conditions somewhat similar to those disclosed in this case, laid down by Judge Sanborn in The Western Star (D. C.) 157 Fed. 489. He says:

"The important considerations affecting a salvage service are whether the aided vessel could have saved herself, or was in probable danger of destruction or serious damage, and, if so, her value; what was the degree of danger to the vessel aided; * * * also whether the salvage service was rendered with promptitude, skill, vigor, and energy, and was successful; what was the danger or hazard in rendering the service, and what was the value so risked, the time spent, its value, and the damage or loss to the vessel by which the service was rendered. * * * Further, it should also be taken into account, although perhaps of minor relative importance, whether the owners of the property saved have acted reasonably in offering reward, or so unreasonably that the salvor is compelled to assume the delay, vexation, and expense of litigation to establish his rights."

Applying this standard for measuring the amount which should be awarded to the Jelling, it is manifest that the schooner was in imminent danger, without the aid rendered by the Jelling. She would have sunk very soon, resulting in total loss. The value of the schooner and her cargo is ascertained by appraisement and public sale. The value of the Jelling and her cargo, fixed by her master, is not controverted; they were, as compared to the schooner and her cargo, large.

I am unable to find that either the crew, or the steamer, or her cargo were in any serious danger, by reason of the deviation and service rendered. I am not impressed with the suggestion, somewhat exaggerated, that the sea was very "rough," or that there was any unusual "swell." The boats had no difficulty in going to and from the two ships. The schooner followed the Jelling, when taken in tow, without difficulty.

The service was rendered promptly, and with skill and energy. I do not think that there was any delay for which the captain and crew of the Jelling can be criticized. The service was skillful and, in all respects, successful. The question which has given me most concern is in fixing the amount which should be awarded by reason of loss of time sustained by the Jelling in rendering the service. Fixing the beginning of the period at, approximately, 2 o'clock on the morning of Thursday, October 25, 1917, that being about the hour at which she sighted the schooner, and stopped on her course, she completed the service—anchored the schooner in Beaufort harbor—at 11 o'clock Friday morning, October 26th. She took on a supply of coal at about noon

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Saturday, October 27th, and on the same day filed the libel in the court at New Bern, about 37 miles distant from Beaufort, with a railroad connection—having two trains each day. The libel was served, and schooner taken into custody by the marshal, at 8 o'clock on Sunday morning, October 28th. The captain remained at Beaufort, for the purpose of having the deposition of himself and his crew taken, until the night of Monday, October 29th, getting back on his course at 10:30 p. m. of that day.

Passing the question whether, after anchoring the schooner at Beaufort and getting a supply of coal, he should not have placed one or more of his crew on the schooner, until an effort could be made to agree upon a reasonable amount for the service, or a libel filed, it is clear that he was entitled to remain at Beaufort until he secured and took on coal, noon of Saturday, October 27th. Conceding his right to await the coming of the marshal on Sunday, October 28th at 8 o'clock a. m., it would seem that, in view of the large expense incurred by the delay, he should, at a favorable condition of the tide, have resumed his voyage not later than midday of Sunday. He brought the schooner in on full tide at 11 o'clock on Friday. There is no suggestion that weather conditions prevented the Jelling from going out at or about the same hour on Sunday, October 28th. Counting from 2 o'clock a. m. on Thursday, October 25th, it would seem that the Jelling should have returned to the point from which she first sighted the schooner, 50 miles from Beaufort, by 2 o'clock on Sunday, thus being delayed 3 days and 12 hours from the time she began the service. This, of course, is but approximate. She claims that the time consumed was 4 days 20 hours and 15 minutes, making 1 day and 8 hours longer than would seem to have been necessary. I do not think that, in the absence of any effort to agree upon compensation with the captain of the schooner, who was at Beaufort, and who says that before the service was rendered he proposed to pay $5,000 or $6,000 to be taken into port, that the time consumed in taking the deposition should be charged to the schooner, at the rate of $1,333 a day.

[2, 3] While the actual expense incurred, or loss of time by the Jelling, do not constitute claims for which payment may be demanded, they are items to be considered. The rule by which courts of admiralty are guided in respect to them is stated by Kennedy:

"Whilst the amounts of damage, expense, or loss of profits ought not, under ordinary circumstances, to be taken as 'fixed figures,' or 'moneys numbered,' to be added to the amount of the reward for actual salvage services, the fact that such damage, expense, or loss has been caused by the performance of the salvage service is a fact which the court ought never to disregard in assessing the amount of the reward. But all the circumstances, of which this is only one, must be considered together, and it does not follow necessarily that, because the salvor proves such damages, expenses, or losses, the court should fix the sum awarded high enough to cover them. On the contrary, the salvage service may itself be so trivial as to make it unjust, or the property salved may be of so small a value as to make it impossible to cast the burden of such an indemnity upon the owner of the salved property. * * * When, however, meritorious salvage services have occasioned to the salvors serious pecuniary loss, and when the value of the property saved is ample, not only to defray the loss sustained by a salvor, in addition to an adequate sum for salvage proper, but also to leave a substantial surplus

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for the owner of the property saved, the salvor should be remunerated with a sufficient sum, both to reward him for his risk, labor, skill, and conduct, and also to cover any damages, expenses, and losses incurred through rendering the service." Kennedy on Civil Salvage, 183.

If, in this case, the value of the schooner had been "between $50,000 and $75,000," as alleged, and as the captain of the Jelling supposed, when he "made the venture" of salving and securing a large award, if successful, instead of accepting the offer for towage service, for a fixed sum, he would have been entitled to a reward very much larger than the value of his prize, as now ascertained, justifies. It would be manifestly unjust to take practically the entire value of the schooner and cargo as a reward for services which could have been rendered by a ship of very much less value and "towing power" than the Jelling, because of the large amount which she was receiving under the terms of the charter party. While the salving vessel is to be rewarded liberally for salvage service, because of the risk which she takes of receiving nothing, if unsuccessful, she also takes the risk of error in the valuation which she places on the vessel saved.

There was, in the conduct of the captain and officers of the Jelling, every element of calculation and careful consideration of the conditions, with ample opportunity for estimating the chances of success and pecuniary reward. The only error made in their calculation was in respect to the value of the William Cobb. After the schooner was anchored, with a day's time and ample opportunity for examination, the captain in his libel swore that the value of the schooner was "between $50,000 and $75,000," and her freight money $7,500. It must be assumed that he honestly thought this was true and undertook the service on that basis. While the testimony is contradictory in regard to the time at which the captain of the schooner asked the captain of the Jelling to tow the schooner into port for an agreed price, it is clear that such a conversation was had, and that his proposal to enter into such a contract was declined.

I am not inadvertent to the fact that, by reason of the local conditions following the anchorage of the schooner, the coal sold for an amount in excess of its value on board. The delay in surrendering the William Cobb to her owners, from October 28, 1917, to January 16, 1918, was due to unusual weather conditions preventing an earlier delivery of the coal.

After a careful consideration of all of the factors entering into the situation, with which all parties were confronted, I am of the opinion that an award of $4,000 should be made to the Jelling and those of her crew who assisted in the service. Each party will pay its own witnesses, including costs of subpœnas, service, and taking depositions. The other court costs will be divided equally between libelants and respondents, each paying one-half. This will include the cost of appraisal rendered necessary by the excessively exaggerated valuation put upon the schooner in the libel.

The apportionment of the amount of the award to be paid by the schooner and cargo will be provided for in the final decree. The clerk will make and report to the court a statement of the cost and expenses incurred, when a final decree will be drawn.

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In re REISWIG.

VALLELY v. GALBRAITH.

(District Court, D. North Dakota. October 10, 1918.)

1. BANKRUPTCY ⟸272—ADMINISTRATION OF ESTATES—DUAL ADMINISTRATION THROUGH GENERAL ASSIGNMENT AND BANKRUPTCY.
The practice of the Northwestern Jobbers' Credit Bureau, one of a number of corporations organized by jobbers, and whose stockholders usually own a majority in number and amount of claims against insolvent mercantile debtors in a number of districts, in handling the estates of such debtors, *held* to require careful scrutiny. Such practice has been frequently to pass the estate first through a common-law assignment, and then through an administration in bankruptcy, resulting in dual expenses of administration, to the detriment of creditors outside of the Bureau.

2. BANKRUPTCY ⟸288(3)—JURISDICTION OF COURT—SUMMARY PROCEEDINGS.
Where bankruptcy succeeds a common-law assignment within four months, based on the assignment as an act of bankruptcy, the bankruptcy court has jurisdiction by summary proceedings to call upon the assignee to account for funds withheld for fees and expenses.

3. BANKRUPTCY ⟸288(3)—SUMMARY JURISDICTION—ADVERSE CLAIMANT.
A common-law assignee holds the property as agent for the assignor, and where bankruptcy follows within four months the fact that he claims a certain part of the funds still in his hands for fees and expenses does not convert him into an adverse claimant.

4. BANKRUPTCY ⟸474—PROCEEDINGS BEFORE REFEREE—ALLOWANCE OF COSTS.
A person brought before a referee in bankruptcy by an order to show cause, on a successful defense, is not entitled to have his bill for expenses and attorney's fees taxed and paid from the estate.

In Bankruptcy. In the matter of Conrad C. Reiswig, bankrupt. On petitions of John Vallely, trustee, for review of order of referee, and of John P. Galbraith for review of second order. Reversed as to first order, and affirmed as to second.

Fisk & Murphy, of Minot, N. D., for petitioner.

Todd, Fosnes, Sterling & Nelson, of St. Paul, Minn., for respondent.

AMIDON, District Judge. Respondent, John P. Galbraith, was assignee under a common-law deed of assignment of the bankrupt's estate, dated August 18, 1917. He immediately took possession and sold the stock and fixtures for $12,340.09. From collections and other minor items, he brought the total of the estate up to $13,289.78. Within four months after the assignment, to wit, December 3, 1917, an involuntary petition in bankruptcy was filed, and on December 22d adjudication was made. The petitioner, John Vallely, was elected trustee, and qualified on January 21, 1918. On February 4, 1918, respondent, Galbraith, filed with the referee in bankruptcy his report and account as assignee, which showed receipts as above, and set forth a detailed statement of disbursements, amounting to $1,631.53, leaving a balance of $11,658.25, which he turned over to petitioner as trustee in bankruptcy. The residue, to wit, $1,631.53, Galbraith retained as legitimate disbursements and fees under the common-law assignment. The report closed with a prayer for an

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order "approving and allowing said account, and approving all acts of your petitioner as such common-law trustee."

Upon this report and a brief petition by the trustee in bankruptcy, the referee, under date of April 18, 1918, made an order upon respondent to show cause why he should not pay over to the trustee $1,474.10 of the sum withheld by him as common-law assignee, embracing such items as his fees, $430.33, and expenses for taking the inventory and investigating the business condition of the bankrupt. In response to this order respondent entered a special appearance, and objected to the jurisdiction of the court on two grounds, to wit: (1) That respondent is a resident and citizen of the state of Minnesota, and not within the territorial jurisdiction of the court. This objection was not pressed, and was plainly untenable, in view of the fact that respondent by his report had submitted himself to the jurisdiction of the court. (2) That respondent is an adverse claimant to all moneys referred to in the order to show cause, and cannot be held to show cause in this summary proceeding. The referee withheld his ruling upon this objection, and thereupon, without waiving the objection, respondent produced his evidence, going fully into his administration of the estate as common-law assignee, and attempting to show that the sums charged were all reasonable and beneficial to the estate. At the conclusion of the hearing the referee dismissed the order to show cause, upon the objection to the jurisdiction of the court to proceed otherwise than by plenary suit. This ruling is certified to the court for review on petition of the trustee.

Respondent presented to the referee a cost bill for expenses and attorney's fees in connection with the order to show cause, amounting to $377.80, and asked that the same be taxed and that the trustee be ordered to pay the amount out of funds of the estate, as part of the expenses of administration. The referee denied this petition, and that ruling has also been certified to the court for review on petition of respondent.

[1] The case is of greater importance than the pecuniary interest indicates. It involves the power of courts of bankruptcy to deal by summary order with a practice that has become general of passing estates of insolvent retail merchants through both common-law assignment and bankruptcy. A brief summary of the facts disclosed by the record will be necessary to present this practice.

Respondent, Galbraith, is general manager, treasurer, and secretary of a corporation known as the Northwestern Jobbers' Credit Bureau, organized under the laws of Minnesota. Its stock is mainly held by jobbers located at Minneapolis and St. Paul. The objects of the Bureau are:

"First, the exchange of ledger information between subscribing members; second, the investigation of the estates of failing debtors and the liquidation of their affairs; third, the obtaining of evidence in order to assist in the efficient prosecution of fraudulent failures."

The Bureau is one of 65 similar organizations located in important wholesale districts throughout the United States, all of which operate under the general supervision of the National Association of

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Credit Men of New York City. These bureaus co-operate with one another in liquidating estates of insolvent merchants, and in mercantile cases almost invariably represent a majority in number and amount of creditors. The Northwestern Jobbers' Bureau, although a corporation, having capital stock, does not pay dividends. Its earnings are first used to pay salaries of employés and the overhead charges. The surplus earnings are used in assisting in the prosecution of fraudulent bankruptcies. Mr. Galbraith is paid a salary of $6,300, and the numerous other employés are paid salaries ranging from $1,500 to $3,000 annually. The Bureau also has at its command a corps of experts upon whom it may call to take inventories, investigate business transactions of merchants, and dispose of stocks that come within the control of the Bureau. It also has a force of clerks, and such other assistants as experience has shown to be necessary in transacting its large business. In districts other than Minnesota it has one or more men whom it regularly elects as trustee in bankruptcy. Mr. Vallely usually acts for it in that capacity in North Dakota. The Bureau extends over the states of Minnesota and North and South Dakota, and parts of Wisconsin, Michigan, Iowa, and Montana, and handles about 300 estates per year. It collects a fee of 5 per cent. upon the amount distributed to creditors, or, in case a common-law assignment is succeeded by bankruptcy, 5 per cent. of the amount turned over to the trustee in bankruptcy. In addition to this fee it charges for the wages paid to special employés for conducting investigations, taking inventories, etc.; also for attorney's fees paid out by it, and numerous smaller sums for postage, stationery, stenographic work, etc.

In about one-third of the estates the practice has grown up of first taking a common-law assignment. Under this the estate is converted into cash, and the affairs of the merchant carefully investigated. Sometimes the estate is distributed under the assignment, but more frequently a petition in bankruptcy is later filed, and the estate finally distributed under the Bankruptcy Act. In these deeds of assignment, and in bankruptcy cases in Minnesota, Mr. Galbraith is named as assignee and trustee. He acts throughout as the agent and officer of the Bureau. All funds received by him are paid into a trust account of the Bureau. Against this Mr. Galbraith draws checks on behalf of the Bureau for the payment of dividends to creditors, or for turning over funds to a trustee in bankruptcy. Sums deducted for expenses, and the 5 per cent. fee of the Bureau are passed to an "expense account." The fee and all sums charged for by the Bureau belong to it, though they are presented in the accounts of the assignee and trustee as his fees and expenses. Out of the fund created in the so-called "expense account" the salaries of Mr. Galbraith and the other regular employés are paid. Thus it is clear that, while he acts as trustee under the deed of assignment, he in fact is acting simply as the agent of the Bureau, and all funds coming into his hands as assignee are held by him as its agent and officer.

It was stipulated upon the hearing that Mr. Galbraith and the Bureau are amply able to respond to any order made by the referee

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or the court for the restoration of any part of the sum withheld under the common-law assignment.

From this statement it is plain that the power of the Bureau over the estates of insolvent retail merchants ought to be subject to the careful scrutiny of courts. It is a permanent organization and continuous in its activities. It thus acquires a skill and power such as other creditors do not possess. It is efficient, and I do not in this opinion make any reflection upon the integrity of its policies; but such agencies representing a single class, so long as human nature is what it is, are likely to develop practices such as are almost inseparable from a permanent bureau, and also such as press their rights beyond the limits of what is just and fair. While it is true in mercantile failures that wholesalers, constituting as they do a majority in number and value of creditors, are entitled to the influence which the law gives to those having such majority, it ought never to be forgotten that the power thus exercised is in the nature of a trust, and can never properly be used to secure to the wholesale merchants, or the agents of the bureau acting in their behalf, any unjust advantage. Their position is the same as that of a majority of stockholders with respect to the minority, as explained in the memorable opinion of Judge Sanborn in the case of Jones v. Missouri-Electric Co., 144 Fed. 765, 75 C. C. A. 631. It is also true that the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 544) speaks in unmistakable terms against exorbitant or duplicate expenses. This feature of the act was emphasized by section 72, which was added by the amendment of 1903 (Act Feb. 5, 1903, c. 487, § 18, 32 Stat. 800 [Comp. St. 1916, § 9656]). Courts, whenever their attention has been called to unreasonable or illegal charges, have been prompt and firm in applying the remedy. They have also declared with equal emphasis that services rendered under a common-law assignment can only be allowed in case a petition in bankruptcy is filed within four months after the assignment, when the services are shown to have been beneficial to the estate, and then only to the extent to which they have been beneficial. Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, and the many cases in the lower federal courts which have followed that decision. It is manifest, therefore, that the practice of passing estates of insolvent merchants through both a common-law assignment and bankruptcy has the burden of justifying itself, unless the mere statement of account shows the practice to have beneficial as to a particular estate.

My attention has within the past few months been called to certain concrete cases by the clerk of court of this district, by some of the referees; and also by clerks of courts of other districts of the Eighth Circuit in which I have been sitting, which show clearly that these bureaus have already developed practices which need correction. Fortunately in this district the whole subject has been brought under examination by an able examiner of the Department of Justice, Mr. Delmas C. Stutler. He has submitted a detailed report to the Attorney General, a copy of which has been transmitted to me. I set forth in a note a quotation from this report, believing that it

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will not only show the reason why I think there is cause for careful supervision over the conduct of this particular bureau, but in the hope that this full statement of the subject will lead to a more careful supervision of the practices of similar bureaus in the administration of insolvent mercantile estates in other districts.[1]

None of these practices have ever been brought to my attention by appeal or certificate. This is due to the fact that the interest of no individual creditor in any particular estate was sufficient to

[1] Regarding the Northwestern Jobbers' Credit Bureau, it is deemed proper at this point to call attention to certain of their methods and practices in the control and management of estates in this district that appear to be somewhat questionable. This appears to be an organization, co-operative in its nature, composed of the jobbers in various lines of business in the northwest section of the country, who as stockholders pay into the association certain dues or assessments to defray expenses, etc., of the association in protecting their various interests, by keeping in touch with business conditions, collecting claims of creditors, furnishing legal counsel and advice, and protecting their interests in all bankruptcy and other matters generally. No doubt it is a perfectly legitimate and beneficial establishment, composed of members who are well-meaning and at all times aiming, as regards the conduct and management of bankruptcy matters, to strictly comply with the requirements of the Bankruptcy Act, and in addition thereto lend every assistance of their association to the strict enforcement of the law.

However that may be, the examination of various accounts of trustees in closed cases on file in the clerk's office at Fargo invariably showed that in those estates controlled by the Northwestern Jobbers' Credit Bureau, and managed by their professional trustees the cost of administration was far in excess of costs of estates of similar magnitude administered by local trustees. In fact, cases were found which had been managed by the Bureau through its trustee (elected by its stockholder creditors), where the fees and expenses claimed and allowed appear absolutely unreasonable and exorbitant. As an instance of this, the Hilman Mercantile case is cited (Bankruptcy No. 1987), wherein the law firm of Todd, Fosnes, Sterling & Nelson, of St. Paul, representing Arthur R. Smythe, trustee, who was appointed by the association's majority control, filed a claim for professional services amounting to $2,006. A copy of said claim is attached hereto, marked Exhibit B and made a part of this report.

Referring to said exhibit, under date of December 10, 1916, is a charge of—

Mr. Fosnes at Grand Forks, N. D., to go over files with referee and secure order for payment of second dividend	$ 25.00
Of April, 1917, 292 letters written	146.00
Of April, 1917, 220 letters received and examined	110.00
General conference with trustee and other services which cannot be specifically enumerated, consuming at least twenty days	675.00
The total of which is	$956.00

Mr. Sveinbjorn Johnson, the referee in this case, disallowed the above amount for very good reasons, apparently so, at least, and notified said attorneys of this disallowance under letter dated April 21, 1917. A copy of said letter is attached hereto, marked Exhibit C, and made a part of this report. Mr. Johnson states in his letter that these claims appear to be exorbitant, etc.; but it was found that later the trustee and his attorney prevailed upon him to allow the claim, on the argument, as Mr. Johnson advised me, that the Credit Bureau represented the majority of the creditors, and were therefore in position to dictate the payment of the trustee's attorney fee.

Not only are the fees and expenses of attorneys designated by the Jobbers' Bureau apparently set out of proportion to the ordinary or average fees and expenses incurred by local attorneys, but the cost for travel on the part of trustees which they elect, and of so-called experts sent from St. Paul to

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lead him to assume the expense of conducting such a review, or carrying on a contest with an organization so powerful and skillful as the Bureau. It is hardly necessary to add that, upon the court's attention being brought to the subject by the report of the examiner, the rules of court have been modified so as to correct the evils pointed out, and the attention of referees upon whom the administration of the bankruptcy law must mainly devolve has been called to the necessity of exercising an independent judgment, and not allowing

North Dakota to prepare inventories, is enormous. All of these expenses are incurred by the Jobbers' Credit Bureau as a matter of course, without previous application to the referee or court to incur such expense. If the officer of the Bureau feels that it is advisable to send a man from St. Paul to Minot, N. D., probably 500 miles, to inventory stock of goods, or if they see fit to put a detective to work to unearth concealed assets at an expense of $400 or $500, they do it, without asking the court for previous authority. They pay the expense and present the bill to their trustee for payment as a matter of course. They may not have done this with all the referees, but the record indicates that the practice has been permitted under Referees Smith, Elton, Johnson, and O'Hare.

Mr. Elton, referee, who is now closing up his referee business, stated that he was of the opinion that the Northwestern Jobbers' Credit Bureau was a detrimental figure in the economical administration of bankruptcy estates in North Dakota; that fees have been actually claimed by the association's attorney for representing general creditors (not petitioning creditors), on the theory that the association, representing the majority of creditors, had, by experienced men and prompt administration, saved money for all creditors; that not only are expenses of their official trustee, for travel back and forth, enormous, but other expenses are incurred in proportion; that attorney's fees and expenses of travel to attend meetings to declare dividends have been paid when such attendance on the part of attorney is considered unnecessary.

Referee Lewis, at Minot, who is believed to be an excellent, high-grade, and up-to-date referee, appears to have had some of this business to contend with himself, as is evidenced by a rule which he promulgated for his court regarding attorney's fees, etc., and his letter of January 17, 1917, addressed to Bosard & Twiford, attorneys, regarding expenses incurred generally by the Northwestern Jobbers' Credit Bureau. Copy of this rule and letter are attached hereto, marked Exhibits D and E, respectively, and made a part of this report.

As a further illustration of possible unnecessary expenses incurred and paid in estates administered through the supervision of the Northwestern Jobbers' Credit Bureau, attached hereto, marked Exhibits F and G, are statements of account filed and allowed in the Kath Bros. case, for fees and expenses of Morphy, Bradford & Cummins,, and statement of John Vallely, trustee in the same case, for expense of travel back and forth from Grand Forks, his residence, to Fargo, the official residence of the referee, and other places. This latter bill will give some idea of expenses usually incurred by the association's trustee, who is appointed possibly without regard to the distance from his residence to the headquarters of the referee or the location of the assets to be administered. In this case (Kath Bros.) the Northwestern Jobbers' Credit Bureau procured the service of Oswald Jones Detective Agency to investigate a shortage of stock of merchandise, paid for said service the sum of $493.47, and filed claim for same against the estate. Previous authority was not asked of the court to incur the expense, and the claim was filed and allowed as a matter of course.

It seems apparent that the minority creditors in estates handled by the association have been imposed upon, and it is very apparent that some of the referees have also been imposed upon somewhat, in permitting this association to take matters into their own hands and conduct the administration of estates according to their own ideas, regardless of the requirements of the law.

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trustees who represent a majority of creditors, or their attorneys, to waste estates by unnecessary or illegal expenses, or to overawe referees in the firm performance of their duties.

[2] Turning, now, to the first certificate of the referee, the question is: Has a court of bankruptcy, in such cases as I have described, power to call upon a common-law assignee to account by summary process for funds deducted from the estate as fees and expenses, when a petition in bankruptcy is filed within four months, and is based upon the assignment as an act of bankruptcy?

It is the uniform holding of the federal courts that as to the capital of the estate the common-law assignee is not an adverse holder, but a mere agent of the assignor for the distribution of the estate among creditors. Bryan v. Bernheimer, 181 U. S. 188, 192, 21 Sup. Ct. 557, 45 L. Ed. 814; Davis v. Bohle, 92 Fed. 325, 326, 327, 34 C. C. A. 372; In re Bininger, Fed. Cas. No. 1,420, 3 Fed. Cas. 412, 417; In re Stuyvesant Bank, Fed. Cas. No. 13,581, 23 Fed. Cas. 207, 209; Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165. In the present case the assignee was not acting under the supervision of a state court, charged with the jurisdiction of examining his accounts and fixing his compensation. All these matters lay simply in the personal judgment of Mr. Galbraith and the Jobbers' Bureau, for which he was acting. May he, by his mere say-so, deduct from the estate such sums as seem to him just, and turn over the residue to the court of bankruptcy, and say that as to the sums deducted he is an adverse claimant, and can be called to account only by a plenary suit? The referee held that he may. The decision was made reluctantly, and upon the expressed opinion that such a practice is not consistent with sound administration of estates of bankrupts. But the referee felt that he was compelled to reach that conclusion by the decision of the Supreme Court in the case of Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413. In my judgment that decision does not require such a holding. To understand the decision of the Supreme Court it is necessary to examine with some care the case, as more fully reported in Sinsheimer v. Simonson, 107 Fed. 898, 47 C. C. A. 51.

The controlling features of the Comingor Case are these: The bankrupts made a general assignment for the benefit of creditors in December, 1898. Comingor was the assignee. The administration upon the assignment was under the jurisdiction and control of the state court. By the local practice a suit had to be instituted immediately upon the execution of the assignment, by means of which parties concerned were brought before the court, and from that time forward the assignee acted under the court's supervision. The petition in bankruptcy was filed on February 14, 1899, two months after the assignment, but the case was pending in the District Court, and the Court of Appeals, until February 12, 1900, before the adjudication was actually made. In the meantime the estate had been converted into cash, amounting to $92,865.77. The assignee had paid out to attorneys representing him $3,200, and had credited himself and paid out as fees belonging to himself $3,300; that amount being such a sum as would have been due him under the established practice

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of the state court. The trustee in bankruptcy had applied to the state court upon a petition stating, among other things, "that the officers of the court had been paid in full, and had no claims on the fund in court," and upon that statement had obtained an order for the turning over of $46,305.03, remaining in the estate after crediting disbursements as to which there was no objection, and also the fees of the assignee, $3,300, and his counsel, $3,200. Having thus obtained the capital of the estate without any formal action of the state court, settling the account of the assignee, the referee of his own motion cited Comingor to show cause why he should not pay to the trustee in bankruptcy the $3,300 deducted as his own fees, and $3,200 previously paid out by him to his counsel. In response to this order Comingor set forth that before the petition in bankruptcy was filed he had made the payments to his counsel, and had credited to himself and paid out the fees, believing them to be due according to the state practice; that he had none of the funds in his possession, and no means wherewith to pay them, and furthermore he stated, in one of his returns, that he had tried to borrow or raise the money with which to make the payment and found it impossible to do so. See 107 Fed. 901, 47 C. C. A. 51. The referee and trial court, in making the order absolute, did not question the amount of Comingor's fees under the state practice, and conceded that the amounts which he had paid to his attorneys were "usual and reasonable, according to the scale of compensation allowed for such services by the state court." Their theory, however, was that, as the assignment was an act of bankruptcy, it was void, and afforded no protection for any disbursements for fees or services made under it, and they ruled upon this legal theory that the money was "in contemplation of law" in Comingor's possession. Their legal theory as to the assignment was clearly wrong. While it was rendered void upon the filing of the petition in bankruptcy, it was not fraudulent, and acts done under it in good faith, and in the exercise of a reasonable discretion, would be fully protected if they were beneficial to the estate, and would in any case afford a shield against an order that the officer be committed to jail as for contempt for failure to return the money. Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165; Summers v. Abbott, 122 Fed. 36, 58 C. C. A. 352; Bramble v. Brett, 230 Fed. 385, 388, 144 C. C. A. 527.

This brings us to the gist of the Comingor Case. Conceding the return of Comingor to be true, had the referee and District Court power to make the rule absolute and commit Comingor to jail for failure to return the money? The Circuit Court of Appeals and the Supreme Court held that no such power existed, but that Comingor, if he was liable at all, was only liable for debt, and could only be proceeded against by a plenary suit and a common-law judgment. The Circuit Court of Appeals bases its decision upon the ground that the return was a complete defense upon the facts, and reversed the case upon that ground, and directed that the order making the rule absolute should be set aside. The Supreme Court bases its decision

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upon slightly different grounds. It holds that the assignee had acted in good faith, that he had not the funds in his possession, and that upon this showing the referee and District Judge were without power or jurisdiction to deal with the subject by means of the summary process, for under that the only execution that could be issued against Comingor would be a jail sentence, and the court holds that if Comingor was legally liable to make good the fund, because of the invalidity of the assignment, he could not be compelled to do so by a jail sentence, but could only be proceeded against by an appropriate action which would result in a common-law judgment for the fund, upon which collection could be made against Comingor's property, if he had any, or upon his bond if he had given a bond. In other words, the reason that underlies the decision is that, upon the showing made by Comingor, the jurisdiction of the referee and the District Judge to proceed to the absolute order ceased, and the only right of a trustee in bankruptcy against him for the recovery of the money must be by a proceeding for the collection of a debt.

[3] Such being the real decision in the Comingor Case, it is not an authority for the doctrine that a court of bankruptcy has no jurisdiction to cite a common-law assignee to account for moneys which have come into his hands under the assignment, but is only an authority against the abuse of the jurisdiction. The assignee, as to all moneys which come into his hands under the assignment, is the agent of the bankrupt, and the fact that he claims a certain part of the fund for fees and expenses, does not make him any more an adverse claimant as to those sums than the same claim would be for the residue of the estate. The assignee cannot by his mere say-so cause himself to cease to hold a part of the estate as the agent of the bankrupt, and convert himself into an adverse claimant. If, while acting in good faith as assignee, he had actually disbursed the moneys which he claims as fees and expenses, he cannot be committed to jail for failure to turn them over. When the summary proceeding has reached that stage, it cannot proceed to a jail sentence; but the trustee in bankruptcy, if there is a legal liability, as for debt, against the assignee, must proceed by plenary suit, so as to recover a money judgment which may be enforced against property by execution.

In the attempt to distinguish the Comingor Case there has been much refinement as to whether the payments were made by the common-law assignee before the petition in bankruptcy was filed, or after the petition, or, again, whether it was made before adjudication or after adjudication. These distinctions do not rest upon differences which go to the jurisdiction. The assignee at all times holds all funds that come into his hands as the agent of the bankrupt. He may be called upon by summary process to account for those funds. If he shows that he has acted in good faith, and parted with the funds, he cannot be committed to jail for failure to turn them over. If he is legally liable, either because his acts have not in the judgment of the bankruptcy court been beneficial to the creditors of the estate, or for any other reason, he is simply liable for a debt, and the trustee must resort to a plenary suit, in which the liability may be enforced by execution.

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Any one dealing with the property of a bankrupt after a petition has been filed, or after such an act of bankruptcy as on its face is notice that the bankruptcy law is applicable to the situation, such as an assignment, or the appointment of a receiver on the ground of insolvency, must deal with it subject to the relating back of the trustee's title, and the supervision of the bankruptcy court over all acts since the date to which such title relates back. In such a case the jurisdiction of the court of bankruptcy exists, but what will be done in the exercise of that jurisdiction must depend upon the facts of each case. It must be borne in mind that here, as between state courts, and the court of bankruptcy, the jurisdiction is successive and not concurrent. In re Watts & Sachs, 190 U. S. 1, 27, 35, 23 Sup. Ct. 718, 47 L. Ed. 933; Randolph v. Scruggs, 190 U. S. 533, 537, 538, 23 Sup. Ct. 710, 47 L. Ed. 1165; In re Zier & Co., 142 Fed. 102, 73 C. C. A. 326; same case as Watts & Sachs, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, upon its return to the lower courts after the decision in 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933. "The bankruptcy jurisdiction, when properly invoked, supersedes the prior proceedings in the state court for winding up the corporation 'as to which the jurisdiction is not concurrent.'" 142 Fed. 103, 73 C. C. A. 327. While this important consideration modifies the doctrine of comity, it does not destroy it. In re Watts & Sachs, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933; Shannon v. Shepard Mfg. Co., 119 N. E. 768, 42 Am. Bankr. Rep. 12 (Sup. Court of Mass.); In re Neuburger (D. C.) 233 Fed. 701; s. c., 240 Fed. 947, 153 C. C. A. 633. The cardinal rule must always be: Has the dealing with the estate been beneficial to creditors? If not, then, in the light of the situation as it existed at the time the dealings occurred, would an intelligent business man have believed that the dealings would so result?

The assignee here, when cited to show cause, had not parted with the funds in any real sense. The transfer to a different account on the books of the Northwestern Credit Bureau was a mere matter of bookkeeping. It is conceded that he and the Bureau are amply able to respond to any order made in the summary proceeding for the return of any part of the fund involved in the order to show cause. The deductions were made as a part of the accounting at the time the balance of the estate was turned over by Galbraith as assignee. Such being the case, the referee was vested with jurisdiction to deal with the subject under the order to show cause, and to determine whether, under the facts and the law, an order ought to be made requiring respondent to turn over any part of the $1,474.10 withheld from the estate. The order of the referee, therefore, dismissing the order to show cause for want of jurisdiction, is reversed, and the cause is remanded for such further action as the facts justify.

[4] The question certified in the second certificate is plain. Neither the bankruptcy law nor the cost bill in equity prescribed by the federal statute authorized the referee to tax respondent's cost bill, or to order the same paid out of the estate. The order to show cause was nothing more than a motion. The prevailing party in such a proceeding is not

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entitled to costs, unless the other party is "in mercy," so that the court can require the payment of costs as a condition of granting its further aid.

The order of the referee on this certificate is therefore affirmed.

THE MAGNOLIA.

(District Court, N. D. California, N. D. September 10, 1918.)

No. 16063.

1. SALVAGE ⇐48—CONTRACT—AGREEMENT.
   Where libelant, who rendered services in salvaging a wreck, claimed an award as a salvager, evidence *held* insufficient to sustain the defense that the services were rendered under a contract under which compensation should be on the quantum meruit.
2. SALVAGE ⇐4—SERVICES—WHAT CONSTITUTES.
   Where a launch rescued a vessel discovered floating, capsized, and bottom up, a short distance outside of a line of breakers off a bar, and the danger was considerable, *held*, that the service was a salvage service.
3. SALVAGE ⇐19—SERVICES—AWARD.
   Where a schooner capsized, and close to breakers was rescued and towed out to the open sea, the fact the master of the launch allowed a tug under contract with the owners of the schooner to continue the towage to a point of safety *held* not to make the tug and launch, which first rescued the schooner, cosalvagers, although the towage service might be considered in determining the value of the launch's service.
4. SALVAGE ⇐28—SERVICES—AWARD.
   Where a gasoline schooner, worth between $8,000 and $10,000, which had capsized and was floating a short distance outside of breakers off a bar, was rescued and taken in tow by power boat worth from $4,000 to $5,000, and the danger was considerable, etc., *held*, that $750 should be awarded for salvage services.

In Admiralty. Libel by William Crone against the gasoline schooner Magnolia. Decree for libelant.

Puter & Quinn, of Eureka, Cal., for libelant.
Coonan & Ricks, of Eureka, Cal., for claimant.

VAN FLEET, District Judge. This is a libel for the value of services rendered in salving a wreck. It grows out of these facts:

Early in the morning of the occasion in question, a vessel was discovered floating, capsized, and bottom up, a short distance outside the line of breakers off the bar at the mouth of the Klamath river, which flows into the Pacific on the coast of California about 48 miles north of Humboldt Bay. The sea was rough, and she appeared to be in great danger of going ashore. When first discovered, the identity of the vessel, by reason of her situation and submerged condition, could not be made out, but from her size and appearance it was thought to be the Magnolia, a gasoline schooner of 49 tons burden, which was known to ply between the port of Eureka and other ports along the northern coast. Word of the wreck was immediately brought to Requa, a fishing village situated on the Klamath a mile or so from

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its mouth, where Capt. Crone, the libelant, was at the time lying at the wharf with the Coaster, a small power boat of some 14 tons burden, of which he was master; and upon being informed of the disaster he, in company with others, at once proceeded to a point overlooking the wreck at a distance of some half mile, the nearest she could be approached by land, and effort was made with a glass to ascertain her identity. While this could not be definitely determined, it was thought by the observers that there was some evidence of life aboard, and thereupon Capt. Crone immediately returned to Requa and prepared to make an effort to go out to the submerged craft, which by reason of the known dangerous character of the entrance, the condition of the tide, and the badly breaking bar, was regarded as exceedingly hazardous, if not impossible, at the time. His boat being loaded, he was required to first discharge cargo, or partially so, and secure an additional hawser and an extra man for his crew, all of which he did as expeditiously as possible, and then dropped down to the mouth of the river, where after several fruitless efforts, but watching his opportunity, he finally, in the neighborhood of 10 o'clock, by skillful maneuvering, succeeded, with great hazard to his craft and peril to her crew, in getting across the bar, when, by the aid of a skiff, he was able to get a line aboard the capsized boat. She proved to be the Magnolia, but no evidence of life was found aboard, and Capt. Crone proceeded to tow her off shore 3 or 4 miles to safety, and then headed south, with the intention to take her into Humboldt Bay. He had towed her some 8 or 10 miles on this course, when he was met by Capt. Coggeshall, one of her owners, who having, as hereafter appears, been informed of her plight, had procured a tug and life-saving crew and was proceeding to her rescue. After some parley, and a promise by Coggeshall that Crone should be compensated for his services, the latter surrendered her to the owner, and she was taken in tow by the tug and carried to Eureka, where she was subsequently righted and refitted. The time Crone was engaged in his work of rescue was from 8 to 10 hours. It is conceded that the value of the Magnolia, at the time she was rescued and taken in tow by the Coaster, was from $8,000 to $10,000, and that the value of the Coaster was from $4,000 to $5,000. In due course libelant presented a demand to the owners for compensation for his services, which not being honored, the libel ensued.

The defenses interposed are, in substance: (1) That the case is not one of strict salvage, but of contract service, wherein the basis of compensation is quantum meruit; (2) that, if a case of salvage, it is one of joint salvage, rendered by the Coaster and the tug, and that compensation must be apportioned and awarded accordingly.

[1] As to the first defense, it is based upon the claim that the rescue of the Magnolia was by agreement or understanding with the owners. The claim grows out of a telephonic conversation between Capt. Crone and Capt. Coggeshall on the morning of the wreck. On learning of the wreck, and that it was believed to be the Magnolia, Capt. Crone, who knew Capt. Coggeshall, called the latter on the telephone at Eureka and told him of the fact. He testified:

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"I told Capt. Coggeshall that a boat was capsized outside the bar which appeared to be the Magnolia. He replied that it was not she, as she was in Crescent City. Then he said, if it was the Magnolia, could any one go out and get her; and I answered that it was too rough to go out."

And he testified that he did not agree to go out to the wreck. Asked how he came to go out, he said:

"After the conversation over the phone I went up on the hill to take a look at the vessel; there was quite a crowd there looking at the wreck; some claimed they could see persons clinging to the bottom, and remarks were made that some one should go out. After watching the wreck for a while, and listening to the talk, I concluded to take a chance and go out. My idea in going out was, first to save life, if there was any on the wreck, and next to save the Magnolia. After taking in the situation, I really went out because, as a seaman, I thought it was my duty. I did not go because of any conversation with Capt. Coggeshall over the telephone."

Capt. Coggeshall, on the other hand, testified that Capt. Crone agreed to go out after the submerged vessel; that the substance of their conversation was that, when Crone told him of the wreck and that it was supposed to be the Magnolia, he said to Crone:

"I would like to arrange to have you go right to sea. Do you think you would be able to go to sea right away?

"Capt. Crone: There is a little too much sea right now, and not enough water.

"Capt. Coggeshall: I wish you would make ready to go to sea, and let me know if anything can be done. I want you to go out if you possibly can.

"Capt. Crone: It is reported that there are men on board of the Magnolia.

"Capt. Coggeshall: If you possibly can get out, I wish you would go and first try to save life, and if you can't do that make fast to the ship and do the best you can with her, and whatever is right for your time and trouble I will pay you.

"Capt. Crone: That is all right; I think I will be able to get out.

"Capt Coggeshall: Go as soon as you can."

There was no other testimony as to what occurred at this conversation, and it is sufficient to say that I am unable to find in accordance with the version given by Capt. Coggeshall, assuming that it would tend to establish a contract rather than a voluntary salvage. See The Roanoke, 214 Fed. 63, 65, 130 C. C. A. 503. I am of opinion that the other circumstances in the case, and particulaly what occurred between Capt. Crone and Capt. Coggeshall when the Magnolia was taken in tow by the latter, and the further fact that Coggeshall proceeded to make other arrangements for rescue, tend to sustain the version given by Capt. Crone, and that I must find accordingly.

[2, 3] Considering the evidence as a whole, I regard the facts as disclosing a clear case of voluntary salvage, performed under circumstances of more than usual hazard to the property and lives employed in the service. It would subserve no useful purpose to discuss the circumstances in detail, but I may say that they wholly refute the contention that what was done by Capt. Crone was, as disclosed by the successful event, attended by little danger, and that the rescued boat was in fact at no time in imminent peril of being ultimately lost. The question is, not what the actual fact was, as judged by

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subsequent events, but what it apparently was to the experienced and intelligent observer at the time the act was performed, since the work of a salver is to be estimated from conditions as they appeared to such observation, and upon which he is justified in acting. It is not to be judged by conditions as actually ascertained by the event. As said in The Roanoke:

"Wisdom born after the event is the cheapest of all wisdom."

Indeed, it is not seriously contended that any of the elements of a true salvage were lacking, if the service was not contractual. 35 Cyc. 720.

Nor is there anything of substance in the second proposition or defense, that the case is one of cosalvage as between the Coaster and the tug. The latter was not a participant in the rescue of the wrecked vessel from any imminent peril; she took her in tow in the open sea, after she had been rescued from the threat of immediate danger of destruction by going ashore; and while her service was of value in carrying her to a safe haven, and thus relieving the Coaster to that extent, and may be considered in determining the ultimate value of the services rendered by the latter, the service of the tug was admittedly rendered under charter or hire by the owner, and is to be regarded more in the nature of a towage than a salvage. The Roanoke, supra. The tug, therefore, cannot be considered in any proper sense as a cosalver.

[4] This leaves but one question for consideration, that of the award of just compensation to libelant for the service performed. While he is entitled to an award which will fully compensate him for the valuable service rendered, I do not regard it as a case justifying an allowance on the extreme basis contended for, that of 50 per cent. of the value of the vessel salved. The basis of such awards, as is conceded by counsel, has been greatly modified by modern conditions, and "there has been a decided tendency by the courts to qualify the grades of salvage services, and to reduce the amounts of awards to salvors from the standard of former days of wooden sailing vessels," etc. Guffey Petroleum Co. v. Borison, 211 Fed. 602, 128 C. C. A. 194, and other cases there cited.

Without further discussion, I am of opinion that under all the circumstances libelant will be reasonably compensated in this case by an award of $750. It would have been different, had he been required to carry the derelict the considerable distance through to Humboldt Bay, which it appears was the nearest point of a safe haven. But he voluntarily surrendered her to the owner, and therefore cannot claim upon the basis of a complete towage to that point. On the other hand, while the amount of the award is in excess of the compensation demanded by libelant before suit, obviously he is not to be circumscribed by the fact that he offered to accept a less sum in amicable adjustment of the controversy. Having been driven to the necessity of litigation, he is to have such award as in the judgment of the court will compensate the services performed, regardless of any previous offer on his part to accept less than that sum. His de-

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mand was exceedingly reasonable, and it is unfortunate for the claimants that they did not see their way clear to meet it.

Let a decree be entered, awarding the libelant the sum above specified, together with his costs.

UNITED STATES v. MURPHY et al.

(District Court, N. D. New York. July 26, 1918.)

1. CRIMINAL LAW ⟸511(2)—ACCOMPLICE TESTIMONY—CORROBORATION—"CORROBORATING EVIDENCE."
"Corroborating evidence" is evidence which is independent of the testimony of the accomplice, and, taken by itself, leads to the inference, not only that a crime has been committed, but that the person charged was implicated therein, etc.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corroborating Evidence.]

2. CRIMINAL LAW ⟸510—ACCOMPLICE TESTIMONY—CORROBORATION.
It is the better practice to require corroborating testimony before giving credence to the testimony of an accomplice.

3. CRIMINAL LAW ⟸780(1)—INSTRUCTIONS—ACCOMPLICE TESTIMONY.
Cautionary instruction that it is the better practice to require corroborating testimony before giving credence to the testimony of an accomplice is proper.

4. CRIMINAL LAW ⟸1192—SECOND TRIAL—FOLLOWING DECISION OF APPELLATE COURT.
Where, on a second trial, after reversal of a conviction, the evidence was different, and the testimony of an accomplice, on which the prosecution relied, was much shaken, the trial court is not bound to follow the decision of the appellate court on a former trial, to the effect that the jury's findings were conclusive.

5. CRIMINAL LAW ⟸742(2)—SUBMISSION TO JURY—ACCOMPLICE TESTIMONY.
Where the only evidence on which a conviction could be sustained was the testimony of an accomplice, and he left the stand a thoroughly discredited witness, the case should not be submitted to the jury, even laying aside the fact that the prosecution relied on accomplice testimony.

6. CRIMINAL LAW ⟸308—PRESUMPTION OF INNOCENCE.
The presumption of innocence remains with defendants throughout the entire trial, and so letters written by defendants and relied on by the prosecution are presumed, in the first instance, to be innocent.

7. CRIMINAL LAW ⟸753(2)—DIRECTED VERDICT FOR DEFENDANT.
Where the evidence as a whole produced by the prosecution is consistent with innocence, and does not lead irresistibly beyond a reasonable doubt to a conclusion of guilt, a verdict should be directed for defendant.

8. CRIMINAL LAW ⟸742(3)—TRIAL—CORROBORATION OF WITNESS.
Whether a discredited witness, on whom the prosecution relied, is sufficiently corroborated to take the case to the jury, is a question of law.

Richard Murphy, Baron Eugene Francois Ernest Oppenheim, and Howard J. Rogers were indicted for crime. On motion to direct a verdict of acquittal in favor of Oppenheim and Rogers. Motion granted.

See, also, 224 Fed. 554; 226 Fed. 512; 241 Fed. 625, 154 C. C. A. 383.

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Edward Hymes, of New York City, for the motion.
Frank J. Cregg, Asst. U. S. Dist. Atty., of Syracuse, N. Y., opposed.

THOMAS, District Judge. The argument in support of this motion is based upon two substantial grounds, as reasons in law why it should be granted: (1) That Brice, a conceded accomplice, must be corroborated, even if not discredited. (2) That Brice, confessedly an accomplice, cannot be corroborated, if discredited, on the ground that then there would be nothing to corroborate.

[1-3] In support of the first contention cases are cited by counsel for defendants as against which the district attorney urges that the rule respecting the corroboration of an accomplice in this circuit, at least, is to be found in Hanley v. United States, 123 Fed. at page 850, 59 C. C. A. 153, decided in 1901, where Judge Lacombe says:

"It is * * * argued that the court erred in refusing to charge that the testimony of William A. Clark, he being a self-confessed accomplice, must be corroborated as to some of the material facts. The statutes of New York do not permit conviction in the courts of that state on the uncorroborated testimony of an accomplice. Those statutes, however, do not regulate proceedings in the federal courts, there is no similar federal statute, and in the courts of the United States the rules of law governing the reception and consideration of the testimony of accomplices are those of the common law. Upon this branch of the case the court called attention to the fact that the New York statute did not apply."

Reliance is also placed upon a subsequent decision of the Circuit Court of Appeals for this circuit, found in Ahearn v. United States, 158 Fed. 607, 85 C. C. A. 428, decided in 1907, when Judge Lacombe, speaking for the court, said:

"The court charged the jury as to the weight to be given to the testimony of an accomplice, as to felonious intent, and as to the presumption of innocence. The testimony of the accomplice was corroborated as to several material facts, although corroboration is not essential in the federal courts and could not have been withdrawn from the jury. It was for them to say what weight should be given to it."

Likewise reference is made to Richardson v. United States, 181 Fed. 9, 104 C. C. A. 69, decided August 22, 1910. There it was denied by the government that the persons whom it was sought to charge as accomplices were in any sense accomplices, and the court was asked to charge the jury that if these witnesses were accomplices their testimony was not to be regarded, unless corroborated by unimpeachable testimony in some material point, and while the court said that there was nothing which forbids the conviction of a defendant, at common law or in a federal court, on the uncorroborated testimony of an accomplice, yet it held that there is a well-established practice, sanctioned by long practice and judicial approbation, to caution juries about accepting the evidence of an accomplice without material corroboration, coming as it does from a polluted source. Then the court cites Holmgren v. United States, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778, which was decided May 16, 1910, about two months before the Richardson Case. In 217 U. S. at pages 523 and 524, 30 Sup. Ct. at pages 588, 592 (54 L. Ed. 861, 19 Ann. Cas. 778), Mr. Justice Day says respecting this subject-matter:

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"It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, *and to require corroborating testimony before giving credence to them.*"

If that rule is to be followed, corroborating evidence is evidence which is independent of the evidence of an accomplice, and which, taken by itself, leads to the inference, not only that a crime has been committed, but that the person on trial was implicated in it; or it must be evidence which corroborates as to some material fact or facts which go to prove that the person on trial was connected with the crime. With this as apparently the last word of the Supreme Court upon the subject, we may safely say it is the correct expression of the rule applicable here. Nor do I understand that this rule is in any way a violation of the decisions found in Gretsch v. United States, 242 Fed. 898, 155 C. C. A. 485, Fischer v. United States (D. C.) 245 Fed. 479, and Erber v. United States, 234 Fed. 225, 148 C. C. A. 123.

In this connection I direct attention to the fact that a careful reading of the cases upon this subject which we have been discussing does not hold, as contended for by counsel, that corroboration of an accomplice is not necessary, but they do hold that a conviction may be had without corroboration. A distinct difference. The principles enunciated in these decisions unquestionably apply to the testimony of an accomplice who has testified in a case and leaves the witness stand unimpeached. The Supreme Court, in such instances, as declared in the Holmgren Case, supra, holds that a trial court should caution juries against too much reliance upon the testimony of an accomplice and to require corroborating testimony before giving credence to such evidence. But I fear we have all devoted too much time to the consideration of these principles concerning which there can be little dispute.

[4] The learned district attorney urges upon the court and relies upon an extract from the opinion of the Circuit Court of Appeals on the appeal from the former judgment as an additional reason for the denial of this motion and directs the court's attention to the following passage found on page 627 of 241 Fed. (154 C. C. A. 383), in Judge Ward's opinion:

"The jury's findings of fact are binding upon us when there is any evidence to support them, and we think there was evidence both as to the conspiracy count and the aiding and abetting counts"

—and further quotation from that part of the opinion of Judge Hough, dissenting from the majority of the court upon other grounds, upon which a reversal was granted. If this court had the same record as confronted the Circuit Court of Appeals, this motion would receive no serious consideration.

The records in the two cases, so far at least as the testimony of Brice is concerned, are entirely different. It is impossible to predicate a conclusion upon the record of the former trial, and urge *that* as the basis for a conclusion to be formed upon the record of this trial. In the former trial the testimony of Brice stood practically unchallenged. I have examined it, and, when the cross-examination was concluded, Brice had emphasized his direct testimony, and there were few contra-

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dictions and few inconsistencies, and such as existed were on unimportant matters.

These facts must be known to counsel who now urge upon the court that the opinion of the Circuit Court of Appeals reversing the former trial binds this court. So it is sufficient to say, as to this, that the Circuit Court of Appeals did not have this record before it for consideration, and it follows that the citation read has no force, no effect, and could have none; and while I yield to no one in having a greater regard for the opinion of our appellate court, I cannot be mistaken in saying that even that learned tribunal would not expect me to follow the conclusion there expressed, upon the record here.

[5-8] But even assuming that the first proposition or reason for granting this motion is not sound in law, and that no corroboration is necessary of an accomplice whose cross-examination leaves him a credible witness, we pass to the second proposition: But the serious question here under consideration is whether, if Brice, an accomplice, leaves the stand a thoroughly discredited witness upon many material points, it can be claimed that, in spite of that fact, there is any testimony here, aside from Brice, which connects Rogers and Oppenheim with the crimes charged, sufficient to submit the case to the jury. Where the government's case hinges largely upon the testimony of a confessed thief, who concededly might be an honest witness, *but who has here time and time again evaded, whose testimony was at times absurd, inconsistent and full of falsehoods, and who when confronted with the facts which pinned him upon either horn of a particular dilemma then confronting him failed to answer, and who on his own statement was torn apart, and of whom it is charitable to say falsified,* can it be that such evidence is sufficient legal evidence to go to a jury?

Leaving out the question of an accomplice, would a court not be justified—yes, required—to take such a case away from a jury, if the witness relied upon to substantiate the main parts of a case were simply a discredited witness and not a discredited accomplice as here. It needs the citation of no authority to sustain the proposition. It is not, as counsel contend, a question of corroboration of what we might call a good accomplice—good in the sense that he made what is commonly called a good witness, frank, open, truthful, such as would impress a trier of a question of fact, by his answers and his demeanor, that he spoke the truth. *But the case here is where we have a bad accomplice, who by his answers not only evaded and equivocated, who was utterly devoid of the sanctity of his oath, but who over and over again falsified upon material matters seeking to connect the defendants Rogers and Oppenheim, and without whose testimony there is nothing.*

In order to support the claims of the government connecting the defendants Rogers and Oppenheim with criminal participation, the testimony of Brice is indispensable; for all of the acts done and conversations had must be linked with Brice's version of what took place and what was said in order to submit the case to the jury. And, but for the demonstrated untruthfulness of Brice upon all material questions, there would be sufficient evidence to make it necessary that the defendants explain. Nor must we lose sight of the presumption of

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innocence which remains with these defendants throughout the trial. *Brice endeavored to remove that presumption, and that was the main purpose of his testimony: yet, as I view it, his testimony was of such a character as to be unbelievable—shattered, as expressed by counsel*—so that all the letters, all the inferences in the letters, by virtue of the presumption of innocence, are presumed to have been innocent, and there is no other evidence to prove they were not.

It is announced by our Circuit Court of Appeals that where the evidence as a whole produced by the prosecution is consistent with the innocence of the accused and does not lead irresistibly beyond a reasonable doubt to a conclusion of guilt, then and in that event no question is presented for the jury, and it is the duty of the trial court to direct a verdict. In the case of Union Pacific Coal Co. v. United States, 173 Fed. 737, at page 740 (97 C. C. A. 578), the court said:

"There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction."

In Hayes v. United States, 169 Fed. 101, at page 103 (94 C. C. A. 449), the court said:

"While evidence to convict of crime, may be circumstantial and inferential in its character, it must always rise to that degree of convincing power which satisfies the mind beyond a reasonable doubt of guilt. This can never be the case when the evidence as produced is entirely consistent with innocence in a given transaction."

In the case at bar, without Brice, the sole question is: What inference will one draw from the statements contained in all the letters? They may be innocent, they may be sinister; but no trier of a criminal cause may be allowed to guess. The various transactions which the learned district attorney urges with so much vehemence as supporting his contention that he has Brice, an accomplice, corroborated, may be illustrated by a single transaction. Take the July 5, 1911, incident as illustration. His claim is that Brice is corroborated regarding the facts of the transaction, even though he be a discredited witness.

Oppenheim, he claims, was in Amsterdam; that he got $700; that the express receipt for $550, sent to Rogers, leaves no room to question the transaction. This is very likely true thus far; but to show criminal knowledge Brice is necessary, and he supports the claim that there was criminal knowledge by saying that he told Oppenheim that he would have to steal the money from the bank, and that Oppenheim said, "All right, steal it." Without discussing the probability or improbability of this story, because that is not the purpose of this discussion, but for the purpose of illustrating the point, eliminate the conversation between Brice and Oppenheim and what have we of the structure left? That Oppenheim was in Amsterdam and that he sent

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$550 by telegraph to Rogers. Nothing appears but what the transaction was legitimate, and, if it were argued, it might well be claimed that Oppenheim, knowing he had a legitimate contract with Brice which called for certain money, and needing the money hurriedly took the train to Amsterdam, got it, and telegraphed it to Rogers. In the light of the familiar rule of law regarding the presumption of innocence, is not the inference suggested from the facts outlined equally as fair as the sinister one that he was in a crooked deal?

So it appears conclusively that Brice must be credible to support the sinister conclusion, and one must believe his version of the conversation had. Nor is this a question of fact for a jury to pass upon. It raises a question of law. So, too, as to all the transactions. Brice must be credible in order to give life and substance to the claim that all defendants knew Brice was stealing from the bank, for they involve his own relation of conversations, and without it the government's case falls.

This one illustration will have to serve to illustrate the various points raised and urged by the learned district attorney. He cannot, nor can any one associated with him, be blamed for the situation in which they find themselves, for, naturally, they could not control the evidence of Brice, nor could they prevent him from continually falsifying upon the witness stand. *It is inconceivable to me that a man who was honestly endeavoring to tell the truth concerning these many transactions could have presented such a hopeless and pitiable object. Brice, as I view it, is, so to speak, not in the case.* Without his truthful, or semblance of truthful, statements regarding all these various transactions, there is nothing to submit to the jury. *If there ever was a case where there was a complete application of the maxim "falsus in uno falsus in omnibus," it is right here.* This being the legal situation confronting us, it is inconceivable to me that this motion should be denied. The law compels me to grant such a motion, and I consider the application of the rule in the Sykes Case, 204 Fed. 909, 123 C. C. A. 205, apposite to the instant case. There the court said:

"And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it."

In other words, that if Brice is in the same situation as the witness referred to there, or substantially in that position, then this testimony does not give us any substantial evidence of what it seeks to relate. So, too, in the Mickel Case, 157 Fed. 229, 84 C. C. A. 672, the court said:

"The evidence in every criminal case should be sufficient to warrant a reasonable conclusion of the defendant's guilt; otherwise, it is the duty of the court to instruct a verdict in his favor. * * * We have carefully read all of the testimony submitted, and are of the opinion that the most that can be said for it is that possibly it might raise a conjecture or suspicion unfavorable to the defendant. But evidence only sufficient for this purpose

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is not legal evidence, for the jury must be governed by the evidence of facts upon which the suspicion is based, not by the suspicion itself."

So, too, the Union Pacific Coal Case is now instructive, and it is not now necessary for me to read what the court said there, as I have already adverted to it. So, if the rule in the Holmgren Case be applied, all the more so is the conclusion here reached irresistible. Nor are the views herein expressed, or the conclusion reached, violative of any of the principles enunciated in the cases cited by counsel for the government and upon which reliance is placed, viz.: Caminetti v. United States, 242 U. S. 495, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168; Burton v. United States, 202 U. S. 373, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392; Hoke v. United States, 227 U. S. 324, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905.

The motion as to Rogers and Oppenheim is granted, and, as there is other evidence independent of Brice as to Murphy, the motion is denied as to him.

Mr. Cregg: Exception.

The Court: Mr. Marshal call the jury.

(The jury returned at this point.)

The Court: Gentlemen of the jury, I excused you for the purpose of hearing argument on a motion. That motion was based upon propositions of law, and, because that is of no concern to you, you were excused. As the result of the argument and deliberations, the motion has been granted. The motion that was made was that the court direct a verdict of acquittal for the defendants Rogers and Oppenheim, and, as I say, after the argument and deliberations, I have granted the motion. You therefore will report a verdict of not guilty, so far as Rogers and Oppenheim are concerned.

(Jury return a verdict of not guilty as to defendants Oppenheim and Rogers.)

Mr. Hymes: Your honor, I move to have the defendants Rogers and Oppenheim discharged and their sureties released.

The Court: So ordered.

In re EL SEVILLA RESTAURANT.

(District Court, S. D. Florida. June, 1918.)

1. BANKRUPTCY ⟸98, 228—REPORT OF MASTER—EXCEPTIONS.
   Where exceptions to the account of a receiver in bankruptcy were referred to a master, who reported thereon, his findings as to the account stand confirmed, unless exceptions to his report are filed within 20 days, as required by equity rule 66 (198 Fed. xxxvii, 115 C. C. A. xxxvii).

2. BANKRUPTCY ⟸113—LIABILITY ON BOND GIVEN ON APPOINTMENT OF RECEIVER.
   A bond given by petitioners for appointment of receiver, conditioned to pay to bankrupts all costs, expenses, and damages occasioned by the appointment in case the petition was dismissed and the receiver discharged, does not cover claims of the receiver for expenses incurred.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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3. BANKRUPTCY ⇐⇒99—DISMISSAL OF PETITION—DISCHARGE OF RECEIVER—LIABILITY OF PETITIONING CREDITORS.

The court has no jurisdiction, upon making of receiver's report after dismissal of petition for involuntary bankruptcy and discharge of receiver, to order payment of the amount found to be due by the report from the petitioning creditors to the receiver for expenses incurred by him, but the question is open to litigation between the parties upon proper proceedings.

In Bankruptcy. In the matter of Celestino Fernandez and Manuel Fernandez, doing business as the El Sevilla Restaurant and the El Moderno Restaurant, alleged bankrupts. On motion to open decree fixing liability of petitioning creditors and sureties. Motion granted, and decree modified.

M. Caraballo, of Tampa, Fla., for receiver.

J. T. Watson, Jr., of Tampa, Fla., for objecting creditors.

CALL, District Judge. This case comes on to be further heard upon a petition for a rehearing upon the decree entered herein on February 28, 1918. The facts as they appear from the record may be stated as follows:

A petition in bankruptcy was filed against Celestino Fernandez and Manuel Fernandez, doing business as El Sevilla Restaurant and El Moderno Restaurant. In this proceeding an application for the appointment of a receiver was made and granted, and a bond for $1,000 with sureties given. The condition of the bond was that the petitioners should pay to Celestino Fernandez and Manuel Fernandez all costs, expenses, and damages occasioned by the appointment of such receiver in case the petition in bankruptcy should be dismissed. Under the order of appointment the restaurants were operated at a loss. Subsequently upon a hearing by the court the petition was dismissed and the receiver discharged. Upon the coming in of the receiver's report exceptions were filed to certain portions, and subsequently an additional and supplementary report was filed. Whereupon an order was made referring the matter to a master to take testimony on said exceptions and such other testimony as may be offered, to state and clarify the account of the receiver, with power to report his findings to the court on the receiver's account, together with the evidence. Hearings were had before the master, and testimony taken; the parties in interest having notice and participating in the same.

[1] The master made his report to the court on November 7, 1917, with the evidence taken before him, sustaining certain exceptions, which had been cured by the supplementary receiver's report, and disallowing certain items claimed to have been paid by the receiver, but not stating the account of amounts still due and incurred by the receiver in the operation of the business. Whereupon on the motion of the receiver it was re-referred to the master on November 14, to state the account as required in the first order of reference; and pursuant to this last order the master on December 24, 1917, filed his report, showing the amount of $987.54 due by the petitioning creditors incurred in the operation of the restaurants by the receiver. This report remained without exception until February 28, 1918, when, after notice to the

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attorney of the petitioning creditors, the court passed the decree sought to be reheard by petitioners.

This decree, after reciting the filing of the reports and the fact that no exceptions had been filed thereto, decreed a confirmation of said reports, and sustained the first and sixth exceptions, and, while overruling the fourth exception, reduced the amount of the item excepted to. The decree then proceeds to order the payment of the amount found to be due by the last report by the petitioning creditors to the receiver. The decree also proceeds to fix the liability of the sureties on the bond theretofore filed by the petitioners on the appointment of the receiver at said amount so found by said master.

The prayer of the petition for a rehearing is that the petitioners may have a rehearing upon the exceptions filed to the receiver's report. The matter of the exceptions to the receiver's report, which exceptions all went to particular items (except the general exception that the report was not sworn to), objecting that the receiver should have credit for same on his account. The master had all the parties in interest before him, took testimony, and made his report allowing some of the items objected to in whole or in part and disallowing others. His last report was on file from December 24 up to February 28 following, without exception being filed. Under rule 66 of the Equity Rules (198 Fed. xxxvii, 115 C. C. A. xxxvii) the report stood confirmed in the absence of exceptions filed within 20 days from its filing. Therefore so far as the allowance of the items in the receiver's report, and the allowance or disallowance of the exceptions filed by the petitioners, further consideration is precluded by the failure of the petitioners to file exceptions within the 20 days as required by rule 66.

[2,3] On presentation of the petition for a rehearing the main contention was that the petitioning creditors were not liable for the expenses of the receivership, and the decree sought to fasten the amount upon such petitioning creditors, and further undertook to fix the liability of the sureties on the bond of the petitioners given upon the appointment of the receiver. As before pointed out, the condition of the bond was to pay the bankrupts their costs and damages. This was not a claim for costs and damages by the bankrupts, so clearly that portion of the decree of February 28, 1918, should not have been entered. Nor do I think was the question of the liability of the petitioning creditors for the expenses of the receivership presented in such manner as authorized the court to adjudicate their liability for the same. This question, it seems to me, is open to litigation between the parties upon proper proceedings.

The petitioning creditors came in and litigated the receiver's accounts, and to that end and no further are they bound by the proceedings had thereon, and therefore the petition to open up the decree of February 28, 1918, will be granted, but the petition for a rehearing on the exceptions will be denied.

An order to this effect, and modifying the decree of February 28, 1918, in the respects pointed out above, will be entered.

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Ex parte PLATT.

(District Court, E. D. New York. September 23, 1918.)

1. ARMY AND NAVY ⇐20—SELECTIVE DRAFT LAW—DECISIONS OF LOCAL BOARD—REVIEW.
The determination of a local draft board in a case where it has authority to act is final, unless appealed to the district board or the President.

2. CERTIORARI ⇐24—HABEAS CORPUS ⇐66—CERTIORARI INCIDENT TO WRIT.
The writ of certiorari may be used to bring up the record, where basis for a writ of habeas corpus is shown; but the law courts have no power to issue such writ to an executive or administrative board, for the sole purpose of reviewing the correctness of its decision.

3. HABEAS CORPUS ⇐16—SELECTIVE DRAFT LAW—REVIEW OF DECISION OF LOCAL BOARD.
The action of a local draft board in holding a person subject to service after a hearing on evidence is not reviewable on habeas corpus, unless it is shown that the hearing was unfair, or that there was no evidence to support the finding.

Petition of Morris Platt for writ of habeas corpus and of certiorari. Writs denied.

Edwin T. Taliaferro, of New York City, for petitioner.
Melville J. France, U. S. Atty., of Brooklyn, N. Y., opposed.

CHATFIELD, District Judge. The petitioner seeks a writ of habeas corpus and a writ of certiorari, alleging that he is an alien, born in Russia, who has never taken out first papers; that he applied to his local board in August, 1917, claiming exemption from military service on those grounds; that he later filed his questionnaire, and received, on or about August 16, 1917, a notice to the effect that he was discharged from immediate liability for military service; that shortly before July 13, 1918, he received a further notice to report before the local board, and on that day was certified for induction into the army; that on July 25, 1918, he was sent to Camp Upton, where he is now, and therefore alleges that he is in custody without authority of law.

According to the petition, the petitioner on June 21, 1918, asked his local board to reopen and reconsider his classification. He filed in support of this petition affidavits, one of which was verified July 24, 1918, evidently subsequent to notice to report for induction, and also affidavits verified June 21, 1918, which were offered to substantiate his claim of alienage. He did not appeal to the district board from the order of August 16, 1917, which he considered to be in his favor, nor does he appear to have appealed from the reclassification, which was followed by order of induction.

Two points are made in his behalf: First, that the local board could have had no evidence before it on which to base an assumption that the applicant was not a nondeclarant alien; and, second, that the decision of the local board did not make the matter res judicata, and that for this reason failure to take an appeal should not be held

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binding as evidence that the petitioner acquiesced in the decision of the local board.

[1] There seems to be no merit to this second contention. The Selective Draft Law Cases, 245 U. S. 366, 38 Sup. Ct. 159, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856, establish the proposition that the local board has the power to exercise certain judicial functions, even though it is not a court, and subject to the Judiciary Law as a whole. The construction of the Draft Law (Act May 18, 1917, c. 15, 40 Stat. 76), as indicating the intention of Congress, makes it certain, in the opinion of this court, that the determination of the local board is final, except by appeal to the district board or the President, in any case where the local board has authority to act. Such determination involves an exercise of judgment based upon such evidence as is before the board. It is like the determination of an executive officer or of a board of inquiry in an immigration hearing, and, when made final by Congress, is not the subject of appeal to the courts.

The question is therefore limited to the familiar proposition, based upon the decision in Angelus v. Sullivan, 246 Fed. 54, 156 C. C. A. 280, that the courts have jurisdiction over any official presuming to act under a statute, to the extent of restricting him to his powers given by that statute, and to prevent, by writ of habeas corpus, wrongful detention where the authority of that statute has been exceeded. Gegiow v. Uhl, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114; United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040.

[2] The writ of certiorari may be used to bring up the record, where basis for a writ of habeas corpus is shown; but the law courts have no power to issue a writ of certiorari to an executive or administrative board, for the sole purpose of reviewing the correctness of the board's decision.

[3] This application, therefore, comes back to the proposition that sufficient ground is shown for the issuance of a writ of habeas corpus. The petition shows that there was a hearing upon notice to the petitioner. There was evidently a reclassification. This was a determination upon the evidence, including the petitioner's own statement before the local board. The local board, in the first place, indicated that it had deferred classification. The various reasons other than alienage, which might have entered into the situation, would have sufficiently explained this delay. But the determination that the petitioner was liable to induction was based upon a hearing on evidence, and the petition does not show that the local board disregarded all the evidence before it, that it held an unfair hearing, or that it acted upon anything except its conclusion upon the testimony and the witnesses before it.

Under these circumstances, this court sees no reason to interfere with its determination, and the application for a writ will be denied

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THE QUEVILLY.

(District Court, E. D. New York. September 23, 1918.)

COLLISION ⇐ 81—MOVING AND ANCHORED VESSELS—ENTERING ANCHORAGE GROUND IN FOG.

A bark turning into the anchorage grounds on the Staten Island side of the Narrows in a dense fog, without giving more frequent fog signals to give warning of the movement, *held* solely in fault for collision with an anchored vessel sounding signals at regular intervals.

In admiralty. Suit for collision by the Norton-Crossing Company against the French bark Quevilly. Decree for libelant.

Robert Strange, of New York City, for libelant.

Kirlin, Woolsey & Hickox, of New York City (Robert S. Erskine and L. De Grove Potter, both of New York City, of counsel), for claimant.

CHATFIELD, District Judge. At about 9 a. m. on the morning of February 18, 1916, the Quevilly was proceeding up through the Narrows, when it became evident that the fog made it unsafe for her to proceed further, and she sought an anchorage. She had been sounding a fog horn and heard fog bells from vessels at anchor on the Staten Island side. From these the Sandy Hook pilot endeavored to locate an open space into which he might proceed within the anchorage lines along the Staten Island shore. The testimony shows that he passed a steamer whose bell was plainly heard, and that he heard no bells above this steamer, from which he inferred that he could safely turn in at that point. The tide was running flood, and he starboarded his helm to pass under the stern of this steamer. He then ported his helm to turn against the tide, when the Urann was sighted practically dead ahead. He starboarded sharply again, and succeeded in almost clearing the Urann, but caught the jib boom with some portion of the mizzen rigging of the Quevilly. At just this time a tug was coming out from the Staten Island shore in search of the Urann, being guided by the sound of the Urann's fog bell, and the captain of the tug called to the Quevilly to go astern, and to drop anchor in order to avoid running into the Indra, which was lying directly in the path of the Quevilly and inshore of the Urann. Just at this moment the pilot of the Quevilly brought his ship to anchor, and she was stopped so near the Indra that, as she swung to the tide, her stern carried away the bobstay of the Indra. The Quevilly had previously stopped her engines, but started ahead again just as she made the turn into the anchorage grounds. She was moving, according to the testimony of the witnesses, at about a two-knot speed, but was evidently drifting sideways with the flood tide more rapidly than the pilot estimated. He testified that he heard no bell from the Urann or any other boat further up the harbor.

The testimony of witnesses whose statements are entirely dependable, and are in no way contradicted, shows that the bell of the Urann was ringing at frequent intervals, and that other boats in the imme-

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diate vicinity and further up the harbor were also ringing bells, and it is apparent that the Sandy Hook pilot's recollection of whether he heard bells, and at what distance, must be at fault. It would appear that the side drift of the Quevilly, when making the turn into the anchorage ground, brought him too close to the Urann, and that he had probably paid no attention to the Urann's bell, on the assumption that it was not within dangerous proximity.

There is testimony that none of the persons on the Urann, or on the tugs alongside, heard the whistles of the Quevilly, and this bears out the theory that, when the Quevilly began to turn in, she was not close enough to the Urann to attract attention, so as to indicate that she was coming out of the channel.

There is also evidence that the Urann was observed by one of the inspectors of the anchorage at a point just outside of the anchorage boundaries; but this does not enter into the case, for the Sandy Hook pilot was navigating by sound, and if the Urann was, at some conditions of the tide, swinging outside of the anchorage line, it did not enter into the causes of this collision. The Quevilly had already turned inside of another boat, and was straightening up to come to anchor before reaching the Urann.

The burden was upon the pilot of the Quevilly (when leaving the channel and running into the anchorage ground, where he knew that vessels were likely to be met) to estimate correctly the various matters which had to be taken into account. The burden was therefore upon him, either to avoid running into any boat which might be encountered, or to indicate by more frequent fog signals the movements of the Quevilly. If he had done this, the attention of the mate ringing the bell of the Urann, and the attention of the other boats in the vicinity, might have been attracted in such a way that they would increase the frequency of their own fog signals, and the Quevilly might thus have avoided the danger in time; but there is nothing in the case to indicate that the Urann was negligent, when lying either on or very close to the anchorage ground, and when sounding its bell at regular intervals, in not anticipating that a boat would come in from the channel and run her down, without sounding its own approach by more frequent signals than the regular fog horn at stated intervals.

The libelant may have a decree.

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SIDEBOTHAM et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. September 10, 1918. Rehearing Denied Oct. 14, 1918.)

No. 3098.

1. INDICTMENT AND INFORMATION ⟸129(1)—FRAUDULENT USE OF MAILS—JOINDER OF CHARGES.

A charge, under Penal Code, § 215 (Comp. St. 1916, § 10385), for using the mails for a scheme to defraud, and a charge, under section 37 (section 10201), for a conspiracy to commit such offense, may be joined, under Rev. St. § 1024 (Comp. St. 1916, § 1690), relating to several charges for same transaction or for two or more transactions connected together.

2. CRIMINAL LAW ⟸1149—DISCRETION OF TRIAL COURT—ELECTION—REVIEW.

The disposition of an objection that defendants were or had been embarrassed in their defenses by a denial of their motion to require prosecution to elect would be within the discretion of the trial court, and reviewable only if that discretion was abused.

3. CRIMINAL LAW ⟸1167(2)—REFUSAL TO REQUIRE ELECTION—HARMLESS ERROR.

In prosecution, under Penal Code, § 215 (Comp. St. 1916, § 10385), for using mails to defraud, and for a conspiracy to commit such offense, refusal to require prosecution to elect was not prejudicial, where defendant was convicted only of the first offense and sentenced for 13 months and to pay costs, where the statute authorized a fine of not more than $1,000, or an imprisonment of not more than five years, or both.

4. POST OFFICE ⟸49—SCHEME—EVIDENCE.

In a prosecution upon counts under Penal Code, § 215 (Comp. St. 1916, § 10385), for using the mails for a scheme to defraud, evidence *held* to show that an envelope, circular, and application for stock in a corporation were placed in the post office under the direction and with the knowledge of the defendants.

5. CRIMINAL LAW ⟸787(1)—INSTRUCTIONS—REFERENCE OR FAILURE TO TESTIFY.

In a prosecution under Penal Code, § 215 (Comp. St. 1916, § 10385), for using mails to defraud, instructions defining intent, and stating that no one had denied a witness' testimony, were not objectionable as referring to fact that defendants did not take stand and testify in their own behalf.

6. CRIMINAL LAW ⟸1172(1)—COMMENT ON DEFENDANT'S FAILURE TO TESTIFY—PREJUDICE—EVIDENCE.

In a prosecution under Penal Code, § 215 (Comp. St. 1916, § 10385), for using the mails to defraud, where court is alleged to have commented on defendant's failure to testify, evidence *held* to show that the verdict was based upon the direct and positive testimony of witnesses and documents and the legitimate inferences, and not from any prejudice because defendants did not testify in their own behalf.

In Error to the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

R. R. Sidebotham and J. G. G. Wilmot were convicted of using the post office for a scheme to defraud and they bring error. Affirmed.

Wellington D. Rankin, of Helena, Mont., for plaintiffs in error.

B. K. Wheeler, U. S. Atty., James H. Baldwin, Asst. U. S. Atty., both of Butte, Mont., and Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

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MORROW, Circuit Judge. The indictment in the court below contained 11 counts. Ten counts, numbered 1 to 10, inclusive, charged the plaintiffs in error and 13 other defendants with the offense of devising a scheme and artifice to defraud certain persons by false and fraudulent representations and pretenses in the sale of certain shares of stock of the Northwestern Trustee Company, a corporation organized under the laws of the state of Montana; that having devised the scheme and artifice to defraud, and for the purpose of carrying the scheme and artifice into execution, the defendants deposited in a post office of the United States certain letters concerning the stock of the Northwestern Trustee Company, the letters being addressed to the persons intended to be defrauded by the scheme and artifice, in violation of section 215 of the Penal Code of the United States. Act March 4, 1909, c. 321, 35 Stat. 1130 (Comp. St. 1916, § 10385). The eleventh count charged the defendants with the offense of having conspired together in violation of section 37 of the Penal Code (Comp. St. 1916, § 10201) to commit the offenses described in the other counts.

[1] It is assigned as error that the court erred in denying the motion of the plaintiffs in error requiring the United States attorney to elect between the eleventh count and the other counts of the indictment on the ground of duplicity. The trial of the case was commenced on January 10, 1917, and the verdict of the jury was rendered on January 27, 1917. This motion was made on January 24, 1917, and after the case had been on trial on all the counts for two weeks. On the same day the court directed the jury to return a verdict for the defendants on counts numbered 1, 2, 3, and 4, and later the court instructed the jury to acquit the defendants on counts numbered 5 and 6. The case was finally submitted to the jury on counts numbered 6, 7, 8, 9, and 11. No objection had been interposed on behalf of the defendants to the introduction of testimony in support of all the counts of the indictment, and no objection was made at the beginning of the trial, or at any time, that the defendants would be or were embarrassed in their defense by this procedure. The objection now interposed is that the indictment is duplicitous, not that the plaintiffs in error were embarrassed in their defense.

The scheme and device to defraud as charged in the indictment, and the conspiracy to commit that offense, grew out of the same transaction, and were so connected together that the evidence to sustain one charge was evidence in support of the other charges, except to establish the conspiracy count, it was necessary to prove the conspiracy. Such charges may be joined under the provisions of section No. 1024 of the Revised Statute (Comp. St. 1916, § 1690), which provides:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

The case of Pointer v. United States, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208, is cited by the plaintiffs in error in support of their ob-

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jection that the conspiracy charged cannot be joined in the same indictment with the charge to commit the offense which is the object of the conspiracy. The Supreme Court did not so hold. In that case the indictment contained four counts:

"In the first count it was charged that the defendant, on the 25th of December, 1891, at the Choctaw Nation, in the Indian country, within the above district, did, with an ax, feloniously, willfully, and of his malice aforethought, 'strike, cut, penetrate, and wound' upon the head one Samuel E. Vandiveer, a white man, and not an Indian, inflicting thereby a mortal wound, * * * the same offense, and differed from the first only in using the words 'beat, bruise,' in place of 'cut, penetrate.' In the third count the defendant was charged, in the words of the first count, with having, in the same manner, on the 25th of December, 1891, feloniously, willfully, and of his malice aforethought, at the Choctaw Nation, in the Indian country, within the same district, killed and murdered one William D. Bolding, a white man, and not an Indian. The fourth count differed from the third only as the second count differed from the first."

[2, 3] The defendant moved to quash the indictment upon various grounds, one of which was that it charged two distinct felonies. The motion was overruled. Before the case was opened to the jury for the government, the defendant moved that the district attorney be required to elect on which count of the indictment he would claim a conviction. That motion having been overruled, he was required to go to trial upon all of the counts. Upon the conclusion of the evidence, the defendant renewed the motion that the government be required to elect upon which count of the indictment it would prosecute him. This motion was overruled. The jury found the defendant guilty upon the first and third count of the indictment. Upon writ of error to the Supreme Court of the United States, the judgment of the trial court was affirmed. In the opinion of the court, after referring to the rule established by authorities:

"That the court in its discretion may compel an election when it appears from the indictment or from the evidence that the prisoner may be embarrassed in his defense if that course be not pursued"

—the court says:

"It is therefore clear that the accused was not confounded in his defense by the union of the two offenses of murder in the same indictment, and that his substantial rights were not prejudiced by the refusal of the court to compel the district attorney to elect upon which of the two charges he would proceed."

The plaintiffs in error in the present case did not raise the objection that they were or had been embarrassed in their defense, and, had that objection been made, the disposition of the objection would have been in the discretion of the court and reviewable only if that discretion had been abused; and as it does not appear that the court abused its discretion in denying the motion, there is nothing for us to review; but, further than that, it does not appear that the plaintiffs in error were in any way prejudiced by the procedure. The jury acquitted the plaintiffs in error upon the conspiracy charge, and found them guilty only on the sixth count, charging them with the scheme to defraud, and depositing a letter in the post office to carry out the scheme. The judgment of the court was that the plaintiffs in error should each be im-

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prisoned for the period of 13 months and pay the costs, amounting to $4,120. The punishment prescribed for the commission of the offense set forth in the sixth count is by a fine not more than $1,000, or imprisonment not more than 5 years, or both. The objection cannot be sustained.

[4] It is next assigned as error that the evidence was insufficient to support a conviction under the sixth count, and that the motion for a directed verdict in favor of the plaintiffs in error should have been sustained. The sixth count charged that the defendants, to carry out their scheme to defraud, placed and deposited in a certain post office in the United States, to be sent and delivered by the post office establishment of the United States, a certain envelope, upon which the postage was fully prepaid; that the envelope was addressed to the person therein named and contained a circular letter and blank application for stock. The text of the letter and blank application are set out, and it is charged that the letter was signed, "Sidebotham & Wilmot, Sole Fiscal Agents, by J. Hosking," that the letter related to the stock of the Northwestern Trustee Company, and that the letter and blank application were a part of the scheme to defraud.

The plaintiffs in error contend that the evidence does not show that Sidebotham and Wilmot actually deposited in the mails the circular letter and blank application referred to, or that the same was deposited by their agent under their direction, with their knowledge. The envelope, circular letter, and blank application were introduced in evidence, and marked, respectively, Exhibits 97, 98, and 99. Jessie Hosking testified that she was a stenographer; that she was employed by Sidebotham and Wilmot in the capacity of stenographer and bookkeeper; that while she was in the employ of Sidebotham & Wilmot in the office of the Northwestern Trustee Company, she had occasion to send out or assist in sending out circular letters, and when circular letters were sent out they were mailed to the stockholders and subscribers; that she identified her signature at the bottom of the letter Exhibit 98 and that she had seen circulars or letters similar to that in the office signed "Sidebotham & Wilmot, by J. Hosking" which were mailed out to stockholders and subscribers; that she was J. Hosking; that Exhibit 97 was the Northwestern Trustee Company's envelope. She recognized No. 99 (blank application for stock). She had seen that in the office of the Northwestern Trustee Company; that it accompanied the letter she had identified as No. 98, and was sent out through the United States mails with it. She didn't know whether it was gotten out by the Northwestern Trustee Company or by Sidebotham and Wilmot. It was sent out by Sidebotham and Wilmot. She was asked, "Who was it that actually sent Exhibits No. 98 and 99—mailed them?" She answered, "Sidebotham and Wilmot." She was asked, "Did you do it for them?" and she answered, "Yes, I did it; it was my instructions to send it out for them." She was asked how they were sent out, and she said, "Through the mail." She was asked how they were mailed out, and she answered, "As far as I can remember, they were dropped in the United States post office." This testimony and the legitimate inferences to be drawn therefrom as to acts of an authorized agent are, we think, suffi-

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cient to establish the fact that the envelope, circular, and application for stock were placed in the post office under the direction of the plaintiffs in error and with their knowledge.

[5, 6] The objection that the court, in its instructions to the jury, referred to the fact that the defendants did not take the stand and testify in their own behalf, has no other basis than the court's definition of the "element of intent" in its instructions to the jury. The court instructed the jury upon this question as follows:

"What is intent? Intent is the quality of mind with which an act is done. It is the mental process, the design, the aim, the purpose or object of the act. How is this intent arrived at? Being a mental process, you cannot penetrate to the mind of a man, if he will not tell you, unless you can infer from his conduct; so that the law is: A man's intent is manifested and shown by all the circumstances connected with the offense."

The court also instructed the jury as follows:

"In September, 1914, Wiggins testified that Wilmot stopped him on the road, and sold him 10 shares at $30, and told him the company had been paying dividends the past year at the rate of 8 per cent., and he would guarantee that this year, when Wiggins did buy, that it would be 30 per cent. or better. No one has denied Wiggins' testimony, and there it stands for your consideration."

The instruction did not in any ordinary or legal sense call the attention of the jury to the fact that the plaintiffs in error did not testify in their own behalf, and we do not think the jury so understood it. None of the defendants testified in their own behalf.

The indictment charged 15 defendants with the offenses described in the indictment. The indictment contained 11 counts. The case was submitted to the jury against 7 defendants on 5 counts in the indictment. Had the court's instructions referred to been understood as calling the attention of the jury to the fact that the defendants did not testify in their own behalf, and had the instructions, as thus understood, prejudiced their defense in this respect, no such discriminating verdict, upon the evidence before the jury, would have been rendered against the plaintiffs in error, while acquitting the other 5. In other words, the evidence in the case clearly indicates that the verdict was based upon the direct and positive testimony of witnesses and documents and the legitimate inferences to be drawn therefrom, and not from any prejudice because the plaintiffs in error did not testify in their own behalf.

Finding no error in the record, the judgment of the District Court is affirmed.

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TOYO KISEN KAISHA v. HARTMAN.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1918.)

No. 3136.

1. APPEAL AND ERROR ⊂=784—FEDERAL COURTS—DISMISSAL BECAUSE OF ERROR IN METHOD OF REVIEW.
By the express terms of Act Sept. 6, 1916, § 4 (Comp. St. 1916, § 1649a), a federal appellate court having jurisdiction to review a cause may not dismiss a writ of error solely because an appeal should have been taken, but must disregard the error.

2. MASTER AND SERVANT ⊂=316(1)—MASTER'S LIABILITY FOR INJURY TO SERVANT—INDEPENDENT CONTRACTOR.
Where a steamship, lying in a harbor and being unable to reach the docks, employed and paid a firm to carry passengers and others to and from the shore in launches, such firm was not an independent contractor as to one injured in a launch, but its employés were pro hac vice employés of the ship.

3. MASTER AND SERVANT ⊂=89(1)—MASTER'S LIABILITY FOR INJURY TO SERVANT—SAFE PLACE TO WORK.
The rule respecting a safe place to work and approaches to it does not apply to the case of a seaman in returning to his ship from the shore, where he had been on his own business, not connected with his employment.

4. MASTER AND SERVANT ⊂=120—PERSONAL INJURIES—LIABILITY OF SHIP.
Injury to a seaman by falling, while attempting to step from a launch to the gangplank of the ship in rough weather and carrying packages in his arms, *held* not due to negligence of the ship.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action at law by A. L. Hartman against the Toyo Kisen Kaisha. Judgment for plaintiff (244 Fed. 567), and defendant brings error. Reversed.

Samuel Knight and F. E. Boland, both of San Francisco, Cal., for plaintiff in error.

Edgar D. Peixotto, of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The defendant in error, who brought in the court below this action against the plaintiff in error to recover damages for personal injuries, was employed on the steamship Shinyo Maru, owned and operated by the plaintiff in error between San Francisco and certain Oriental ports, including Nagasaki, Japan. He was on the ship's articles at a salary of $1 a month, being the barber of the ship, and receiving the proceeds of the shop. On the occasion in question the ship was at her accustomed anchorage at Nagasaki, at which place ocean-going vessels are not able to go to the dock. The firm of Holmes, Ringer & Co., of Nagasaki, was employed by the plaintiff in error for the transportation of passengers and others, and their baggage, between their ships and the shore, using launches for

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the purpose—usually large launches, but sometimes, as in the present instance, small ones.

On this occasion the defendant in error, having gone ashore on his own business, when ready to return to the ship, went to the dock, where he found one of the small launches, in which he took passage with the ship's physician, Dr. Wemple, and one Japanese. He had with him two bundles, one of which was 2 feet long and 2 inches wide, and the other about 12 by 8 inches. A heavy wind was prevailing, necessarily resulting in rough weather—some of the witnesses saying very rough. When the launch reached the ship, the doctor and the Japanese went aboard; but when the defendant in error undertook, with the two bundles under his left arm, to step from the launch to the gangplank, he lost his balance and fell, his left leg being caught in the hawse hole of the launch, resulting in his injury, for which he sued and recovered the judgment here complained of—the court below having awarded him $700 for medical and other expenses incurred by him, and a like sum for his suffering and loss of time, $1,400 in all, besides costs.

Among the defenses interposed by the defendant were denials that the crew of the launch was employed by the defendant, or was guilty of any of the negligence alleged, but, on the contrary, alleging that it was employed by an independent contractor, and as an affirmative defense set up contributory negligence by the plaintiff, and as a further and separate defense that the rights, duties, and liabilities of the parties were prescribed and to be measured by the laws of the empire of Japan in force at the time of the accident, which laws the answer set forth at large.

[1] A motion has been made on behalf of the defendant in error to dismiss the writ of error, on the ground that the action was really in admiralty, and the judgment reviewable only by appeal. In denying the motion, which we do, we think it sufficient to cite section 4 of the act of September 6, 1916 (39 Stat. 726 [Comp. St. 1916, § 1649a]), which provides as follows:

> "That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

The plaintiff in error contends that the firm of Holmes, Ringer & Co. was an independent contractor, for whose negligence, if any, it is not responsible; that, if not such independent contractor, then its employés were pro hac vice the employés of the plaintiff in error, and therefore fellow servants of the defendant in error, for whose negligence, if any, the former is not liable; that there was no negligence on the part of the plaintiff in error, and, if so, that the injury was proximately caused by the negligence of the defendant in error; that the court below erred in holding that the laws of the empire of Japan did not measure the rights and liabilities of the parties, and erred in refusing to apply the general rule of the maritime law in fixing the amount of recovery allowed.

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[2] We have no difficulty in agreeing with the trial court that the firm of Holmes, Ringer & Co., being under contract with the steamship company to furnish means of communication back and forth between the dock and ship, cannot be properly regarded as an independent contractor, but that the plaintiff in error must be taken to have held out to its employés, as well as to its passengers aboard the ship, that they were to use the means of transportation thus afforded; indeed, it was the only means—provided and paid for, as the record shows, by the plaintiff in error. The crew of the launch were therefore pro hac vice employés of the plaintiff in error.

[3] Assuming that there was some evidence tending to show negligence by them, and therefore sufficient to sustain the finding of the court that they were negligent, we are still unable to sustain its conclusion that the plaintiff in error was liable for the injury. The learned judge based his conclusion upon the well-established rule regarding the duty of an employer to furnish his employé with a reasonably safe place for the performance of his labor, adding in his opinion that it "includes reasonably safe means of access to his place of employment—so far, at least, as the circumstances require such means to be furnished by the employer."

We are of the opinion, however, that the rule referred to has no application to the facts of the present case; for, as shown by the evidence without dispute, neither in going from or returning to the ship was the defendant in error traveling for any purpose connected with the business of his employer, but solely for his own pleasure and purposes. Ellsworth v. Metheney, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389, presented a case to the Circuit Court of Appeals for the Sixth Circuit where a coal miner, during the noon hour and while not engaged in work, went to visit another miner in another part of the mine, and in going along one of the passageways was killed by coming in contact with a wire claimed to have been improperly insulated. The trial court instructed the jury, in effect, that the deceased, in going and returning from the visit during the hour set apart for dinner and rest, was "in the line of duty within the meaning of the law."

In holding that view erroneous, Judge Day (now a Justice of the Supreme Court), with whom concurred Judge Lurton (later also a Justice of the Supreme Court) and Judge Severens, said:

"It is to be borne in mind in this connection that Metheney was not going from, or coming to, his work. He was not engaged in the business of his employer at the time of the injury, but came to his death during the noon hour, while returning from a visit undertaken, upon his own volition, outside the part of the mine in which he was employed."

See, also, Ocean Accident, etc., Co. v. Industrial Accident Com., 173 Cal. 313, 159 Pac. 1041, L. R. A. 1917B, 336; Kennedy v. Chase, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153; Wright v. Rawson, 52 Iowa, 329, 3 N. W. 106, 35 Am. Rep. 275; 1 Shear. & R. Neg. § 190.

[4] But, if the law were otherwise, we are of the opinion, after a careful consideration of the question of the alleged negligence, that but one conclusion can be reasonably reached upon the evidence, and

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that is that the unfortunate accident was not due to any negligence on the part of any employé in the operation of either the launch or ship, but to the attempt of the defendant in error to step from the launch to the gangplank, in the then condition of wind and water, with the bundles under one of his arms. It would serve no useful purpose to review the evidence, but, reaching that conclusion, it is obviously our duty to disregard the finding of the trial court to the contrary. It being unnecessary to consider any of the other points relied upon by the plaintiff in error, the judgment is reversed, and the case remanded to the court below for a new trial.

UNITED VERDE COPPER CO. v. KUCHAN.

(Circuit Court of Appeals, Ninth Circuit. June 3, 1918.)

No. 3089.

MASTER AND SERVANT ⟹184—MASTER'S LIABILITY FOR INJURY TO SERVANT—UNSAFE PLACE TO WORK.

Under Civ. Code Ariz. 1913, par. 4071, requiring warning to be given before firing a blast in a mine, and Const. Ariz. art. 18, § 4, abrogating the fellow servant doctrine, a mining company is responsible for a failure to give such warning, whereby an employé is injured.

In Error to the District Court of the United States for the Distrcit of Arizona; Wm. H. Sawtelle, Judge.

Action by Nick Kuchan against the United Verde Copper Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action for damages for personal injuries received by the defendant in error while employed by the plaintiff in error in its mine in Yavapai county, Ariz. At the time of the injury the defendant in error was employed upon the 700-foot level of the company's mine, where another servant of the plaintiff in error was engaged in blasting and discharging explosives. While the defendant in error was passing, with others, from one place upon said level to another place on the same level, where they were to have lunch, a large quantity of dynamite or other high explosive placed in a hole by the servant of the plaintiff in error engaged in that work was suddenly exploded and discharged, without any warning to the defendant in error that such explosion and discharge was to be made. As a result of the explosion, the defendant in error was struck with a quantity of rocks and stones, whereby he sustained severe permanent injuries, among others, the loss of both of his eyes, the total loss of the hearing in one ear and impairment of the other, some destruction of the molar bones of the jaw and a wounding of the left shoulder; the latter probably not a permanent injury. At the trial the injuries were proven as stated, and, at the conclusion of the testimony, counsel for the plaintiff in error stated that, notwithstanding he contended there was no negligence on the part of the plaintiff in error, he was willing that the jury should bring in a verdict of $7,500, but that he was not willing that they should bring in a verdict for more than $7,500, unless the jury believed defendant was guilty of negligence. No claim was made that defendant in error was guilty of contributory negligence. The jury returned a verdict for $25,000 and costs.

G. P. Bullard, of Phœnix, Ariz., and Le Roy Anderson and Anderson, Coleman & Nilsson, all of Prescott, Ariz., for plaintiff in error.

F. C. Struckmeyer and J. S. Jenckes, both of Phœnix, Ariz., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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MORROW, Circuit Judge (after stating the facts as above). It is assigned as error that the court gave the jury the following instruction:

"You are instructed that the law requires a mining company, such as the defendant, before firing charges of explosives, to give warning in every direction from which access may be had to the place where blasting is going on. This is a duty imposed upon mining companies, and the failure to give warning as required by statute constitutes negligence on the part of the defendant; and if you find from the evidence that warning of the intention to fire the charges of explosives which caused the injury to the plaintiff was not given to the plaintiff, and that the failure to give such warning constituted the proximate cause of such injury to the plaintiff, then the plaintiff is entitled to recover in this action."

The instruction was based upon subdivision (e) of section 4071 of the Civil Code of Arizona (Revised Statutes of Arizona 1913 and Civil Code, p. 1365). The section provides, among other things:

"Before firing charges, warning must be given in every direction from which access may be had to the place where blasting is going on."

The question is: Does the law place the duty of giving the warning before firing a charge of explosives upon the mining company? The appellant contends that the duty of giving the warning must be definitely fixed upon the company to make it liable, and as there are no words in the statute designating the mining company as the person or company on whom the duty to give the warning falls, the duty is not so placed, and must fall upon the employés or servants, failing to do that duty; but the "common-law doctrines of fellow servants, so far as it affects the liability of a master for injuries to his servants resulting from acts or omissions of any other servant," was abrogated by section 4 of article 18 of the Constitution of the state. It follows that, if it be conceded that the statute fails to place the duty to give the warning upon the mining company, nevertheless the Constitution of the state, construed in the light of the general law, makes the company responsible for the neglect of such duty, and the same result is reached as though the statute had directly placed the duty of giving the warning upon the mining company. This responsibility of the mining company arises under the general law requiring all employers to use ordinary care to furnish a reasonably safe place within which their employés are required to work.

The Supreme Court of Iowa, in Hendrickson v. United States Gypsum Co., 133 Iowa, 89, 110 N. W. 322, 9 L. R. A. (N. S.) 555, 12 Ann. Cas. 246, after stating the general rule that it was a masterial duty to provide employés a safe place to work, and that this duty was one which could not be delegated in such a way as to release the master from responsibility for failure to perform it, gives this clear and logical construction of the rule as applied to the use of explosives in a mine, the question before the court in that case. The court says:

"It must at all times be remembered that defendant was using a highly dangerous explosive in its mine, and that, by reason thereof, the place was unsafe, unless proper rules were made for the handling thereof, and proper warnings given of the blasts."

In Belleville Stone Co. v. Mooney, before the New Jersey Court of Errors and Appeals, the plaintiff an employé in defendants' quarry was

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injured by a piece of rock thrown out by a blast. The plaintiff was not warned of the blast soon enough to enable him to reach a place of safety. In discussing the question of the employer's liability for the neglect of an employé in failing to give timely warning of the blast, the court said:

"The danger of blasting was one frequently recurring, and its occurrence could always be foreseen, not by workmen scattered about the quarry, but by any person charged with the duty of watching for it. If the danger was not foreseen, and proper warning given, the quarry became an unsafe place for the workmen; but it was made reasonably safe if such warning was given. It seems clearly to follow that on him whose duty it was to take care that the place should be kept safe was cast the duty of giving timely warning. We conclude, therefore, that it was part of the defendant's duty to the plaintiff that proper care should be exercised in giving warning of an expected blast." 60 N. J. Law, 323, 38 Atl. 835; 61 N. J. Law, 253, 39 Atl. 764, 39 L. R. A. 834.

To the same effect is Hjelm v. Western Granite Contracting Co., 94 Minn. 169, 102 N. W. 384; Jacobson v. Hobart Iron Co., 103 Minn. 319, 114 N. W. 951.

In Iowa, New Jersey, and Minnesota the fellow servant rule prevails in other than railroad employment. It will thus be seen that, in using such a dangerous agent as an explosive in those jurisdictions, the safe place rule required of the master is made superior to the fellow servant rule, and determines the master's responsibility for injuries arising from negligence. It follows that the use of explosives in a jurisdiction where the fellow servant rule has been abolished the law with still greater force and certainty imposes upon the employer, under the safe place rule, a responsibility he cannot delegate to others and determines his liability for the negligence of a fellow servant. This we believe to be the correct interpretation of the provision of the Constitution and Civil Code of Arizona upon that subject.

This conclusion is a sufficient answer to the other questions discussed in the brief of the plaintiff in error. We think the questions involved in the writ of error were of sufficient importance to be brought to this court, and the defendant ought not to be subjected to additional damages on that account.

The judgment of the court below is affirmed.

AMERICAN MINERAL PRODUCTION CO. v. HELSLEY.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1918.)

No. 3184.

SALES ⟸359(1)—ACTION FOR PURCHASE PRICE—SUFFICIENCY OF EVIDENCE.
Evidence *held* to sustain a verdict finding that there was a sale and delivery to defendant of personal property and its acceptance.

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

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Action at law by F. M. Helsley against the American Mineral Production Company and another. Judgment for plaintiff, and defendant named brings error. Affirmed.

Post, Russell, Carey & Higgins, of Spokane, Wash., for plaintiff in error.

Zent & Powell, of Spokane, Wash., and L. C. Jesseph, of Colville, Wash., for defendant in error.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

HUNT, Circuit Judge. This action was brought by Helsley against Cole and the corporation, American Mineral Production Company, for the purchase price of six motor trucks. The two defendants jointly denied all material allegations of the complaint and pleaded the statute of frauds. Upon the trial, the court granted the motion of defendant Cole for judgment, upon the ground of lack of evidence to show joint purchase by Cole and the corporation, but denied the motion for judgment in favor of the corporation, holding that there was evidence of an agreement of sale with the corporation and a delivery under the agreement. The jury were instructed upon this theory, and there was verdict, and thereafter judgment, in favor of Helsley.

The assignments of error present the question of the sufficiency of the evidence to show a contract between Helsley and the corporation. There was evidence to the effect that Cole was president of the corporation defendant; that in July, 1917, after negotiations, he purchased the interest of Helsley in the trucks, and agreed to pay $5,500 therefor; that there was delivery to the agent of the corporation, and that the corporation used the trucks and put them under the immediate supervision of one of its employés; that at the time of the negotiations referred to the corporation was party to a contract with Helsley to deliver to him at least 600 tons of ore a week for transportation, at $2 per ton; and that upon consummation of the sale Helsley was relieved of the obligations of the contract.

The court in its instructions to the jury explained that under the law of the state of Washington a sale of personal property to the value of more than $50 is void, unless there is a written memorandum of the sale signed by the party to be charged, or unless some part of the purchase price has been paid, or unless there has been a delivery of the property or some part of it, and charged that the plaintiff was obliged to prove that a sale was made as alleged, and that the trucks were delivered to and accepted by the corporation. Inasmuch as the charge was directly upon the issues presented, and plaintiff in error took no exceptions to the law as stated, its rights have not been injured.

We cannot sustain the contention that Cole was not acting for the corporation. The court was correct, we think, in dismissing the case as to Cole as an individual; but the question whether Cole was acting for the corporation when the negotiations were had was properly submitted to the jury.

We find no error, and affirm the judgment.

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CHICAGO, M. & ST. P. RY. CO. v. CHAMBERLAIN.

(Circuit Court of Appeals, Ninth Circuit. June 3, 1918.)

No. 3097.

1. EVIDENCE ⟸122(6)—RES GESTÆ—STATEMENT CONNECTED WITH EVENT.
A statement made by plaintiff, shortly before he fell from an unlighted station platform on defendant's railroad and was injured, that he was there to take an incoming train, *held* admissible as part of the res gestæ.

2. EVIDENCE ⟸155(11)—COMPETENCY—SIMILAR EVIDENCE BY ADVERSE PARTY.
Testimony in rebuttal that plaintiff in personal injury case was not intoxicated, relevent in contradiction and explanation of testimony introduced by defendant over plaintiff's objection, *held* properly admitted.

3. NEW TRIAL ⟸6—DISCRETION OF COURT.
The denial of a motion for a new trial in the federal courts is within the discretion of the court.

4. APPEAL AND ERROR ⟸977(1)—REVIEW—NEW TRIAL.
Where the court exercises its discretion in denying a motion for new trial, and there is evidence supporting the judgment, motion is not reviewable on writ of error.

In Error to the District Court of the United States for the District of Idaho; Frank S. Dietrich, Judge.

Action by Bartholomew Chamberlain against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Action to recover damages for personal injuries. The defendant in error received injuries as a result of falling from a platform owned by the plaintiff in error, located at a point on its line of railway designated as Herrick, in the state of Idaho. The parties to the action will be designated as in the court below.

It is alleged in the complaint, in substance, that prior to October 1, 1916, there was at Herrick, in Idaho, a depot building with a platform in connection therewith for the convenience of passengers arriving and departing on the trains operated by the defendant over its line of railway; that the depot and platform at this time were constructed between the main line and a siding adjoining, and were elevated above the natural lay of the ground about 10 feet; that the depot building was constructed upon posts about 10 feet high, and the platform in connection therewith extended from the depot building proper out to the main line, a distance of about 11 feet; that on the west side of the depot building the platform was extended from the main line to the side track for the purpose of transferring freight and passengers from the main line to the side track, and completely bridged the low land between the side track and the main line on the west side of the depot building; that about the 1st of October, 1916, the defendant removed the depot building and that portion of the platform west of the building from the station to some other point on its line of railway, but left the platform, which had extended from the depot building to the main line, being about 11 feet in width and 80 feet long; that on the side of the platform where it formerly joined the depot building it was elevated above the natural lay of the ground about 10 feet, and that the ground below was thickly covered with rocks, boulders, and logs; that after moving the depot building the defendant maintained a station at that point as before, and sold tickets to and from the station, and continued the platform for the use and convenience of passengers, but left the platform along the space where the depot building stood unguarded and unrailed; that on November 15, 1916, the plaintiff, intending to board a west-bound passenger train as a passenger, went

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upon the platform about 7 o'clock in the evening, just before the arrival of the train; that the evening was dark and the platform unlighted, and because of the unguarded and unrailed condition of the platform, along the space where the depot building had been, the plaintiff fell from the platform about 10 feet to the ground below and was injured, as charged in the complaint.

The defendant in its answer denied the allegations of the complaint. Upon the trial there was evidence on the part of the plaintiff tending to establish all the material allegations of the complaint. The court charged the jury upon the issues of fact. No exceptions were taken to the charge, and the jury returned a verdict in favor of the plaintiff for $7,500, and a judgment was entered accordingly. A motion for a new trial was denied.

George W. Korte, of Seattle, Wash., and J. F. Ailshie, of Cœur d'Alene, Idaho, for plaintiff in error.

R. B. Norris, of St. Maries, Idaho, and Corkery & Corkery, of Spokane, Wash., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] The answer of the defendant denied that the plaintiff went upon the platform at the station for the purpose of becoming a passenger on defendant's train. This denial raised the issue as to whether or not the plaintiff did intend to become such passenger. On the trial the plaintiff testified that he went upon the platform, intending to take passage to another station on the west-bound train. This testimony was uncontradicted, but in support of it a witness was called, who testified, among other things, that he saw the plaintiff at the station upon the arrival of the train; that the witness was about to shake hands with him and bid him good-by, when the plaintiff stated that he "was going on through with" the witness "on the train as far as Plummer Junction." It was objected that this testimony was hearsay, self-serving, and incompetent. It was not self-serving, unless it can be presumed that the plaintiff anticipated falling from the platform, and that he knew it was necessary that he should have the rights of an intending passenger to enable him to recover for whatever injuries he might receive. We cannot indulge in such a presumption. We cannot assume that the plaintiff knew that he was about to fall from the platform, or that as an intending passenger the company owed him a duty he was not otherwise entitled to claim.

In a sense, the testimony of the witness was hearsay, but it stood "in immediate causal relation to the act—a relation not broken by the interposition of a voluntary individual wariness seeking to manufacture evidence for itself." Wharton on Evidence (3d Ed., 1888) par. 259. In this sense it was a part of the res gestæ.

"These surrounding circumstances, constituting part of the res gestæ, may always be shown to the jury along with the principal fact, and their admissibility is determined by the judge according to the degree of their relation to that fact and in the exercise of his sound judgment; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description." 1 Greenleaf (12th Ed.) par. 108; St. Clair v. United States, 154 U. S. 134–147, 14 Sup. Ct. 1002, 38 L. Ed. 936.

We think the testimony was unimportant, but its admission was properly within the discretion of the court.

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[2] In support of the defense of contributory negligence on the part of the plaintiff, evidence was introduced, over the objection of the plaintiff, tending to show that he had been at another station on the line of the road earlier in the day drinking with friends; that, returning in the afternoon along the railroad track in the direction of Herrick, the party had been overtaken and picked up by employés of the road operating a motorcar; that the employés on the motorcar did this as a matter of safety for the men taken on the car. The plaintiff was called in rebuttal and testified that he was not drunk, and over the objection of the defendant testified that the party paid the employés on the car for the ride.

It is contended that the admission of this testimony was error tending to prejudice the jury against the defendant. The testimony was admitted by the court as tending to meet the defense that these men were picked up because they were in an intoxicated condition. The car ride having been brought to the attention of the jury over the objection of the plaintiff, it was not error on the part of the court to permit him to show the circumstances connected with the ride, and the fact, if it was a fact, that, instead of being taken onto the car for his safety, it was because he paid for the ride to Herrick. It was testimony in rebuttal, and under the circumstances was properly admitted.

The evidence on behalf of the plaintiff upon the issues of the case were sufficient to go to the jury, and the court properly denied the motion of the defendant for an instructed verdict.

[3, 4] The denial of a motion for a new trial in the federal courts is within the discretion of the court, and where that discretion has been exercised, and there is evidence to support the judgment, as in this case, a motion is not reviewable on a writ of error. Hedderly v. United States, 193 Fed. 561–571, 114 C. C. A. 227; Pickett v. United States, 216 U. S. 456–461, 30 Sup. Ct. 265, 54 L. Ed. 566; Holmgren v. United States, 217 U. S. 509–521, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Shepard v. United States, 236 Fed. 73–77, 149 C. C. A. 283; Maryland Casualty Co. v. Orchard Land & Timber Co., 240 Fed. 364–367, 153 C. C. A. 290.

The judgment of the court below is therefore affirmed.

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BALLARDVALE SPRINGS CO. v. UNITED METAL SEAL CO.

(Circuit Court of Appeals, First Circuit. September 12, 1918.)

No. 1341.

1. PATENTS ⟸328—VALIDITY—CAP FOR BOTTLES.
The Recht patent, No. 796,356, for improvement in caps for bottles, *held* void for lack of patentable novelty, in view of the prior art.

2. PATENTS ⟸42—IMPROVEMENT PATENTS—VALIDITY.
In considering the claims of a first improver upon a specific device, when asserted against third persons, it is often useful to inquire whether his claims could have been asserted by the improver against the inventor and patentee of the specific device upon which the improvement was made.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit in equity by the United Metal Seal Company against the Ballardvale Springs Company. Decree for complainant, and defendant appeals. Reversed.

James Q. Rice, of New York City (Alfred H. Hildreth, of Boston, Mass., on the brief), for appellant.

Harrison F. Lyman, of Boston, Mass. (Fish, Richardson & Neave, of Boston, Mass., on the brief), for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and BROWN, District Judge.

BROWN, District Judge. This is an appeal from a decree of the District Court, holding valid and infringed claims 1 and 5 of letters patent to F. Recht, No. 796,356, August 1, 1905, for improvements in caps for bottles.

Claim 1 is typical:

"1. The combination, with a metal cap adapted to be locked over the mouth of a bottle, of a tenacious metal disk contained within the cap, and a disk of compressible material interposed between the cap and metal disk, the whole organized to effect a sealing contact between the metal contained in the cap and the mouth of the bottle."

The "tenacious metal disk" is the element claimed to be new; the other elements being contained in prior art devices.

The manufacturer of defendant's device has taken a bottle cap of the old type, described in the earlier patent to W. Painter, No. 468,258, February 2, 1892, consisting of a cap of hard metal with a corrugated flange and a sealing disk of cork, a kind of bottle closure in very extensive use, and known as the "Crown Cork and Seal," and for the purpose of preventing contamination of the contents of the bottle, and to prevent leakage through the pores or defects of the cork sealing disk, has applied to the side of the disk which comes in contact with the contents of the bottle a disk of tin foil or a thin sheet of tin.

[1] The defendant relies upon the patented art prior to Recht as disclosing this protective means, and as justifying its use by defendant, irrespective of the patent in suit.

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The use of a "thin sheet of pure tin" for this purpose in sealing devices for bottles, jars, and other vessels, is shown in the British patents to Weissenthanner, No. 7,597 of 1893, and No. 13,352 of 1879. The use of tin foil is described in the Laurent British patent, No. 6,920 of 1887, the Jovignot British patent, No. 12,957 of 1902, the United States patent to Chrysler, No. 51,020 of 1865, and other patents.

The District Court said:

"The use of cork disks covered with a tin foil coating was old, as is not denied; such coating being intended to prevent contact between the cork and the liquid contents of the bottle—a contact found liable to injure carbonated or other waters when so contained."

The plaintiff seeks to avoid the disclosures of the prior art by contending that the Recht patent relates to the special art of "crown caps" for bottles, which began with the Painter patent, No. 468,258, and which involves the use of considerable pressure in applying the caps to the bottles.

It seems clear that Painter, the prior patentee of the crown cap, who had invented a new form of bottle cap, could not be deprived of the right to use in connection with that invention the familiar and well-known means of avoiding contamination, which was applicable to the general art of bottle closure upon which he improved. In the present case it appears that the problem of preventing the contamination of the contents of a bottle by a cork, or by reason of imperfections of a sealing disk, had been solved by interposing a sheet of tin between cork and contents.

The mere fact that, after Painter, Recht, or any one else may have been first to do this for a crown cap, does not in the least assist in showing that invention was involved in so doing. Nor does the fact that it has proved very useful, because so many crown caps are used, tend to show invention. It is useful with crown caps, exactly as it was useful with caps of other kinds, and for the same reason.

The idea of using with Painter's new type of cap the same protection—tin—which was commonly used for that purpose was not an inventive idea, unless the new construction presented obstacles to its use nonexisting in old forms and requiring to be overcome by a new idea of means.

The new feature introduced by Recht is said to be "a tenacious metal disk"—i. e., a disk which will not be torn when it is subjected to the considerable pressure used in attaching crown caps to bottles. The patentee says of his protective disk:

"It is of such thickness, usually three to five thousandths of an inch, and of such tenacity that when the requisite pressure is applied for fixing the cap and the metal disk is clamped between the wood disk and the mouth of the bottle the metal disk will properly fold and adjust itself to the mouth of the bottle without tearing and effect a proper sealing contact."

There is no evidence from which it can be inferred that the problem of preventing disruption of a protective disk presented any practical difficulty that required more than ordinary common sense for its solution.

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Assuming that there was presented the problem of providing a lining that would withstand a pressure heavier than that applied to former battle caps, and that this problem was solved by thickening the material already selected by prior art users on account of its insolubility, we are unable to regard this as involving invention.

In estimating the value of the defendant's argument that the patent in suit was for an improvement in a special class of bottle closures, we must remember that the crown cap was an old and complete invention, which in common with other closures uses a cork which comes into contact with the liquid. The means for obviating the direct contact between cork and contents was well known. Tin or tin foil had been selected because of the quality of insolubility, and it performed the protective function in the devices of the prior art exactly as in the crown caps protected by the same kind of substance. The fact that there are many patents for other means of protection for corks, whether in crown caps or in caps of other kinds, and that various experiments were made to find other means, does not detract from the fact that tin was already described in prior patents, relating to the art of sealing devices for bottles and other vessels, as suitable for this purpose.

[2] In considering the claims of a first improver upon a specific device when asserted against third persons it is often useful to inquire whether his claims could have been asserted by the improver against the inventor and patentee of the specific device upon which the improvement was made. The inventor of a specific improvement in the art of sealing bottles does not by securing an improvement patent cut off himself or others from resort to the prior art upon which he improved. That he established a new art or subart by his species improvement must be shown by contrasting what he did with the devices of the prior art upon which he improved. Upon the question of the scope of his invention the prior art may be cited against him, and against all improvers upon his specific device. The crown cap patents do not begin that branch of the art of bottle closure which has to do with protection interposed between cork and contents. This is an old and special feature of the general art, and in order to show that what was old when applied to other structures is new when applied to a crown cork we must consider first whether any new function was effected. So far as appears, the function of the insoluble tin was the same as before.

We may next inquire whether there was any mechanical difficulty in applying tin to a crown cap which did not exist in applying it to prior devices, and which had to be overcome by inventive skill. It is said that, as the crown cap was subjected to greater pressure, it had to be made of material sufficiently tenacious to resist that pressure. The Weissenthanner patents and the Jovignot patent show the protective sheet of tin conforming to pressure and adapting its form to the compression of the cork which it covers and keeps from contact with the contents, and are a sufficient indication to a mechanic that the protective sheet must be strong enough to withstand such strains as are used to compress the cork. Aside from this we think it obvious that a protective sheet applied to cork which is to

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undergo pressure must be strong enough to withstand the degree of pressure to be applied, and that this would be obvious to any person of ordinary skill who was seeking to apply to crown caps the same kind of protective covering used on caps of other descriptions.

The history of the experiments and failures of others is much relied upon to prove invention. It is true that the argument that apparent simplicity in means shows noninvention may be met by the answer that many tried and nobody thought of it; but this avails nothing against prior patents which describe the means and show that, even if there was reinvention at a later time, there was nevertheless no patentable novelty.

As we are of the opinion that the claims in suit are invalid for want of patentable novelty, it is unnecessary to consider the defenses of double patenting and laches.

The decree of the District Court is reversed, and the case is remanded to that court, with instructions to dismiss the bill. The appellant recovers costs in both courts.

HUEBNER-TOLEDO BREWERIES CO. v. MATHEWS GRAVITY CARRIER CO.

(Circuit Court of Appeals, Sixth Circuit. October 8, 1918.)

No. 3125.

1. PATENTS ⟸26(1)—INVENTION—ADAPTATION OF OLD DEVICES.
To adapt an old and familiar device to another structure equally old and well known is not to exercise the inventive faculty, but to apply the skill of the mechanic.

2. PATENTS ⟸19—INVENTION—IMPROVED RESULT.
A mere carrying forward of the original idea, a change in form, an improvement in degree, without substantial change in either means or result, is not invention.

3. PATENTS ⟸26(2)—INVENTION—COMBINATION OF OLD ELEMENTS.
The selection and putting together of the most desirable parts of different machines in the same or kindred arts, making a new machine, but in which each part operates in the same way as it operated before, and effects the same result, cannot be invention.

4. PATENTS ⟸36—INVENTION—COMMERCIAL SUCCESS.
Commercial success is never a safe criterion of invention, except in cases of doubtful validity of the patent.

5. PATENTS ⟸328—VALIDITY—GRAVITY CARRIER.
The Mathews & Lister patent, No. 890,917, and the Mathews patent, No. 978,466, each for improvements in gravity carriers, are both void for lack of invention, in view of the prior art.

Appeal from the District Court of the United States, for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Suit in equity by the Mathews Gravity Carrier Company against the Huebner-Toledo Breweries Company. Decree for complainant, and defendant appeals. Reversed.

Russell Wiles, George A. Chritton, and Wm. H. Dyrenforth, all of Chicago, Ill., for appellant.

A. C. Paul, of Minneapolis, Minn., and Wilber Owen, of Toledo, Ohio, for appellee.

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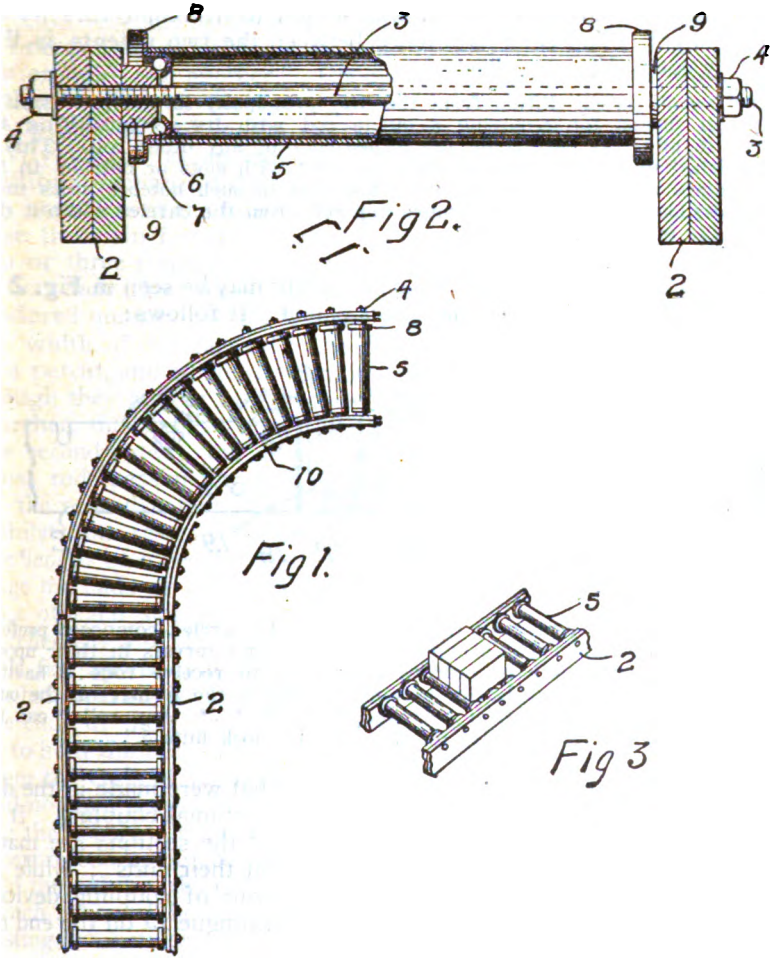
Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This suit is based upon alleged infringement of two patents; it is met in the answer, not only by denial, but particularly by allegation that the claims of these grants are "wholly and entirely void, as not involving anything more than ordinary mechanical skill over what is common knowledge in the art," and a great many prior patents are referred to. The patents in suit are (1) No. 890,917, issued June 16, 1908, to Mathews & Lister, assignors to Mathews Gravity Carrier Company, and (2) No. 978,466, issued December 13, 1910, to Mathews, assignor to the same company. That company was a Minnesota corporation, and its rights, so far as this suit is concerned, have passed to the appellee, a Pennsylvania corporation. The patents were each in terms granted for "improvements in gravity carriers," and will be mentioned hereafter, in the order of their dates, as the first patent and the second patent. Claims 2, 4, 5, 6, 7, 8, and 9 of the first, and all the claims of the second, patent are in issue; and both patents, as respects the claims in issue, were held valid and infringed by the court below. The cause was referred for an accounting and damages, and perpetual injunction was issued. By consent the master reported that appellant had purchased from a company named (though not a party to the suit), and had used in its business, "material found by the court in its decree to be an infringement," and stated the amount of appellee's loss of profits thereon. The Breweries Company appeals.

We may as well say at the outset that, if the patents are valid, they are, at least as to some of the claims in issue, infringed. The important feature of the case is found in the issue of validity. This issue in the end is one of fact. It is whether the disclosures of the patents, when compared with the prior art, amount to anything more than the natural developments of the skilled mechanic. The first patent relates, in the language of the specification, "to carriers designed particularly for transporting brick and similar articles of comparatively small dimensions by gravity." Generally speaking, the carrier comprises two parallel side rails, with a series of transverse metal tubular rollers having ball bearings at their ends and having rods extending through their longitudinal centers, and also through the side rails, where they are held by means of lock nuts; the rollers so mounted rotating freely on their respective rods or axles. The carrier is constructed in sections of lengths suitable for removal from one place to another, and the sections are provided with projecting ends adapted to fasten one section to another, and so to form a continuous structure of such length, along such courses, and at such a grade as the convenience of the user may require. Another feature of this patent is that the rollers are provided with flanges or rims at the ends, on which packages of greater width than the length of the rollers may be placed and transported. The specification states: Side guards or other frictional interference with packages moving on the carrier are dispensed with; the packages follow "the line of least resistance" and travel "in the direction of rotation of the

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wheels," and may thus be moved from one point to another along the roller surface of the carrier, when maintained at a slight grade. The character and details of the structure will be readily understood by reference to the following drawings which accompany the letters patent:



"Fig. 1 is a plan view of a brick carrier embodying our invention. Fig. 2 is a transverse sectional view, one end of a roller being broken away to illustrate the bearing for the same. Fig. 3 is a perspective view showing a portion of a carrier and the bricks thereon." [1]

[1] Although claim 1 is not in issue, yet the flanged rollers displayed in the drawings will be explained by that claim:

"A gravity carrier comprising side rails, rods connecting said rails at intervals, metal rollers having flanged ends and ways and balls fitting there-

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It will be observed that the rods with threaded terminals not only pass through the rolls (including the ball-bearing appliances), but also through the side rails, upon the outside of which they are fastened by lock nuts *4*. This seems to have rendered it inconvenient to remove a single rod with its accompanying roller, since it required removal of one of the side rails entirely. It was sought to overcome this by the second patent. The chief difference between the two patents is thus stated by counsel for appellee:

"The second patent differs from the first principally in the provision of convenient means for removing a single rod with its accompanying roll without in any way disturbing the adjustment of any other roll. This is accomplished by having the side rails provided with slots or notches in the upper edges, with the rods detachably mounted in such notches, thus making it possible to immediately remove any roll from the carrier without disturbing the other rolls."

The means so provided in the second patent may be seen in Fig. 2 of the drawings accompanying the letters patent. It follows:

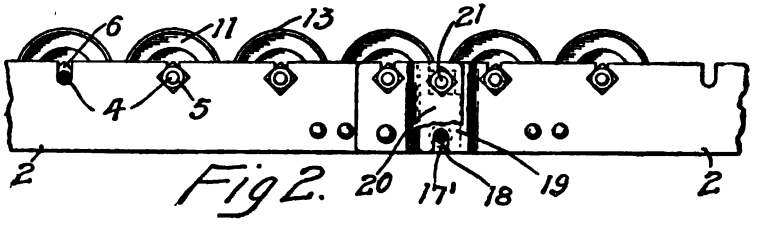


Fig 2.

"In the drawing, *2* represents the side rails of the carrier, composed preferably of flat steel bars. These bars are provided at intervals in their upper edges with vertical slots or notches *3* adapted to receive rods *4* having threaded ends and provided with lock nuts *5* and *6*, the former on the outside of the bars and the latter between them. * * * Any roller can be easily removed from the carrier by loosening the lock nuts *5*."

We may mention one or two other changes that were made in the device of the second patent. One involves the sectional coupling. It is said in the specification of the first patent that the sections are made of any suitable length and "coupled together at their ends"; while in the second patent it is stated that various forms of coupling devices may be provided, but preference is given to "a tongue *19* on the end of

in, cones mounted on said rods and having bearing surfaces, and between which surfaces and said ways said balls are arranged."

And as further explanatory of the elements comprised in the patented device we think it sufficient for present purposes to add a claim that is in issue:

"2. A gravity carrier comprising side rails and means connecting them at intervals, and rollers having anti-friction bearings at their ends upon said connecting means and forming a way over which comparatively small articles such as brick may be transported, said rollers being of substantially uniform diameter between their ends and extending above the tops of said rails, substantially as described."

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each rail *2* bent outwardly to offset it from the plane of the rail and adapted to fit between a plate *20* and the end of the abutting rail." These parts may be riveted or bolted together. Another change was made through the use of additional braces. Apparently three within each section are disposed at right angles with the side rails and fastened to them, and between these braces are two sets of diagonally crossing braces; the object being to hold the sides of the carrier in "parallel relation with one another." Claims 1 and 4 are copied in the margin further to illustrate the second patent.[2]

Appellee offered in the court below one section of the Mathews gravity carrier as an exhibit. This exhibit, as we understand, and additional sections of the carrier, were displayed and operated as a unitary structure at the hearing in our court. The exhibit seems to comprise the main features of the two patented devices in suit, except in two or three respects: The rollers have no flanges, but are disposed so that their upper plane is above that of the side rails; thus flanges are rendered unnecessary for transporting "articles of greater length than the width of the carrier"; the flanges were distinct features of the first patent, and of the specification and drawings of the second patent, though they appear to have been given up in the structure exhibited. Further, this exhibit omits lock nuts *4* of the first and *5* and *6* of the second patent, and also the threads upon the end portions of the cross rods passing through the rollers of both patents. The notches of the second patent, it is true, are preserved in the side rails of the exhibit; but instead of lock nuts *5* a metal bar, extending throughout the length of a section and having slots disposed therein so as to engage the ends of the cross rods, is bolted to the outer and upper surface of each side rail. Lock nuts *6* are replaced in function by (a) notches cut into the cross rods near their ends so as to fit into and be held fast by the notches of the side rails, and (b) tubular portions of the ball-bearing devices surrounding the cross rods and extending from the ends of the rollers almost to the side rails; the purpose seems to be to hold the rails in "parallel relation with one another" and also free from the ends of the rollers. This substitution of a slotted metal bar and notched cross rods apparently has the further purpose of facilitating the separate removal of rollers. Whether we have or not rightly interpreted the objects of these differences between the patents in suit and the exhibit, the changes serve to characterize methods of progress which may well be considered in trying under the facts of this case to distinguish between skill and invention. We come now to an inquiry into the state of the art prior to the dates of the patents in suit.

[2] "1. A gravity carrier having side rails composed of flat metal bars having slots or notches in their upper edges, rods detachably mounted in said slots and connecting said rails, and rollers having anti-friction bearings on said rods, substantially as described."

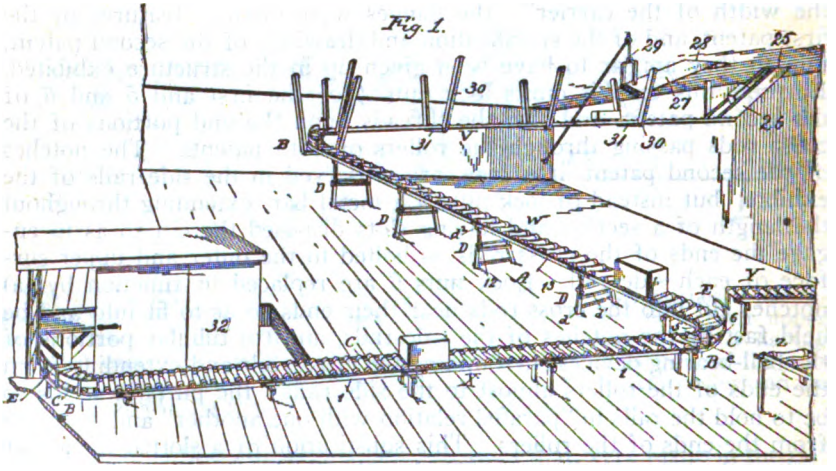
"4. A gravity carrier comprising side rails, diagonally arranged brace bars connecting said rails, cross rods also connecting said rails, the upper edges of said rails being provided with vertical slots or notches and rollers detachably mounted in said notches."

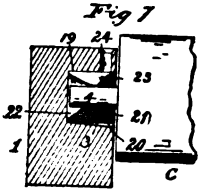
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(1) *Gravity Carriers Old.*—In point of equivalency more of the present elements, whether considered singly or in combination, are perhaps to be found in Alvey's gravity conveyer, patented in 1902, No. 714,432, than in any other prior patent. Alvey stated in his specification:

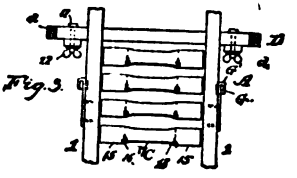
"My invention relates to conveyers for the purpose of transferring goods from place to place—such as boxes, barrels, and packages—the movement of the packages or other articles being ordinarily effected by gravity; but it is to be understood that the invention is not confined necessarily to a conveyer on which the articles are moved by that force alone. * * * The invention has for its objects to enable goods to be transferred from one point to another, as in a warehouse, expeditiously and with a minimum of hand labor and to allow of the apparatus being adjusted to receive goods at different points, and to deliver them at different points as may be required, expeditiously and with certainty."

Among the drawings accompanying the letters patent are the following:









"Fig. 1 is a perspective view showing a conveyer of portable character embodying my invention set up in a warehouse for the transfer of goods from one point to another. * * * Fig. 3 is a plan view of a portion of the same. * * * Fig. 7 is a sectional view of the roller bearing. * * * Each of the straight sections *A* comprises side pieces *1*, of wood or other suitable

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material, united at suitable points by transverse connecting members or tie rods 2. These side pieces have formed in them or attached to them bearings 3 for the shafts or journals 4 of the transverse rollers C. The latter are spaced apart, but are sufficiently close together to enable the goods to be conveyed to pass from one roller to the next without falling through. The curved sections B are constructed on similar principles, but with inner and outer curved side pieces 5 and 6, the rollers C' of said curved sections being arranged on lines radial to the center of the curve on which the section is constructed. * * *

"It is highly important that the rollers should revolve freely under packages of relatively light weight, to which end the rollers must not be too heavy or have too much inertia. On the other hand, they must be strong enough to carry heavy weights when required. I have constructed the rollers, after much experimentation, of a material which meets both these requirements. They are made from a pulp of hard fiber of relatively light specific gravity, known as 'leatheroid.' They are thus also seamless, without grain, and not liable to crack."

As illustrative of the combinations and essential elements involved, two of the claims are copied in the margin.[3]

Alvey further developed the gravity carrier art through his patent of May 23, 1905, No. 790,776, under an application filed September 5, 1904. He introduced a spiral gravity conveyer adapted to carry all kinds of articles usually stored in warehouses, from any of the upper floors to the basement or shipping room, and to discharge packages at any of the intermediate floors. The spiral conveyer is adjusted to and supported by a vertical post extending through such floors of the building as may be desired, with suitable openings through which to maintain the conveyer and carry packages; in order to distribute packages at intermediate floors, gravity switches are removably connected with the spiral portions of the conveyer; provision is made for carrying articles to the spiral parts by gravity conveyers, which, as also the switches, are similar in form to the structures above shown in Alvey's patent of 1902, No. 714,432. Alvey went still farther in 1905, under an application of September 5, 1904, through his patent, No. 790,811. There he provided for lifting, instead of lowering, packages from floor to floor. The conveyer is maintained at an ascending grade and driven by power. It is to be observed of both of Alvey's later structures that the carriers are divided into sections with angle iron side rails.

Some 14 years before the issue of Alvey's first patent, Pusey secured a patent, No. 387,733, upon a structure called an "artificial toboggan or coasting hill," which is instructive in the gravity carrier art. The specification states:

"The trackway consists of a series of rollers journaled transversely in a suitable framework."

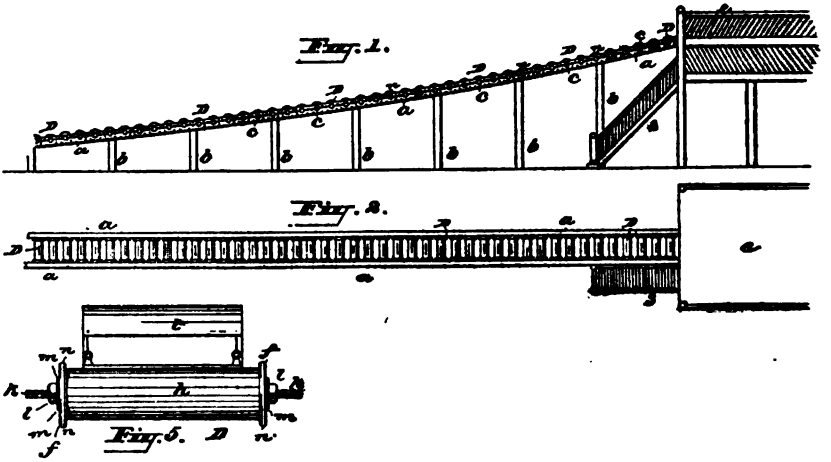
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[3] "1. In a portable conveyer, the combination of a plurality of sections provided with transverse rollers, and supports for said sections, the upper part of each support being hinged to the conveyer-section and the lower part of each support being adjustable on said upper part."

"6. In a gravity conveyer, the combination of a series of separately and freely rotatable rollers, and means for supporting the same to form an inclined way, said rollers being constructed with shoulders 16 and intermediate recessed portions, and adapted to automatically maintain packages in the middle of said way, substantially as set forth."

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The simplicity of the structure will be seen by reference alone to some of the accompanying drawings:



"Fig. 1 is a side elevation. Fig. 2 is a plan. * * * Fig. 5 is an elevation of roller detached, with end view of the toboggan thereon. * * * *a*, Figs. 1 and 2, represents longitudinal frames or stringers supported by a trestlework or posts, *b*, and provided with bearings *c*, for the journals of the series of wide transverse rollers *D*."

The cylindrical portions of the rollers are made of waterproofed paper or strawboard, or similar light and strong material. The patentee states in his specification:

"I am aware of the fact that roller trackways for sleds are old, * * * in which trackway were inserted rollers or balls for the runners of the sleds to descend upon; and I do not therefore claim broadly, as new, an inclined trackway with rollers therein."

The patentee's idea of the scope of invention open to him is important and is sufficiently explained by claim 1 copied in the margin.[4]

In 1885 Hinds & Mace received a patent on a portable chute, No. 312,468, saying in their specification:

"The invention relates to inclined slideways, and is specially adapted to transfer tiles, bricks, or similar articles from the drying shed to the kiln, or from the kiln to the yard. The slideway is made in sections, each of which has its floor composed of rollers having bearings in the sides of the sections."

Palmer obtained a patent in 1888, No. 376,340, on an elevator, which may properly be regarded as a distributing contrivance; it was designed for carrying goods or other materials up or down in a warehouse, store, manufactory, or other similar place of business, and automatically

[4] "An artificial coasting course or toboggan slide, consisting of the combination of the inclined longitudinal frames or stringers, the supporting frame or trestlework, and the series of rollers journaled in and between said stringers, adjacent to and out of contact with each other, substantially as and for the purpose set forth."

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delivering them at different floors or stations, and there depositing them upon an "inclined series of rollers" disposed transversely between parallel side rails, whence they were moved by gravity to the place desired; the particular use illustrated by the drawings related to the manufacture and handling of bricks.

(2) *Metal Side Rails and Rollers.*—It will be noticed that none of the prior patents thus far considered in terms calls for metal rollers; but it is to be remembered that the last two Alvey patents mentioned call for metal side rails. Assuming that a change of material, say from wood to metal, was important in a frictional sense or otherwise, there were kindred power-driven conveyers which expressly provided for metal rollers; and we think such conveyers may fairly be treated as part of the prior art in question. They are certainly of a closely analogous art. Holman provided for the use of metal rollers in 1885 in his power-driven railway track layer, patent No. 315,034. He fastened to the outer sides of cars a sectional tramway, comprising parallel side rails, called "parallel bars," with transverse metal rollers journaled in the bars. The rollers were used to convey ties and rails from the cars to points in front of the train in the line of the proposed railway construction. Again, in Hanna's carrying roll, patented October 28, 1902, No. 712,061, we find a design for metal tubular rollers of uniform diameter, with integral journal portions, which are intended as carriers of belts for "elevators, conveyers, and similar classes of machinery." The patentee made no provision for side rails or other familiar bearings upon which to operate his rollers as carriers; nor was such omission unusual. See, for instance, the carriage with rollers in the brick and tile machine of McKenzie, patented in 1878, No. 203,284, and in Aiken's feed table for rolling mills, patented in 1890, No. 439,925. Further, Alvey emphasized in the portion of his specification above quoted the importance of rollers that would revolve freely under packages of relatively light weight and yet be strong enough to carry heavy weights when required; and he says that "after much experimentation" he adopted a material for rollers called "leatheroid," which was "seamless, without grain, and not liable to crack." [5] Pusey had pointed out years before, that rollers might be made of "suitable light material," saying that the "ease with which the inertia and friction of the rollers are overcome * * * of course depends mainly upon the weight" of the rollers. He preferred "compacted waterproofed paper or strawboard," and as we have seen used such rollers in his gravity toboggan. The experience of Alvey and that of Pusey as expressed by each in his specification, and more particularly the use made of the metal rollers as above stated, were manifestly suggestive of the adoption of metal rollers for gravity carriers. Wright v. Tobacco Co., 252 Fed. 146, —— C. C. A. ——, decided by this court August 3, 1918.

(3) *Stationary Axles with Revolvable Rollers.*—Appellee points out a difference between the patents in suit and the gravity conveyers of

[5] Alvey's roller metal journals and metal bearings with oil-retaining chamber 22 to lubricate them, are another important feature to be observed. They are illustrated in Figs. 7 and 8 of his drawings, supra.

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the prior art as respects the relations between the axles and rollers of the two sets of structures. True, as we have seen, the axles of the former are stationary and the rollers with ball bearings revolve upon them; while the rollers of the latter have rigid and axially connected journals which are mounted on bearings in the side rails and revolve with the rollers. Apart from the ball bearings of the patents in suit, considered later, the plan of an exterior roller (composed of "sleeves") distinct from an interior part axially carried by side bearings was shown, for instance, by McKenzie in 1878 in his brick and tile machine before pointed out. Holman, above mentioned, provided metal rollers with annular flanges at their ends; but he also stated in his specification that he "proposed to make these rollers hollow, and of metal, and to mount such construction of roller on a stationary axle which passes through the closed ends of the roller, whereby the bearing is entirely at the ends of the roller." Perhaps the commonest examples of this latter construction are found in the ordinary road wagon, having rigid axles and spindles with hubs turning upon the spindles, and in the idle wheel to which a belt is shifted when not in use for transmission of power, while the bicycle furnishes a complete illustration, as for instance, the Douglas bicycle, patented in 1892, No. 469,627.

(4) *Sectional Carriers.*—In view of what has been pointed out it is scarcely necessary to allude to this feature of the patents in suit. We have seen that Alvey's patent, No. 714,432, divides the carrier into sections with "firm connection of the various sections end to end," the connecting parts being described in the specification and shown in the drawings; this in substance is true of Alvey's patent, No. 790,776, of the Hinds & Mace patent, and also of the Spence portable conveyer, Pat. No. 779,139. We do not stop to consider the horizontal and diagonal braces of the sections, because such bracing is familiar in structures of everyday use, such as the ordinary stepladder, trestle or scaffold.

(5) *Notched Frames.*—It is contended that the patentee of the second patent in suit "introduced for the first time the feature of the slotted side rails whereby any through shaft and roller could be removed separately." This is to overlook Winter's provision of the same character in his skid for moving rails, patented September 19, 1905, under application of 1904, No. 799,699. The rollers are there mounted in open slots and, as his specification states, "may be easily removed when broken or worn out and replaced by others." Such slots or notches were old when Winter adopted them. The drawings of the McKenzie patent of 1878, before cited, plainly show notches in the upper edges of the side bars in which the rollers were journaled, though the patentee does not seem to have thought it worth while even to mention the notches in his specification or claims. However, the notches must be regarded as "described" in a "printed publication" within the meaning of the patent act (Keene v. New Idea Spreader Co., 231 Fed. 701, 708, 145 C. C. A. 587, and citations [C. C. A. 6]); this is true of the drawings of Aiken's and Spence's patents, supra. Apart from Winter, these patentees do not state, though it is manifest, that the notches shown were designed in part to admit of separate

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removals of rollers. Further, the convenience of open slots with parallel sides adjusted to corresponding sides cut upon stationary axles near their ends was in practical purpose shown in the Douglas patent; indeed, in the respects mentioned the slots and axles of the gravity carrier exhibit offered in evidence closely resemble the slots and axle of the Douglas bicycle.

(6) *Ball Bearings.*—The ball bearings of the patents in suit and the carrier produced in court differ in some details, but in essential respects they are all like those commonly used in bicycles; in fact, these carrier rollers with their ball bearings are clear equivalents of the hubs and ball bearings of the ordinary bicycle. This is sufficiently shown by the following patents: Teetor in 1891 for "ball bearing," No. 456,664; Douglas, supra; Sturgis in 1897 for a bicycle training device, No. 581,835; Svensson in 1897 for anti-friction journal bearings, No. 580,994; and it appears in Teetor's specification, besides being well known, that bicycle ball bearings were old in 1891. The analogy to appellee's designs for ball-bearing rollers found in the Sturgis bicycle training device is very persuasive. This device comprises three rollers mounted transversely between uprights fastened to the longer sides of a rectangular adjustable frame; the rollers are provided with axles passing through and beyond their longitudinal centers and journaled in the uprights. A sprocket chain connects the middle and forward rollers, and the three rollers are so disposed upon the frame as to engage the wheels of a bicycle and to enable the rider to operate it the same as if riding on a road; and although the body of the bicycle remains stationary, its wheels revolve upon the rollers. The specification states:

"The rollers are journaled on their respective axles by means of suitable ball bearings."

The ball bearings are not otherwise described except as they are shown in Fig. 4 of the drawings. They appear to be of the usual bicycle type and to be operated similarly to those of the appellee's carrier. It is to be noticed however that the Sturgis ball-bearing device is for the most part extended beyond instead of being countersunk into the ends of the roller; the cups seem to be integral parts of the roller, while the cones are threaded upon the ends of the axle, and opposed annular rings are provided in the cups and cones for ball races or containers. Although the material of which the rollers are composed is not shown and is not very important, yet apparently it is metal.

We have thus been at pains to point out earlier devices as means for testing the issue of fact concerning the validity of the patents in suit; and we are unable to find in these patents any advance over the prior art except in degree. The idea of a gravity carrier was not new. In one form or other such carriers had been designed, patented and, inferentially at least, put into use. Alvey had designed them for purposes precisely similar to those of the patents in suit. Even the kinds of business which Alvey's carriers and those of appellee were intended to said, the emplacements of the carriers and their modes of

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operation, the results to be attained, all are practically the same. The marked resemblances in matters of equivalency between the two sets of devices cannot escape attention. In a word, the devices themselves, the new and the old, as they are shown in the drawings and in the descriptions of the patentees, speak in terms amounting to a demonstration.

We understand it to be admitted, it certainly is true, that every element of the claims in suit is old. What has been done here is to adapt and substitute some old and familiar devices in place of certain parts of the earlier gravity carriers, particularly Alvey's. This involved for the most part simply a change in the material of parts comprised in the earlier carriers; and these substituted devices practically perform, not only the same functions as had been performed by the replaced parts, but also the same functions as they themselves had performed in devices of the prior art. It may not be amiss to show again where some of the important substituted parts may be found in the prior art: Appellee's metal roller was described by Holman, in 1885, and the rigid axle (with whatever incidental support the axle furnishes to the side rails) and ball bearings were shown by Sturgis, and the perfectly plain equivalency of the bicycle hub with its ball bearings and rigid axle should also be borne in mind; the notches or slots of the side rails and the facilities they afford for separate removal and replacement of rollers were shown and explained by Winter and Douglas; as to the metal side rails, it is necessary only to recall those of Alvey's last two patents; the remaining parts of appellee's devices are negligible; and after all the old and the new carriers in precisely the same way transport packages by gravity.

[1] It must, of course, be conceded that patentable novelty may exist in a combination of old elements; but here the combination claims in suit are lacking in the usual and essential tests of invention. No new function of elements or new method of operation is evolved, and the result achieved is exactly the same as the old one. The settled rule under such facts is that to adapt an old and familiar device to another structure equally old and well known is not to exercise the inventive faculty; it is to apply the skill of the mechanic. Aron v. Manhattan Railway Co., 132 U. S. 84, 88, 10 Sup. Ct. 24, 33 L. Ed. 272; Peters v. Active Mfg. Co., 129 U. S. 530, 537, 9 Sup. Ct. 389, 32 L. Ed. 738; Crescent Brewing Co. v. Gottfried, 128 U. S. 158, 169, 9 Sup. Ct. 83, 32 L. Ed. 390; Penn. Railroad v. Locomotive Truck Co., 110 U. S. 490, 494, 4 Sup. Ct. 220, 28 L. Ed. 222; Weir Frog Co. v. Porter, 206 Fed. 670, 676, 124 C. C. A. 470 (C. C. A. 6); Frederick R. Stearns & Co. v. Russell, 85 Fed. 218, 226, 29 C. C. A. 121 (C. C. A. 6); Indiana Novelty Mfg. Co. v. Crocker Chair Co., 103 Fed. 496, 502, 43 C. C. A. 287 (C. C. A. 7).

[2] It may further be conceded that appellee's carriers are better than the Alvey carriers or any others of the prior art; this, too, is unavailing. It is met by the old rule that a mere carrying forward of the original idea, a change in form, an improvement in degree, without substantial change in either means or result, is not invention. Railroad Supply Co. v. Elyria Iron Co., 244 U. S. 285, 292, 37 Sup.

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Ct. 502, 61 L. Ed. 1136; Wagner v. Meccano Limited, 246 Fed. 603, 608, 158 C. C. A. 573 (C. C. A. 6), and citations. Superiority is not enough. Grinnell Washing Machine Co. v. Johnson Co., 247 U. S. 426, 38 Sup. Ct. 547, 62 L. Ed. 1196. It can scarcely be doubted that the defects if any in the Alvey structures might have been remedied by the skilled mechanic. Keene v. New Idea Spreader Co., 231 Fed. 701, 710, 145 C. C. A. 589 (C. C. A. 6). This derives emphasis from the changes made in appellee's carrier, as we have pointed them out in the exhibit produced in court.

[3] It is said that appellee's carrier is not anticipated by any single patent; but it is not necessary to show complete anticipation in a single patent. The selection and putting together of the most desirable parts of different machines in the same or kindred art, making a new machine, but in which each part operates in the same way as it operated before and effects the same result, cannot be invention; such combinations are in the nature of things the evolutions of the mechanic's aptitude rather than the creations of the inventor's faculty. Thompson v. Boisselier, 114 U. S. 1, 11, 5 Sup. Ct. 1042, 29 L. Ed. 76; Luten v. Whittier, 251 Fed. 590, — C. C. A. —, decided by this court May 7, 1918; Elite Mfg. Co. v. Ashland Mfg. Co., 235 Fed. 893, 895, 149 C. C. A. 205 (C. C. A. 6); Kelly v. Clow, 89 Fed. 297, 303, 32 C. C. A. 205 (C. C. A. 7); Keene v. New Idea Spreader Co., supra, 231 Fed. at pages 708, 709, 145 C. C. A. 589.

[4] Assuming, as counsel claim, that large sales have been made of the carriers in issue, still commercial success is never a safe criterion, except in cases of doubtful validity of the patent; such success cannot aid claims that are clearly without patentable novelty. Olin v. Timken, 155 U. S. 141, 155, 15 Sup. Ct. 49, 39 L. Ed. 100; Grinnell Washing Machine Co. v. Johnson Co., supra; Keene v. New Idea Spreader Co., supra, 231 Fed. at page 710, 145 C. C. A. 589.

[5] We conclude that the claims in issue under the first patent in suit and all the claims of the second one are null and void for want of invention; the decree is accordingly reversed, and the cause remanded, with direction to dismiss the bill; and appellant will recover costs, except such as arise from one-half the copies of letters patent introduced by it, 60 in all, and embodied in the record.

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WINDSOR v. MERCIER.

(Circuit Court of Appeals, Sixth Circuit. October 8, 1918.)

No. 3126.

PATENTS ⊂=328—INVENTION—DUMPING BODY FOR VEHICLES.

The Windsor patent, No. 1,181,192, for a dumping body for vehicles, *held* void for lack of invention.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by James G. Windsor against John A. Mercier. Decree for defendant, and complainant appeals. Affirmed.

Stuart C. Barnes, of Detroit, Mich., for appellant.

Barthel & Barthel, of Detroit, Mich. (O. F. Barthel and C. R. Stickney, both of Detroit, Mich., of counsel), for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and COCHRAN, District Judge.

DENISON, Circuit Judge. The plaintiff below appeals from the decree dismissing his infringement bill, based upon patent to Windsor, No. 1,181,192, issued May 2, 1916, and covering a dumping body for vehicles. The patent has two claims. The District Court held them both invalid. The plaintiff rests his appeal upon the second claim, as to which infringement is better made out, and only that claim need be considered. The construction involved is clearly enough indicated by the language of the claim, which is as follows:

"The combination with a vehicle, a horizontal transverse way on said vehicle, a body V-shaped in cross-section having sides converging downward toward a center, a rocker engaging said way shaped in approximately the arc of a circle extending under and adjacent to the lower portion of said body at its center, and extending farther from the surface of said body and rising above the lower part of said body toward each end, the sides of said body, when in its upright position, being inside of the other lateral limits of said vehicle, said rocker being adapted to carry said body laterally of the vehicle so that its dumping edge shall be beyond said limits when said body is rocked to its dumping position and said side along the surface of which the load is discharged shall have its inner edge elevated because of the said extension of the rocker beyond the surface of the body, so that the load shall slide therefrom by gravity."

The general plan of supporting the dumping body upon curved arms, which rock upon a horizontal base, so that as the body is tilted there is a tendency to carry the whole of it sidewise and enable it to dump clear of the base, reveals an obviously useful idea; but Windsor was not the first to adopt this general plan. His invention, if there is any, consists only in refinements and improvements. Windsor thought he had made the broader invention to which we have referred, and expressed this thought in his first claim as filed, which was:

"The combination of a body, a rocker secured to said body and passing under the lower portion of the same, and a transverse way upon which said rocker may roll."

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Successive rejections in the Patent Office eventually led to injecting into the claim the limitations that the sides of the V body, when in its upright position, should be inside the other lateral limits of the vehicle, and that the rocker should have such a high degree of curvature and should project out away from the V sides of the body so far that when the V body was tipped over in dumping position the apex of the V should be lifted high enough to cause the contents of the body to slide out by gravity. It is plain, at least after our attention is called to it, that the extent to which this apex is swung up from the bottom, and therefore the extent of the tendency of the contents to slide out by gravity, will depend upon the shape and extent of the rocker. It was in effect conceded in the Patent Office—or, if not conceded, it is entirely clear—that proportioning the dump body so as to keep it, when upright, within the lateral limits of the vehicle, is a matter that cannot contribute patentability to an otherwise nonpatentable combination; and hence the second distinction and characteristic above noted indicates the decisive question. Did the addition of this element of construction to combinations otherwise existing or obvious create a new and patentable combination?

Windsor has developed the commercial use of his invention in connection with highway vehicles, like motor trucks and trailers; but his patent relates to dumping bodies without limitation, and dumping bodies for railway cars are within the fields of infringement and of prior art. From this conclusion, it follows that all the elements of his claim are old and have been associated in the same general relationship to bring the same general result. Such novelty as his structure has pertains to specific relationship and degree of result. It was old to make dumping bodies of V shape or with square bottoms or with curved bottoms; it was old to mount them on rockers, either at each end, in trunnion form, or underneath like a child's cradle; they were made low or high or narrow or wide as desired; tracks for the rockers had been provided of shape and length appropriate to the specific rocker used; the bodies had been arranged to dump from one side only or from either side, and to dump automatically when released, and to return automatically to vertical position when empty; and the rockers had been of different shapes and sizes.

Windsor desired to use a V-shaped body; he did not wish it to overhang the sides while the vehicle was in motion, and so he made it narrow. He desired that when it was tilted into dumping position the side edge which had become the lower edge should project laterally beyond the sides of the vehicle, and so he made the rockers with a sufficient degree of curve to insure lateral travel of the dumping body when tilted on the rockers. He wished the body to discharge its contents completely by gravity when it was tilted, and therefore made the rockers of such shape that the edge which had been the bottom of the V and which became the inner edge when tilted, should then be elevated well above the outer edge. He wished the body to dump automatically by gravity when the fastening was removed which held it against opposite tilting, and to return automatically to vertical position when the load was discharged, and there-

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fore he so proportioned the parts that when the body was loaded the center of gravity would be above the rocking center, and when the vehicle was empty the two centers would have relatively reversed position.

The modifications and limitations found in the second claim are only descriptive of the shape and arrangement of the parts which produce these results, and in each instance the dependence of the result upon the shape and relationship of the parts had either been illustrated or pointed out in the older patents or was too obvious to have required statement or illustration. Nothing was involved, excepting elementary principles of mathematics and of familiar construction. We are satisfied that Windsor did not accomplish any new result in the sense in which that term is rightly used as indicative of invention. On the other hand, we think his adaptation of existing structures, in order to make a dumping body that, when applied to road vehicles, would be in some degree better than the old forms, was well within the limits of mechanical skill.

The specific thing most urged upon us as evidence of invention is that older structures, with underneath rockers, had the rocker at its central point farthest away from the dumping body, while Windsor made this the nearest point of approach; but this is merely the inevitable effect of using a V-shaped body sufficiently extended downward. Whether the V is sharp enough to produce the desired relation or is too obtuse for that purpose is of no substantial importance; and patentability cannot rest on an unimportant selection of form.

Though we should hesitate to describe Windsor's product, in strict nomenclature, as an aggregation, yet we think the rightfulness of our conclusion is illustrated by the latest expression of the Supreme Court in Grinnell Co. v. Johnson Co., 247 U. S. 426, 38 Sup. Ct. 547, 62 L. Ed. 1196, filed June 10, 1918. See, also, Huebner Co. v. Mathews Co., 253 Fed. 435, —— C. C. A. ——, this day decided, and some of our own opinions cited therein.

The decree is affirmed.

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POLITZER TOY MFG. CO., Inc., v. NATIONAL FRENCH FANCY NOVELTY CO., Inc.

(District Court, S. D. New York. February 19, 1916.)

1. PATENTS ⇐179—CONSTRUCTION—COMPOSITION OF OLD MATTER.
A claim of a patent for a child's toy, which did not display any new principle of mechanics, or any new application of any principle, but was for a mere composition of old matter, the pleasing feature of which depended upon a concealed switch, which would cause the eyes to blink, should receive a narrow construction, limited to the exact form of the toy shown.

2. PATENTS ⇐179—CONSTRUCTION OF CLAIM—"CONCEALMENT."
The word "concealment," in its application to a claim of a patent for a toy for children, the pleasing feature of which was a concealed switch, which would make the eyes blink, means hidden from ordinary observation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Concealment.]

In Equity. Suit by the Politzer Toy Manufacturing Company, Incorporated, against the National French Fancy Novelty Company, Incorporated, involving patent No. 844,577, to Martha Borchardt, dated February 19, 1907. Decree for complainant.

Stephen J. Cox, of New York City, for plaintiff.
George L. Wheelock, of New York City, for defendant.

HOUGH, District Judge. It is held that the patent to Borchardt now in suit is a valid patent, disclosing the statutory requisites of novelty, etc. It is also held that the defendant has infringed upon this patent by the manufacture and sale of the article, a specimen of which is here produced and marked Plaintiff's Exhibit A.

[1] This is the kind of patent, however, which may be (and in many cases in the past has been) made the subject of unnecessary and expensive proceedings before a master. Therefore, in order to prevent, so far as in me lies, such proceedings, I go further than the requirements of this present hearing, and hold that the claim of the patent must be interpreted with the utmost narrowness.

What is it that enabled Mrs. Borchardt to get a patent upon this toy? The patent covers a new article of manufacture; a composition of matter. There is not shown or displayed in it any new principle of mechanics, or any other branch of science, or any new application of any principle of mechanics or science.

Without being able to define "invention," one may at times attempt to describe it, and the claim which undoubtedly operated on the minds of the officials of the Patent Office, and which operates on my mind to show invention, is the neat union, especially attractive to the childish mind, of familiar principles and old appliances in the form of a toy; for this composition of matter can only be useful to and among children. This adaptation of means to end, this embodiment of the means in a new form, certainly possesses some of the attributes of invention. But when a person does this, and no more than this, the inventive idea is so small that it must be confined to the exact form in which it is advanced; and this is especially so when the claim is

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so narrowly drawn as this one. Indeed, it is only by such a narrow view of one's own invention that small patentees can get their devices through the Patent Office; and it is singularly unjust to the public to permit one whose application reveals no other invention than the smallest to enlarge or seek to enlarge the very narrow language of the claim as allowed.

Therefore I point out that Mrs. Borchardt's patent claims particularly that all of the parts which produce the pleasing result shall be concealed, and that the switch is described as having "a flexible part thereover"; that is, over the switch. Technically, I think, and certainly as described in the Borchardt patent, that that which is pressed in order to produce the desired illumination is a part of the switch. I refer for this to Fig. 2 of the patent, and to lines 55 et seq. of page 1 of the specifications.

Therefore, if an accounting is insisted upon in this matter, I direct that the interlocutory decree shall be so drawn that the master must hold, upon the accounting, that the toy, as made in substantial compliance with the method shown by Exhibit 13, does not infringe upon the Borchardt patent. With this limitation the plaintiff may take the usual decree.

Mr. Cox: Would it be too much for me to ask of your honor some definition of the word "concealment"? I do not, of course, ask it; I simply make that suggestion, because, if you will refer to the file wrapper, you will see that the patent is unnecessarily limited. There was nothing in the prior art which showed any kind of concealment, and it seems to me that is really a very important part of the invention, because, as I said, it makes the source of illumination a mysterious one.

The Court: [2] In answer to Mr. Cox's question, I shall hold, and make it the law of this case in this court (in order that exception thereto may be taken and appeal facilitated), that unless the external covering of the toy conceals, within the ordinary meaning of that word, the mechanical contrivance which produces the blinking eyes, the Borchardt patent is not infringed; and I submit and hold that the word "concealed" means "hidden from the ordinary observation" of those persons who would be likely to use and handle the appliance or contrivance to which the word "concealed" is applied. To take an actual example, I think that the apparatus shown and marked as an exhibit for identification, wherein the push button or switch is situated within the ear of the toy, is a concealment, because it is where it will not be observed by the child or children who are to be amused by the contrivance.

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GAS & ELECTRIC SECURITIES CO. v. MANHATTAN & QUEENS TRACTION CORPORATION.

In re BEGG et al.

(District Court, E. D. New York. September 9, 1918.)

RECEIVERS ⇐82—OPERATION OF STREET RAILROAD—FARES.

A court cannot authorize its receivers for a street railroad company to charge a higher rate of fare than that fixed as a maximum by the company's franchise.

In Equity. Suit by the Gas & Electric Securities Company against the Manhattan & Queens Traction Corporation. On petition of William R. Begg and Arthur C. Hume, receivers of defendant, for permission to charge an increase in fare and increase wages of employés. Denied.

Frueauff, Robinson & Sloan, of New York City (Robert S. Sloan, of New York City, of counsel), for receivers.

William P. Burr, Corp. Counsel, of New York City (John P. O'Brien and Vincent Victory, both of New York City, of counsel), for city of New York.

CHATFIELD, District Judge. Receivers appointed by this court ask for authority to charge 7 cents fare for carrying a passenger on the street railroad now being operated by them. The city of New York opposes the application on various grounds.

One objection urged is that section 181 of the Railroad Law of New York (Consol. Laws, c. 49) limits a fare within an incorporated city to 5 cents. The receivers claim that the charter of the Greater City has repealed this statute by later contradictory or limiting provisions. But, even if this be so, the franchise provides for the same rate of fare. The sole basis for operation of the road is the franchise, and without that franchise the receivers could do nothing but liquidate the property, and must cease operation. In the meantime they have the right, by order of the court, to continue to carry passengers, and they undoubtedly have a reasonable time to decide whether they will undertake the carrying on of the franchise contract.

But if they can disavow the obligation, or temporarily postpone operation under it, the court would then have property in its hands which can be operated only within the law. Possession of the property gives the court the right to enjoin any attempt to interfere with that possession, or to restrain any illegal exercise of authority. But this court cannot prevent the city from enforcing in a proper tribunal the rights which the receivers are standing upon as the basis for having anything to receive. The receivers cannot treat the right to operate a road as property in their possession, and then ignore or disregard the essential limitations showing of what the property consists. In other words, the receivers have a property right to hold and operate a 5-cent fare collecting business, with its physical accessories and implements. But the plant cannot be put to another use

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without the making of a new contract. This court has not the power to force such a new contract on the city, nor to regulate fares upward beyond the limits fixed by the contract creating the right to act at all. The court has not the power to fix the rate at which the city must allow the road to be operated. Simpson et al. v. Shepard, 230 U. S. 352, 433, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. Nor can the court proceed to exercise the franchise while holding it unconstitutional.

There is no vested right to operate a road for public convenience, unless that right be the one which the contract establishes. The court may prevent a breach of contract by the city in reducing rates; it may hold a statute unconstitutional, as confiscatory, if a proceeding is brought under section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162), as amended by Act March 4, 1913, c. 160, 37 Stat. 1013 (Comp. St. 1916, § 1243); but it cannot abrogate a contract by holding unconstitutional the law under which the contract was made, and thereupon enlarging the terms of the contract, in order to avoid the consequences of ceasing to act under the contract. Nor should the court order its receivers to treat the public unequally by allowing them to collect an excess fare from those passengers who do not refuse to pay.

The remedy must be sought by application to the city or to the Public Service Commission for a modification of the franchise, if the receivers deem it to the interest of the creditors to continue the franchise rather than to liquidate. The rights and convenience of the public must be looked out for by the receivers and the city, from the standpoint of the consequences if the receivers stop operating. But the end will not justify the means, so as to give the court jurisdiction to prevent the proper authority from deciding what franchise the public should grant for its own welfare.

The application must be denied, but without thereby preventing or hindering the receivers from seeking any source of relief from the terms of the franchise itself.

In re BISHOP.

(District Court, E. D. New York. August 30, 1918.)

BANKRUPTCY ⇐415(½)—DISCHARGE—CONCEALMENT OF PROPERTY.

Application for discharge by a bankrupt, who listed his wife as a creditor for money borrowed from her with which he installed machinery on land owned by her, but omitted such property from his schedules, denied without prejudice, pending a suit by creditors against the wife to recover the property.

In Bankruptcy. In the matter of George D. Bishop, bankrupt. On application for discharge. Denied without prejudice.

Bertha Rembaugh, of New York City, for objecting creditor.
Arington H. Carman, of Patchogue, N. Y., for bankrupt.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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CHATFIELD, District Judge. This bankrupt borrowed money from his wife, with which he erected ways for a small shipyard upon land belonging to the wife. He spent various moneys for a shop, machinery, and other apparatus, which were attached or used upon the same property. Some years later he found himself in financial difficulties, and after examination in supplementary proceedings, with the usual restraining order, he filed a petition in bankruptcy, with schedules of creditors, in which he listed his wife for the moneys which she had advanced to him at the time the plant was started. In the same bankruptcy schedules he omitted, and thereby surrendered to his wife or kept for himself as tools of trade, all the property which he had acquired. Thus, as against his creditors and with his wife's knowledge, he sought to repay her, and at the same time deliver to her and keep from his creditors the entire plant, both as to the parts attached to the real estate and those as to which no claim of title by the owner of the real estate could be made.

The bankrupt in making up his schedules consulted counsel as to whether he was bound to include these properties in his assets, and now seeks to avoid objection to his discharge by showing that this counsel advised him that he was not required to include any of these properties in his schedules of assets. If a man accused of murder should offer, as a defense of lack of intent, that an attorney had advised him in advance that the circumstances constituted no more than justifiable homicide, the situation would be analogous. This bankrupt was in difficulties and under supplementary examination, and could not transfer the properties to his wife. He therefore surrendered them to her and sought to free himself from the debts by going through bankruptcy. He went to the attorney and stated the facts in such a way as to obtain an opinion that the property did not belong to the bankrupt. He had already concealed his property, if it was available for his creditors, by abandoning his own claim thereto, and his sincerity may be viewed from the manner in which he continued in business and used the property as his own, until, as his wife testifies, she stepped in and apparently ousted him from the active management.

The rights of the creditors are being urged in a creditor's action against the wife; the attorneys for the creditor and the trustee correctly assuming that a turn-over proceeding against the bankrupt alone, or against his wife, for property not in his possession, might fall short of raising an issue which could be disposed of. Under these circumstances the application for discharge cannot be heard without creating difficulties in the maintenance of the action to recover the assets. The referee has reported that the discharge should be granted, inasmuch as the bankrupt presented the apparently false schedules after advising with counsel. The court cannot agree with the proposition. But the matter of discharge should not be disposed of until the bankrupt can be given an opportunity of determining the actual resting place of the title to the property in dispute, before he is called upon to explain his intent in apparently turning everything over to

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his wife, and at the same time seeking to repay her in part for the purchase price of the things turned over.

The application for confirmation of the commissioner's report will be denied, without prejudice to any further proceedings.

In re LIGHTSTONE.

(District Court, W. D. New York. June, 1918.)

BANKRUPTCY ⇐398(1)—HOMESTEAD EXEMPTION—NEW YORK STATUTE.

Filing of a claim to a homestead exemption by a bankrupt prior to his bankruptcy, under Code Civ. Proc. N. Y. § 1397, has effect only from the date of its registry, and is inoperative against debts contracted before such time.

In Bankruptcy. In the matter of Maurice Lightstone, bankrupt. On review of decision of referee. Order confirmed.

George V. Holton, of Rochester, N. Y., for bankrupt.
Plumb & Plumb, of Rochester, N. Y., for trustee.

HAZEL, District Judge. Four years prior to the bankruptcy the bankrupt acquired a house and lot in Rochester, and subsequently gave his son a power of attorney authorizing him to file a petition in bankruptcy and to file a homestead exemption claim under section 1397 of the Code of Civil Procedure of the state of New York. The homestead exemption claim was filed August 17, 1917, and the petition in bankruptcy August 29, 1917. Nearly all the debts of the creditors whose claims have been proved and allowed herein had been previously contracted and were owing at the time of registering the claim of homestead exemption. Indeed, before such time, and while insolvent, the bankrupt had endeavored to make a compromise of his debts with his creditors.

The question submitted for review is whether the notice designating the interest of the bankrupt in the house and lot as exempt was valid as against debts contracted before such designation. I think, as did the referee, that the intendment of section 1397 of the Code of Civil Procedure is that such exemption shall be invalid as to debts contracted before the designation. While a statute of this description is entitled to a liberal construction, with a view to comporting with "the beneficent spirit that prompted its enactment" (Smith v. Thompson [C. C. A. 8th Cir.] 32 Am. Bankr. Rep. 165, 213 Fed. 335, 129 C. C. A. 637), still the statute law of the state wherein the bankrupt resided and registered his designation is controlling.

The adjudications cited by the attorney for the bankrupt on the point that the bankrupt was entitled to the homestead exemption in question were interpretative of statutes of other states, differently phrased. The language of section 1397, "Debts contracted before the designation of the property," must be given interpretative effect, and it does not seem to me that liability for such debts is to be excluded

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after the designation, while a judgment recovered for the debt would be included. The purpose of the statute no doubt was to give notice to creditors of the recording of the exemption claim, and this would be an idle ceremony if a debt or debts previously contracted were to be defeated by the designation. In Waples on Homestead and Exemptions, p. 290, is cited section 1397 of the Code of Civil Procedure of the state of New York, and the author construes such section as follows:

"The homestead continues liable after its designation by the filing of the deed or notice for a debt previously contracted, under a statute similar to the above cited"—citing Mutual Life Insurance Co. v. Newton, Court of Chancery, New Jersey, reported 15 Atl. 542.

And besides there are homestead exemption statutes of other states, worded similarly to section 1397, which have been construed by the courts as not granting exemption from debts contracted before the recording. See In re Furniss, 34 La. Ann. 1013; Linsey v. McGannon, 9 West Va. 154; Watkins v. Overby, 83 N. C. 165. Hence it is held herein that the homestead exemption in question, registered by or on behalf of the bankrupt, can have effect only from the time of the designation or date of register and that it was and is inoperative against debts contracted before such time.

The exceptions are overruled, and the report of the referee confirmed.

ÆTNA LIFE INS. CO. OF HARTFORD, CONN., v. RYAN.

(District Court, E. D. New York. August 24, 1918.)

APPEAL AND ERROR ⇐461—SUPERSEDEAS—COST BOND.

A bond given by plaintiff in error in an action at law, conditioned for payment of "all costs and damages that may be awarded against it, if it shall fail to make its plea good," unless so specified in the approval, does not operate as a supersedeas.

At Law. Action by the Ætna Life Insurance Company of Hartford, Conn., against Catherine Ryan. On motion for further bond on proceedings in error. Granted.

James B. Henney, of New York City, for plaintiff in error.
Edward H. Daly, of New York City, for defendant in error.

CHATFIELD, District Judge. The defendant appellant has presented a bond, which has been approved, to secure "all costs and damages that may be awarded against it, if it shall fail to make its plea good." This bond was intended, not only as a bond for costs, but to act as a supersedeas, and no question was raised at the time as to its form. The approval of the bond does not specify that it is to act as a supersedeas, and under the authority of Orchard v. Hughes, 68 U. S. (1 Wall.) 73, 17 L. Ed. 560, it must be treated as a bond for costs only.

In admiralty or equity, the decree rendered in the appellate court carries with it the entry of a new judgment, and the language used in

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this bond would undoubtedly bind the assured to pay the amount of the judgment, as well as any additional damages or costs which might be awarded. But at common law, where the appeal is by writ of error, the original judgment stands, unless reversed and a new trial ordered. Thus, as stated in Orchard v. Hughes, supra, a bond for costs and damages which may be awarded on appeal, is the usual form for the cost bond, as distinguished from that intended to be a supersedeas. Bonds using this language are sometimes approved as a supersedeas, in which case they would undoubtedly be construed to cover the judgment which had already been awarded on the cause of action.

The point has, in this case, been raised by the appellee, who requests that the giving of another bond be required. This is equivalent to a waiver of the requirement that such security be given within 60 days after the entry of judgment, and would estop the appellee from seeking to issue execution.

The motion should therefore be granted.

In re LANGFELDT.

(District Court, S. D. Florida. May, 1918.)

BANKRUPTCY ⊂=412—DISCHARGE—NOTICE TO CREDITORS OF APPLICATION.

The provision of Bankruptcy Act July 1, 1898, § 58a, requiring 30 days' notice to creditors of an application for discharge, is mandatory, and the notice jurisdictional.

In Bankruptcy. In the matter of F. E. Langfeldt, bankrupt. On motion by bankrupt to dismiss specifications of objection to discharge. Denied, and new notice of application ordered.

E. J. Binford, of Tampa, Fla., for bankrupt.

Shackleford & Schackleford, of Athens, Ga., for objecting creditors.

CALL, District Judge. On February 19, 1918, the bankrupt filed his petition to be discharged. On February 23 the clerk entered an order requiring notice to be published, and fixing the return day March 23, at 10 o'clock a. m., for the creditors to appear and show cause why the petition should not be granted. No appearance was filed on that day, but on March 25 specifications of objection were filed by the trustee and others. A motion was made by the bankrupt to dismiss such specifications, on the ground that no appearance had been entered on the return day, and because said specifications were filed after the return day without first appearing on the return day.

This motion is submitted to the court on briefs. No objection is made on the shortness of the notice to the creditors, and if all the creditors had joined in the specifications such defect would have been probably waived; but the requirement of section 58a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 561 [Comp. St.

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1916, § 9642]) is positive, and as a discharge releases the bankrupt from liability for all debts, covered by such discharge, to be effective the requirement of that section should be strictly complied with. In this case the fact that 30 days' notice was not given is apparent upon the face of the proceedings, and an order of discharge would therefore be unauthorized and without the jurisdiction of the court to make it.

Unquestionably General Order 32 (89 Fed. xiii) requires the creditor to appear on the return day of the order to show cause and file his specifications of objection within 10 days thereafter. For cause shown the time for filing these may be extended. Attention is called to this in Re Grant (D. C. Pa.) 14 Am. Bankr. Rep. 398, 135 Fed. 889, and it is there decided that without appearance on the return day specifications cannot be filed. However that may be, I am satisfied that the court in this case ought not to make any order in this case, except an order fixing a return day and requiring the proper notice to creditors, pursuant to section 58a of the Bankruptcy Act.

Such order will be made.

WAINWRIGHT v. PENNSYLVANIA R. CO.

(District Court, E. D. Missouri, E. D. October 22, 1918.)

No. 4893.

1. WAR ⇐4—WAR POWERS OF CONGRESS—DELEGATION OF POWER TO EXECUTIVE—RAILROAD ADMINISTRATION ACT.

Act March 21, 1918, providing for federal control of railroads during the war and authorizing the President to make regulations therefor, assuming that it authorizes the fixing by such regulations of the venue of actions in federal courts against railroad companies, is within the war powers of Congress, and constitutional.

2. WAR ⇐4—FEDERAL CONTROL OF RAILROADS—EXECUTIVE REGULATIONS.

Amended regulation No. 18a, promulgated by the Director General of Railroads April 18, 1918, providing that "all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose," as applied to suits in the federal courts, is within the authority conferred on the President by Act March 21, 1918.

3. STATUTES ⇐205—CONSTRUCTION—RULE GOVERNING.

Statutes may not be construed by selecting some part thereof and disregarding other parts, but the whole must be read together.

At Law. Action by Nellie Wainwright, administratrix, against the Pennsylvania Railroad Company. On demurrer to plea in abatement. Overruled.

The plaintiff on May 6, 1918, instituted this action to recover damages under the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]) for the death of her husband, alleged to have resulted from injuries sustained on December 26, 1917, while in the service of the defendant, and while both were engaged in interstate commerce. The defendant filed a plea in abatement, alleging as causes: "(1) The Pennsylvania Railroad Company, defendant herein, is a common carrier now under control of

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the United States Railroad Administration. (2) The plaintiff herein, and the deceased, John Wainwright, resided, at the time of the accrual of the cause of action stated in the plaintiff's petition, in the city of Pittsburgh, state of Pennsylvania. (3) That the place of trial, to wit, city of St. Louis, state of Missouri, is far removed from the place where the plaintiff was injured and resided at the time of the accrual of this action, to wit, city of Pittsburgh, Pa.; that the trial of this suit in the city of St. Louis, Mo., will necessitate the summoning of men, to wit, Engineman N. Carlson, Fireman W. J. Corbet, Conductor W. Baker, and Brakeman J. Wainwright, now operating trains in points distant from the place of trial, and keep them for a considerable period of time from said work of operating trains, all of which will greatly prejudice the interests of the government in maintaining railroad traffic for war purposes. And the defendant further states that the above specifications of facts, enumerated above, constitute to all intents and purposes a case of abatement under General Order No. 26, promulgated by the United States Railroad Administration on May 23, 1918, and General Order No. 18-A promulgated by the United States Railroad Administration on May 18, 1918." To this plea the plaintiff demurred.

The general orders pleaded by the defendant were promulgated by the Director General of the United States Railroad Administration. General Order No. 18, made on April 9, 1918, reads: "Whereas, the act of Congress approved March 21, 1918, entitled 'An act to provide for the operation of transportation systems while under federal control,' provides (section 10) 'that carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or with any order of the President. * * * But no process, mesne or final, shall be levied against any property under such federal control; and whereas, it appears that suits against the carriers for personal injuries, freight, and damage claims are being brought in states and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose, the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more, which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operation of the railroads, and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs: It is therefore ordered, that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided, or in the county or district where the cause of action arose."

On April 18, 1918, this general order was amended by General Order No. 18-A, as follows: "It is therefore ordered that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

As this action was instituted after the promulgation of General Orders Nos. 18 and 18-A, and no question of limitation can possibly arise, it is unnecessary to refer to or pass upon the effect of General Order No. 26, in disposing of these pleas. These general orders are claimed to have been made by authority vested in the President and the Director General designated by the President, by Appropriation Act Aug. 29, 1916, c. 418, 39 Stat. 645, and the act of Congress entitled "An act to provide for the operation and transportation systems while under federal control, for the just compensation of their owners, and for other purposes," approved March 21, 1918.

Brownrigg, Mason & Altman, of St. Louis, Mo., for plaintiff.

Fordyce, Holliday & White, of St. Louis, Mo., for defendant.

E. H. Seneff and D. P. Williams, both of Pittsburgh, Pa., amici curiæ.

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TRIEBER, District Judge (after stating the facts as above). The demurrer to the plea raises two questions of law: (1) Assuming that the act of Congress authorizes the President and the agencies appointed by him to make these regulations, is the act warranted by the Constitution? (2) Does the act vest the power to make these regulations in the President or the Director General?

At the outset of this opinion it is proper to state that, as this action was originally instituted in a court of the United States, the question whether Congress may authorize the general orders in question to apply to the courts of the states is not involved, and therefore cannot be determined in this proceeding. What is stated in this opinion is necessarily intended to apply solely to actions instituted in the national courts. Whether, under the war power, Congress may enact laws affecting the maintenance of actions in the state courts, can only be determined when it properly comes before the court. To express an opinion on that question in the instant case would be clearly obiter, and the court, for this reason, limits this opinion to actions instituted in the national courts.

[1] *Has Congress the power to enact this legislation, assuming that it vests the power claimed on behalf of the defendant?*

That Congress possesses the power to enact legislation of this nature, under the Constitution, cannot be questioned at this day. There are several grounds upon which it must be sustained.

1. In McCulloch v. Maryland, 17 U. S. (4 Wheat.) 316, 421 (4 L. Ed. 579), Chief Justice Marshall delivering the opinion of the court, it was held as a proper canon of the interpretation of the powers of Congress under the national Constitution, among others:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

This rule of construction has never been doubted or questioned by any subsequent decision, but has been uniformly followed, whenever it has been before the courts, and must therefore be accepted as elementary in the construction of the national Constitution. That there is nothing in the Constitution prohibiting Congress from determining the venue in civil actions is beyond question.

Article 1, § 8, cl. 11, of the Constitution, grants Congress the power to declare war, and clause 12 of that section empowers it to raise and support armies. That, by virtue of these provisions of the Constitution, Congress may use all means which are, in its opinion, appropriate to that end and not prohibited by some provision of the Constitution, has, under the rule established in McCulloch v. Maryland, been settled in Miller v. United States, 78 U. S. (11 Wall.) 268, 20 L. Ed. 135, and Stewart v. Kahn, 78 U. S. (11 Wall.) 493, 506, 507, 20 L. Ed. 176; reaffirmed in Mayfield v. Richards, 115 U. S. 137, 5 Sup. Ct. 1187, 29 L. Ed. 334. In Stewart v. Kahn it was held:

"The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the

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Constitution. In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

The same principle was recognized in the Legal Tender Cases, 79 U. S. (12 Wall.) 457, 539 (20 L. Ed. 286), where it was held:

"Before we can hold the legal tender acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, not appropriate in any degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited. This brings us to the inquiry whether they were, when enacted, appropriate instrumentalities for carrying into effect or executing any of the known powers of Congress, or of any department of the government. Plainly to this inquiry, a consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important. It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times."

See, also, the address of former Justice Hughes on the War Powers under the Constitution, 42 American Bar Association, 232.

Whether the exigencies existed when Congress enacted this statute was for that body to determine, and cannot be questioned by the courts, if there is any substantial ground therefor. McCulloch v. Maryland, supra; Lottery Cases, 188 U. S. 321, 355, 23 Sup. Ct. 321, 47 L. Ed. 492; McDermott v. Wisconsin, 228 U. S. 115, 128, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39. That there was substantial ground for the enactment of the statute requires no argument. The conditions so graphically described in the Legal Tender Cases (79 U. S. [12 Wall.] 540, 20 L. Ed. 286) prevail now, and it will conduce to brevity to refer to what was there said, without quoting it in this opinion.

That the act was enacted under the war power is not only apparent from its context, but it is expressly declared in section 16 of the act "to be emergency legislation, enacted to meet conditions growing out of war," and section 14 provides that the federal control of railroads shall continue not exceeding one year and nine months after the ratification of the treaty of peace.

2. Another ground upon which the act must be sustained is that the right to maintain an action in any particular court is always subject to the legislative will. It is only when one is deprived of all rights to maintain an action for the redress of his wrongs that the statute would be obnoxious to the Fifth Amendment to the Constitution. Congress has uniformly exercised that power by providing in what courts suits may be maintained, and in no instance has such an act been held void. Among the many is Act March 3, 1873, c. 226, 17 Stat. 509, authorizing the Attorney General to institute suits against the Union Pacific Railroad Company, for certain acts, in any Circuit Court of the United States. The constitutionality of this act was sustained in United States v. Union Pacific R. R., 98 U. S. 569, 25 L. Ed. 143. The Carmack Amendment to the Interstate Commerce Act, approved June 29, 1906 (34 Stat. 595, c. 3591, § 7, pars. 11, 12 [Comp. St. 1916, §§ 8604a, 8604aa]), authorizes an action against the receiving carrier, re-

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gardless of the fact that the loss or damage sued for was caused by a connecting carrier. Its constitutionality was sustained in Atlantic Coast Line v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7. Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1916, § 6923), vested the exclusive jurisdiction of actions on bonds of contractors for the construction of public works in the courts of the district in which said contract was to be performed and executed. The validity of the act was sustained in United States v. Congress Construction Co., 222 U. S. 199, 203, 32 Sup. Ct. 44, 56 L. Ed. 163, Hopkins v. Ellington & Guy, 246 U. S. 655, 38 Sup. Ct. 423, 62 L. Ed. 924, and Ex parte Southwestern Surety Ins. Co., 247 U. S. 19, 38 Sup. Ct. 430, 62 L. Ed. 961. The Clayton Act, approved October 15, 1914 (38 Stat. 730, 737, c. 323, § 12 [Comp. St. 1916, § 8835k]), expressly authorizes an action by the government, not only in the district whereof the defendant corporation is an inhabitant, but in any district where it may be found or does business. Section 15 of that act (section 8835n) authorizes service of process on other parties than the offending corporation, who are properly joined, in any district where found. The validity of these provisions was sustained in Southern Photo Material Co. v. Eastman Kodak Co. (D. C.) 234 Fed. 955.

Every state of the Union has provided by statute the venue for civil actions in its courts. In some states actions may be brought only in the county where the defendant resides; in some, where the defendant resides or may be found. Some actions can only be maintained in the county in which the cause of action accrued; others, where the subject-matter of the action is situated; and in some states actions may be maintained in the county where either plaintiff or defendant resides. The various acts are referred to in 22 Encyc. of Pl. & Pr. 790 et seq. In United States v. Crawford (C. C.) 47 Fed. 561, 565, Judge Parker said:

"I have no doubt that Congress may provide for service of process out of the district, as this is a regulation of practice and subject to the legislative control."

This was cited with approval by Judge Morrow in United States v. American Lumber Co. (C. C.) 80 Fed. 309, and in Sidney L. Bauman, etc., Co. v. Hart, 192 Fed. 498, 113 C. C. A. 104.

3. Another ground upon which this provision of the act must be upheld is that the courts of the United States, inferior to the Supreme Court, are not established by the Constitution, but owe their existence and powers to Congress alone. That they possess no powers not granted by an act of Congress was determined as early as 1809 in Bank of United States v. Deveaux, 9 U. S. (5 Cranch) 61, 3 L. Ed. 38, and again in 1812 in United States v. Hudson, 11 U. S. (7 Cranch) 32, 3 L. Ed. 259, and uniformly adhered to ever since. A late case in which this ruling is reaffirmed is In re Wisner, 203 U. S. 449, 455, 27 Sup. Ct. 150, 51 L. Ed. 264. That Congress may increase or diminish their powers, or abolish them, is beyond question. It has done so a number of times. Judiciary Act March 3, 1875, c. 137, 18 Stat. 470, extended the jurisdiction of the Circuit Courts of the United States mate-

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rially. Act March 3, 1887, c. 373, 24 Stat. 552, contracted it. The Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087) increased it in some respects, and in others decreased it. By that act Congress abolished the Circuit Courts, and no one ever questioned the exercise of these powers by Congress. If Congress, by the act under consideration, has seen proper to authorize the contraction of the jurisdiction of the District Courts, by limiting the courts in which actions may be maintained, it has only exerted the power which has been exercised ever since the enactment of the first Judiciary Act, in 1789 (1 Stat. 73, c. 20), by the first Congress under the Constitution. Possessing this power, Congress may well determine in what courts actions may or may not be maintained.

The Constitution confers on the Supreme Court appellate jurisdiction, but "with such exceptions and under such regulations as Congress shall make." In Ex parte McCardle, 74 U. S. (7 Wall.) 506, 514, 19 L. Ed. 264, it was held that Congress could deprive that court of appellate jurisdiction, and the repeal of an Act of Congress granting appellate jurisdiction in certain causes deprived the court of the power to review judgments in such actions. This case has been followed as a correct interpretation of the powers of Congress in all cases involving this question decided since. Murphy v. Utter, 186 U. S. 95, 109, 22 Sup. Ct. 776, 46 L. Ed. 1070. In Dooley v. Pennsylvania R. R. Co. (D. C.) 250 Fed. 142, Judge Booth passed upon an act similar to this and sustained it.

The contention that the statute is void, because vesting administrative officers with legislative discretion or power, is without merit. Selective Draft Cases, 245 U. S. 366, 389, 38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856. It is therefore clear that the act, if it authorizes these general orders, is within the power of Congress under the Constitution.

[2] *Does the act of Congress grant this power to the President?* Counsel for plaintiff contend that it does not, relying upon that part of section 10 of the act, which reads:

"Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law."

In the opinion of the court all this quotation means is that any person having a cause of action shall not, by reason of this act or any regulation made thereunder, be deprived of the right to maintain it in a proper court, if, under the state, federal, or common law, he is entitled to a legal remedy. It does not mean, as claimed, that, having a cause of action against the carrier, he has the right to institute it in any forum in which he could have brought it before the passage of this act. To meet the exigencies existing during the war, Congress has granted to the President the power to say that one shall not maintain an action in a forum where the natural effect of selecting such forum will be, in the language of General Order No. 18:

"That men operating trains engaged in hauling war materials, troops, munitions, or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week

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or more, which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operation of the railroads, and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs."

That the exercise of the right to maintain actions in a forum distant from the place where the witnesses reside will seriously interfere with the successful prosecution of the war cannot be open to doubt. How are the soldiers drafted under the Selective Draft Act to be transported from the interior to the seaports, if the operation of trains is to be interfered with in this manner? How are munitions, clothing, food, coal, and other supplies necessary to carry on the war, to be transported expeditiously, if the employés, without whom trains cannot be operated, are to be compelled to leave their employment to attend as witnesses at places hundreds of miles away from where their duties require them to be, whenever a person has, or imagines he has, a cause of action against the carrier, and for his convenience, or in some instances, perhaps, to prevent a proper defense, institutes the action in a court far distant from the district where the cause of action arose, and in a district other than that of the residence of the plaintiff at the time of the accrual of the cause of action? The fact that not only the plaintiff, but his witnesses, can more conveniently attend the court, if held at or near his home, or where the cause of action accrued, may well raise a doubt whether the selection of the foreign forum is always made in good faith. The amendment of General Order No. 18 by General Order No. 18–A was evidently intended to prevent a change of residence for the purpose of enabling a suit to be brought at a distance from where the plaintiff resided at the time of the accrual of the cause of action, as is so frequently done to enable one to maintain an action in a national court, instead of in the courts of the state of which the plaintiff and defendant were both citizens at the time of the accrual of the cause of action.

[3] But, aside from this, statutes may not be construed by selecting some part thereof and disregarding other parts. For a proper construction of a statute the whole of it must be read together, to ascertain the legislative intent. In the language of Mr. Chief Justice White in Van Dyke v. Cordova Copper Co., 234 U. S. 188, 191, 34 Sup. Ct. 884, 885, 58 L. Ed. 1273:

"We may not, in order to give effect to those words, virtually destroy the meaning of the entire context; that is, give them a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent."

The various provisions of an act should be read so that all may, if possible, have their due and conjoint effect without repugnancy or inconsistency. New Lamp Chimney Co. v. Ansonia Brass Co., 91 U. S. 656, 662, 23 L. Ed. 336; Aaron v. United States, 204 Fed. 943, 123 C. C. A. 265.

Applying this canon of construction to the act, and giving effect to every part of it, as is our duty, it is apparent at once how untenable this contention is. That part of section 10 applicable to the matter in controversy reads:

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"Sec. 10. That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President."

Another provision of the act is section 9:

"And the President, in addition to the powers conferred by this act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofor conferred."

There is nothing in the general orders under consideration which deprives the plaintiff of her right to maintain an action against the defendant, but for reasons of public necessity, in a time of war, these regulations were made, because in the opinion of the President and Director General, for good and sufficient reasons, they are necessary to prevent serious interference with the physical operation of railroads under the control of the government and employed in the prosecution of the war. The act and regulations may well be sustained upon the ground that "salus populi supreme lex est." "The welfare of the people is the paramount law."

The demurrer to the plea is overruled.

In re SIMMONS et al.

(District Court, D. Massachusetts. July 30, 1918.)

No. 24658.

1. BANKRUPTCY ⟸143(12)—PROPERTY VESTING IN TRUSTEE—LIFE INSURANCE POLICY.
   A trustee is entitled to the surrender value of an endowment insurance policy on the life of bankrupt, where it has a cash surrender value, either by its terms or by the concession and practice of the company.
2. INSURANCE ⟸239—LIFE INSURANCE—RIGHTS OF BENEFICIARY.
   Under St. Mass. 1907, c. 576, § 73, providing that a life policy payable to a married woman shall inure to her separate use and that of her children, free from debts of the insured, her rights in a policy having a cash surrender value are subject to the right of the insured to surrender it.

In Bankruptcy. In the matter of Arthur E. Simmons and John J. Griffin, partners, bankrupts. On petition to review order of referee directing Arthur E. Simmons, one of the bankrupts, to turn over to the trustee a certain life insurance policy. Order affirmed.

Milton B. Warner and Warner & Barker, all of Pittsfield, Mass., for bankrupts.

Walter J. Donovan, of Adams, Mass., for trustee.

JOHNSON, Circuit Judge. Arthur E. Simmons, one of the bankrupts, at the time of the adjudication of bankruptcy, held an endowment policy for $1,000, issued by the Metropolitan Life Insurance Company on the 4th day of September, 1903, which provides that

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the insurance company will pay to him at the expiration of 20 years the sum of $1,000, and in case he should die prior to the expiration of 20 years, while said policy is in force, the said company shall pay the above-mentioned sum to Martha A. Simmons, mother of the insured, if alive; otherwise, to the legal representatives of the insured.

[1] While there is no provision in the policy for a change of beneficiary, it appears by assignment dated November 16, 1912, which is attached to the policy, that Martha A. Simmons assigned all her interest in the said policy to the insured, and that upon the request of the insured, Minnie M. Simmons, his wife, was designated as contingent beneficiary in said policy, to whom the proceeds of the same were to be paid in the event of the death of the insured prior to the expiration of the endowment period, if living; otherwise, to his legal representatives. The insurance company, it would seem, assented to this change of beneficiary and recorded the assignment and change of beneficiary in its policy register.

The referee has found that this policy had a cash surrender value on February 19, 1917, the date of the adjudication, of $415.26, according to the computation of the insurance company, and has ordered the bankrupt, Arthur E. Simmons, to pay or cause to be paid to his trustee the amount of the cash surrender value of said policy at the date of adjudication in bankruptcy, or that he execute an assignment of such documents and papers as may be necessary to enable the trustee to collect from the insurance company the amount of the cash surrender value of said policy, and the District Court is asked to review his order.

Section 70a, cl. 5 (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. 1916, § 9654]), contains the following provision:

"Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors, participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

While the policy does not contain any provision for a cash surrender value, other than a table of the different amounts which the insurance company would loan at the expiration of different times during the life of the policy, the referee has found that the policy did have at the adjudication a cash surrender value, and it is evident from his report that this was recognized by the insurance company, as the amount was computed by it.

It was held in Hiscock v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, that the provision of the Bankruptcy Act relating to insurance policies is not confined to policies in which the cash surrender value is expressly stated, but applies also to policies which have a cash surrender value by the concession or practice of the company issuing the same.

Previous to this decision of the Supreme Court, it had been held in this circuit (In re Boardman [D. C.] 103 Fed. 783), by Low-

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ell, District Judge, that it was immaterial whether the cash surrender value was stated in the policy or not; "if in the ordinary course of business the bankrupt can obtain cash from the company by a surrender of the policy, his creditors are entitled to the cash."

While the referee does not state that the insurance company admitted that the policy at the time of adjudication had a cash surrender value, he does find and report that this cash surrender value was computed by the company, and I think his finding and report should be accepted by the court.

[2] But it is contended that, even if the policy had a cash surrender value, it was exempt under chapter 576, § 73, of the Acts and Resolves of Massachusetts of 1907, which is as follows:

"Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred or in any way made payable to a married woman, * * * shall inure to her separate use and benefit, and for that of her children."

And it further provides that the "beneficiary * * * shall be entitled to its proceeds against the creditors and representatives of the person effecting the" insurance.

This statute has received a construction by the Supreme Court of Massachusetts in Bailey v. Wood, 202 Mass. 549, 89 N. E. 147, 25 L. R. A. (N. S.) 722, and it was there held that it applies to and includes an assignment by a husband to his wife of a paid-up endowment life insurance policy, even when such assignment was made when the assignor was deeply insolvent within the knowledge both of himself and his wife. It will be noted, however, that the policy assigned to the wife was a paid-up endowment life insurance policy, and the court held that the insured's life "constitutes no part of the assets of his estate, and nothing therefore is taken from his creditors by an insurance upon it in favor of his wife or the assignment to her of a policy of insurance already issued."

In Dame v. Blinn, 207 Mass. 159, 93 N. E. 601, it was held that:

"A general assignment for the benefit of creditors which conveys all property of the assignor legal and equitable except such as is exempt by statute from being taken on execution, and expressly includes 'all claims, debts, choses in action, owing to him, whether now or hereafter payable,' transfers to the assignee a right of the assignor to surrender a policy of life insurance and take the amount of the surrender value for his own benefit."

The policy in this case was an endowment policy payable to the insured at the expiration of the period stated in the policy, or if the insured should die before that time to children of the insured, if living, otherwise to the insured's executors, administrators, or assigns, with power to the insured to surrender the policy to the company at any time. The policy was therefore assignable by the insured, and it contained a statement of what the accepted surrender value or the amount to be paid by the company to the insured or his assignees on surrender of the policy would be at the end of the successive years of the proposed insurance. The court there held that the children's rights under the policy were made subject to the unrestricted right of the insured to surrender it; that "this was a valuable property

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right, incident to his general right under the policy, such as would pass with an assignment of the latter."

While the policy in the case under consideration contains no power of surrender clause, nor any clause authorizing assignment of the policy, yet it is true that the insurance company had already recognized one assignment of the policy before adjudication, and in view of the fact that the referee has found that the policy did have a cash surrender value at that time, it is evident that the referee must have found that it was the practice of the insurance company to accord the right of surrender to the insured under such a policy.

In Burlingham v. Crouse, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148, the policies under consideration had a surrender value; but the bankrupt before adjudication had procured loans upon the policies to the extent of their full surrender value. The court there held that there was nothing of value under the policies to be assigned to the trustee, and "that in the present case the company had advanced upon the policies their full surrender value as stipulated in the policies, and that the only interest that could have passed to the trustees would have been the speculative right to the net proceeds of the policies, contingent upon the death of the bankrupt, and possibly dependent upon the payment of large annual premiums for 13 years." The court in its opinion states:

"Congress recognized also that many policies at the time of bankruptcy might have a very considerable present value which a bankrupt could realize by surrendering his policy to the company. We think it was this latter sum that the act intended to secure to creditors by requiring its payment to the trustee as a condition of keeping the policy alive."

The court there held that there was nothing of value under these policies to be assigned to the trustees, but expressly recognizes the right of the trustees to hold as part of the property of the bankrupt, or to have paid to him, as part of the property of the bankrupt, the cash surrender value of any insurance policy.

I agree with the referee that the policy in question had a surrender value which the company was willing to pay, and which makes its value available to the bankrupt estate at the date of adjudication.

The order of the referee is affirmed, and the petition for review is dismissed.

UNITED STATES v. LEWIS et al.

(District Court, S. D. California, N. D. July 10, 1918.)

No. 118.

INDIANS ⇐38(2)—PROSECUTION—JURISDICTION—FEDERAL COURTS—"RESERVED FOR EXCLUSIVE USE OF UNITED STATES."

A homestead acquired by an Indian on public land in a state under the general homestead law is not land "reserved * * * for the exclusive use of the United States," within Criminal Code, § 272, subd. 3 (Comp. St. 1916, § 10445), and a federal court is without jurisdicton to try a criminal offense committed thereon.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Criminal prosecution by the United States against Sarah Lewis, Roy Lewis, and Louis Valencia. On demurrer to indictment. Demurrer sustained.

Lyle W. Rucker, Asst. U. S. Atty., of Los Angeles, Cal.

George G. Graham, of Fresno, Cal., and Edward Schary, for defendants.

TRIPPET, District Judge. The defendants have been indicted for murder. The case is before the court on a demurrer to the indictment. The defendants raise the question that the court has no jurisdiction to punish for the offense charged in the indictment. The jurisdictional facts charged in the indictment are as follows:

"That Sarah Lewis, an Indian woman, Roy Lewis, a minor Indian, both wards of the United States government, and Louis Valencia, * * * at, upon, and within the limits of an Indian homestead, formerly of the public domain of the United States, known as the Joe Dehy ranch, for which application was made on April 13, in the year of our Lord one thousand eight hundred and eighty-seven, by one Joe Dehy, a full-blood Piute Indian, and the father of Sarah Lewis and of Minnie Fuller, both Piute Indian women, and wards of the United States government, and for which a patent was granted May 5, in the year of our Lord one thousand eight hundred and ninety-three, which said patent contained a twenty-five year trust provision, as provided in the act of Congress of July 4, in the year of our Lord one thousand eight hundred and eighty-four, and amendments thereof, said Indian homestead entry being more particularly described as the west one-half (½) of the southeast one-quarter (¼), section nine (9), township ten (10) south, range thirty-four (34) east, in the county of Inyo, within the Northern division of the Southern district of California, which said Indian homestead entry was at all of the times herein mentioned within the exclusive jurisdiction of the United States and within the jurisdiction of this honorable court, with force and arms, in and upon Minnie Fuller, a full-blood Piute Indian woman," etc.

There are two sections of the Penal Code (Act March 4, 1909, c. 321) concerning the jurisdiction of the court to try criminal offenses, namely, section 272 and section 328 (35 Stat. 1142, 1151 [Comp. St. 1916, §§ 10445, 10502]). Sections 2145 and 2156 of the Revised Statutes (Comp. St. 1916, §§ 4148, 4159) need not be considered, because the lands here involved are not within the Indian country. Ex parte Tilden (D. C.) 218 Fed. 920. Section 328 is as follows:

"All Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, and larceny, within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases. And all such Indians committing any of the above-named crimes against the person or property of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States: Provided, that any Indian who shall commit the offense of rape upon any female Indian within the limits of any Indian reservation shall be imprisoned at the discretion of the court."

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The United States attorney concedes that the court has no jurisdiction by reason of this section. No concession was necessary, however, because it is so plain that the court would not have jurisdiction by reason of this section that it will not admit of discussion. The United States attorney relies upon Donnelly v. United States, 228 U. S. 243, 268, 33 Sup. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710, United States v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228, and similar cases. These cases, however, deal with Indian reservations and are not in point here. But this section has an important bearing upon the interpretation to be given to section 272. In this respect, when Congress enacted section 328, it intended by that section to provide, so far as the Penal Code was concerned, for all cases concerning Indians that should be prosecuted in the federal court, and therefore the fact that some of the defendants are Indians in this case has no relation whatever to the jurisdiction of the court.

Section 272 of the Penal Code (Comp. St. 1916, § 10445), is as follows:

"The crimes and offenses defined in this chapter shall be punished as herein prescribed: * * *

"Third: *When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof,* or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

The United States attorney contends that the court has jurisdiction by virtue of the first part of this paragraph; that is to say, he contends that the land, upon which this murder was committed, was land reserved or acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof.

The court cannot agree with this contention. The land, at the time of the settlement by the Indian upon it, was the public land of the United States, subject to homestead entry, and the Indian acquired the title to the land under an act of Congress, entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-five, and for other purposes," passed July 4, 1884 (23 U. S. Stat. at Large, 76, 96, c. 180, 3 Fed. Stat. Ann. [2d Ed.] 820 [Comp. St. 1916, § 4612]). The provision of this act, authorizing the issuance of this patent, is as follows:

"That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been

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made, or, in case of his decease, of his widow and heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

It seems to me perfectly plain that the land, upon which this murder was committed, was not reserved for the exclusive use of the United States, simply by reason of the fact that there is a trust provision in the patent. The United States held it in trust for the use of the Indian, and not for the use of the United States. The mere fact that the Indian is a ward of the government does not change the reasoning in the slightest. This precise question has never been directly passed upon by any court, but nevertheless we are not wholly without authority. In United States v. Kiya (D. C.) 126 Fed. 879 (see, also, Matter of Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848), Judge Amidon rendered an able opinion, which has a bearing upon the proposition under discussion. Congress, February 8, 1887 (24 Stat. 388, c. 119), passed an act entitled "An act to provide for the allotment of lands in severalty to Indians. * * *" 3 Fed. Stat. Ann. 830, § 6, amended May 8, 1906 (34 Stat. 182, c. 2348 [Comp. St. 1916, § 4203]). This act provided for the allotment of lands in Indian reservations in severalty to Indians. The statute provided for a patent to issue to the Indian, but having a clause reserving a trust in the government for the benefit of the Indian, the same as in the act of 1884. The act further provided that, after the expiration of 25 years a patent should issue to the Indian or his heirs under certain conditions. In the case at bar there does not seem to be any necessity for a second patent.

In the case just referred to Judge Amidon held that a crime committed upon land so allotted to an Indian was not within the jurisdiction of the United States District Court. This decision in itself could not have much weight here, but for the fact that, subsequent to said decision, Congress amended the act of February 8, 1887, and provided in such amendment that, during the time the lands were so held in trust by the government, crimes committed thereon should be within the jurisdiction of the United States court. If the trust clause in the act as originally enacted had given the United States court jurisdiction of crimes committed upon the land, then there was no necessity for Congress to amend the act. The amendment, therefore, amounts to a legislative interpretation that the trust provision in the allotment patent would not give the court jurisdiction. If the court, under the act alloting lands in severalty in Indian reservations, did not have jurisdiction by reason of the trust clause, a fortiori the court would not have jurisdiction under the statute by virtue of which the patent was granted in this case.

There is another phase of this matter that is entitled to consideration. In United States v. Bateman, 34 Fed. 86, the Circuit Court for the Northern District of California held that homicide committed within the Presidio military reservation was not an offense over which the courts of the United States had jurisdiction. In that case it is pointed out that, when California was admitted to the Union,

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no reservation was made by the national government of jurisdiction over any property. And the federal court could only acquire jurisdiction to punish crime in any territory within the state by cession of the state. It is not necessary for me to go into this phase of the matter fully, but, in passing, I call attention to the statutes of California upon the subject. There are many acts of the Legislature of California ceding jurisdiction to the United States over certain specified territories, such as Indian reservations, military reservations, etc.; but there is none ceding jurisdiction to the United States over land such as is described in this indictment.

I am therefore of the opinion that this court has no jurisdiction, and the demurrer is sustained.

MONTGOMERY v. CITY OF PHILADELPHIA et al.

(District Court, E. D. Pennsylvania. October 9, 1918.)

No. 5226.

1. ASSUMPSIT, ACTION OF ⇐⇒1, 10—PENNSYLVANIA PRACTICE—EQUITABLE DEFENSES—INTERPLEADER.

Under the Pennsylvania practice, an action in assumpsit is open to equitable defenses, and when the real issue is, not whether the defendant owes, or how much, but to whom the money owed rightfully belongs, the action is transformed from one in debt to an interpleader proceeding between the respective claimants.

2. INTERPLEADER ⇐⇒32—MONEY PAID INTO COURT BY DEFENDANT—RIGHT TO HAVE OWNERSHIP DETERMINED.

When a court has jurisdiction of the parties and of the subject-matter, and emphatically when that subject-matter is money paid into court for the express purpose of having its ownership determined therein, there is no legal procedure obstacle in the way of such determination.

3. BANKRUPTCY ⇐⇒172—PROPERTY PASSING TO TRUSTEE—MONEY ASSIGNED BY BANKRUPT.

An assignment by a contractor for city work of all money to become due under the contract to the surety on his bond, which on his default completed the work at a loss, *held* to entitle the surety, as against the contractor's trustee in bankruptcy, to sums earned before default, but reserved by the city, although the city was not notified of the assignment.

At Law. Action by Kingsley Montgomery, trustee in bankruptcy of Cloud, Stiles & Work, a corporation, against the City of Philadelphia and the Maryland Casualty Company, intervening defendant. Judgment for Maryland Casualty Company.

Joseph H. Hinkson, of Chester, Pa., for plaintiff.

John P. Connelly, of Philadelphia, Pa., for defendant city of Philadelphia.

Maurice W. Sloan, of Philadelphia, Pa., for defendant Maryland Casualty Co.

DICKINSON, District Judge. The crucial point of the question involved in this case may be best presented by an outline statement of the fact situation:

Cloud, Stiles & Work, a contracting corporation, entered into a contract with the city of Philadelphia to do certain construction work for

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the city. The Maryland Casualty Company became the surety of the contractor. The city reserved the right to withhold a certain percentage of the earned payments (otherwise payable to the contractor) until the completion of the contract. These moneys then became payable as part of the final payment.

As part of the inducement to the surety to become such, the contractor made what is conceded to have been (between the parties) a valid assignment of all moneys which became payable under the contract by the city, including this reserve. The assignment became operative in the event of a default by the contractor upon its contract. This assignment was duly executed and delivered, but no notice thereof was given to the city, nor was there other delivery than of the assignment. The contractor proceeded with the work until May 1, 1916. It then defaulted, and the city thereupon regularly declared, and notified the surety of, the default, and called upon the latter to complete the work. This the surety did at a cost in excess of all payments under the contract, including the sum which had been held back from the contractor by the city by virtue of the right given to it by the contract. The figures expressive of the sum so reserved are $8,215.67.

The contractor, subsequently to the default, went into bankruptcy. The date is agreed to be August 1, 1916. The plaintiff, as trustee in bankruptcy, brought this action against the city. The latter, admitting its possession of the fund and having no interest in the controversy over the ownership of it, asked and was given leave to pay the money into court. These further proceedings are in effect an interpleader to determine to whom the money belongs, and the question is presented through and by a case stated.

The plaintiff advances the claim of the bankrupt estate from two positions. One is in effect that the question of to whom this money belongs is a question for the determination of the court in bankruptcy, and because of this the fund should be taken in charge by the trustee. The underlying principle upon which the trustee relies must be accepted, but the acceptance of the conclusion involves a begging of the real question. The right to the money determines the question before us, but the question is, not the right to the money, but the right of the plaintiff to recover in this action.

It is fairly presented by a statement of the defense as really made. It is that the defendant owes the plaintiff nothing, because the debt, although admitted to be due, is due, not to the plaintiff, but to another. If this defense is made out, the plaintiff cannot recover. Ordinarily, it is true, a defendant has no concern with the ownership of the debt which he owes, if the plaintiff has a right of action in the sense of being the legal plaintiff. If he owes the money, and owes it to the plaintiff, he cannot escape judgment by setting up that the ownership of the fruits of the action has passed to a third party. His only legal defense is that he does not owe the plaintiff. Herein lies the distinction between the legal and an equitable, or, as the Pennsylvania practice has it, a use, plaintiff. It may be, however, that the circumstances are such as to give the defendant a real interest in the question of to

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whom payment should be made, and that he has a claim upon the protection of the court against the danger of being compelled to pay the debt twice.

[1] The statutes of Pennsylvania supply a weapon of defense, although a somewhat unwieldy one, to such defendants. Moreover, it is one of the merits of the Pennsylvania system of practice that its machinery, aside from that provided by statute, is mobile and flexible. An action in assumpsit, although an action at law, is regarded as an equitable action, or proceeding open to equitable defenses. When the real issue is, not whether a defendant owes, or how much he owes, but to whom he owes, in the sense, not of in whom is the legal right of action, but to whom does the money to be recovered rightfully belong, the action is transformed from an action in debt against the defendant to an interpleader proceeding between the respective claimants to the money, to determine its ownership.

[2] This fitly describes the present proceeding. When a court has jurisdiction of the parties and of the subject-matter, and emphatically when that subject-matter is money which has been paid into the court for the express purpose of having its ownership determined, there would seem to be no legal procedure obstacle in the way of such ownership being determined.

Aside from all other considerations, the common sense of the situation would command that the real question be finally, so far as concerns that court, determined. This is particularly true when the court which may pronounce judgment and the court to which the question would be referred are one and the same, although sitting in the one case as a court of equity and in the other as a bankruptcy court.

[3] This brings us to the other standing ground of the plaintiff, which is that the Maryland Casualty Company has no valid title to this fund as against a trustee in bankruptcy, having, as he does, the status of an execution creditor. The argument proceeds upon the thought that the law of Pennsylvania has accepted the principle ingrafted upon the common law by the statute of Elizabeth that possession is the badge of ownership of personal property. In the application of this principle the law of Pennsylvania is guided by the more direct, simple, and sturdier spirit of the common law, and does not follow the more subtle doctrines of the civil law in countenancing secret transfers and liens inconsistent with the ownership indicated by possession. It therefore places under the ban of its condemnation all transfers unaccompanied with a change of possession.

The modification of the doctrine is recognized to the extent that such transfers are good as against the grantor and persons claiming title through him, and that no further change of possession is required than that called for by the nature of the thing transferred, but that such transfers are not valid against execution creditors, unless there has been a change of possession or its equivalent. The principle, it is asserted, applies to choses in action as well as to things tangible. When a chose in action, in the form, for instance, of a claim of debt, is assigned, it is reasonably possible to have the assign-

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ment accompanied, not only by a delivery of the written assignment, if there be one, but also by notice to the debtor. Without the latter, therefore, an assignment of a chose in action is void as against an execution creditor. The line of foreign attachment and other attachment cases, in each of which the title of the assignee has been upheld, is distinguished from the case of a trustee in bankruptcy in this: That the plaintiff in an attachment proceeding stands in the shoes of and makes his claim through the grantor, and that the title of such trustee is that of an execution creditor.

As against this view there are two things to be said. In the first place, the fund here was in a very substantial, although somewhat technical, sense, earned by the surety, and not by the bankrupt. The latter had no claim whatever to the money until the contract was completed, although it is true that the money represents work done by the bankrupt. The contract was completed by the surety and the reserve money thus saved. There is, because of this, great force in the equitable consideration that the salvor should not be at a loss.

In the second place, and as a finality, the question sought to be raised has been set at rest by the case of Hawley Down-Draft Furnace Co., 238 Fed. 122, 151 C. C. A. 198. In that case there was a secret assignment of choses in action in the form of book accounts. Not only was no notice given to those who owed the accounts, but the assignor collected them as if still the owner. It was, it is true, agreed between the grantee and grantor that in making collections the grantor acted as the agent of the grantee; but this relationship was in no way disclosed to others. A receiver was appointed by a state court, who collected the outstanding accounts. Bankruptcy proceedings followed, and the receiver paid over the fund to the trustee in bankruptcy. The assignee made claim to the moneys under his assignment, and his title was upheld against that of the trustee.

This ruling is decisive of the question of ownership. The conclusion reached is based upon the finding that by the assignment of this reserved fund title thereto was in the Maryland Casualty Company. We, in consequence, answer questions (a) and (b) submitted for our decision, but see no occasion to answer question (c).

These answers are as follows: (a) No. (b) Yes.

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UNITED STATES v. BORDONARO et al.

(District Court, W. D. New York. October 15, 1918.)

BRIBERY ⇐=1(2)—"OFFICER OF UNITED STATES" —MEMBERS OF DRAFT BOARD.
A member of a local draft board is an "officer of the United States" or a person acting on behalf of the United States in an official function, within the meaning of Criminal Code, § 39 (Comp. St. 1916, § 10203), making it an offense to give or offer a bribe to any such officer, or person.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, United States Officer.]

Criminal prosecution by the United States against Charles Bordonaro and John Marino. On demurrer to indictment. Overruled.

Stephen T. Lockwood, of Buffalo, N. Y., for the United States.
Henry Donnelly, of Olean, N. Y., for defendants.

HAZEL, District Judge. [1] The demurrer, jointly interposed by defendants, challenges the validity of the indictment mainly on the ground that one Murrin, chairman of the local exemption board, division 1, of Olean, to whom $500 was given by defendants to reclassify John Marino, by removing him from class 1, A to class 5, F, as a resident alien, was not an officer of the United States; the contention being that he was in fact an officer of the state of New York under the Selective Draft Act (Act May 18, 1917, c. 15, 40 Stat. 76) and the rules and regulations promulgated for carrying it out, and hence that there was no infraction of section 39 of the Criminal Code of the United States. Act March 4, 1909, c. 221, 35 Stat. 1096 (Comp. St. 1916, § 10203). This contention, however, seems to me to be untenable.

The members of local boards appointed for carrying out the provisions of the Selective Draft Act are appointed by the President, and it is entirely immaterial that the appointments are made upon the recommendations of the Governors of the various states in which the appointees perform their duties. The act in terms authorizes and empowers the President to designate local boards upon the recommendations of the Governors of the states, and, furthermore, to utilize the services of officers and agents of the several states in the execution of the act. Indeed, the act substantially provides that any and all persons designated and appointed under the rules and regulations prescribed by the President, regardless of whether they are appointed by the Governor, or any officer of any state, are required to perform their duties as ordered and directed by the President. Under the act, the President was specifically authorized to establish and create exemption boards, such boards to be appointed by him and to consist of three or more members, the boards to have power to determine questions of exemption under the act. Such provisions, in my judgment, support the view of the government that a member of a draft board is an officer of the United States, under article 2, § 2, of the Consti-

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tution, and, in any event, under the Selective Draft Act is required to perform an official duty for the United States, and is therefore a person acting in an official function within the meaning of section 39 of the Criminal Code.

Another point sustaining this view is that failure to perform any duty required of a member of a local board is a misdemeanor and subjects him to punishment in the District Court of the United States having jurisdiction of the offense. He was selected, not merely to perform a ministerial duty, or a duty in a particular case, or as an expert or assistant, nor for his special knowledge, as was the case in Auffmordt v. Hedden, 137 U. S. 327, 11 Sup. Ct. 103, 34 L. Ed. 674, cited by counsel for defendants, but, on the contrary, he was to perform a quasi-judicial function requiring conference with his associate members and the exercise of judgment and discretion in the proper discharge of his duties. It is true that the duration of his office was not stated at the time of his appointment, nor the emolument he was to receive, though reference to the latter is made in the rules; nevertheless his duties were such as fall either to an officer of the United States or to "any person acting for or on behalf of the United States in any official function." Section 39, Criminal Code. In either case the indictment sufficiently apprises the defendants of the character of the charge against them.

The precedents cited by counsel for defendants to sustain his point are to my mind clearly inapplicable to the present situation. In no sense are the members of local boards employés or agents of the states or counties. While their duty, true enough, is to assist in raising the state's quota of men for the United States army, and their decisions result from co-operation and concurrence of the members of the board, still Congress, in enacting the Selective Draft Act, did not contemplate that they were to be employés and agents of the state. Of course, as pointed out, the members of the boards act unitedly, and no individual member has the right to determine for the board any question of classification; but it was plainly a commission of the offense in question to give money to any person acting for, or on behalf of, the United States in any official function with an intent to influence his decision or action on any question which might at any time be pending, or which might be brought before him in his official capacity.

It is questioned whether there was a matter pending before the board. Upon this phase we must look to the indictment, which alleges that a matter was pending and about to come before the board, and that defendants offered money to Murrin in his official capacity to induce him to vote on it a certain way. The trial will no doubt indicate whether or not there was a basis for the performance of an official act by Murrin. It is not thought that section 39 of the Criminal Code is limited to a question or matter pending before Murrin individually, as distinguished from a question or matter pending before the local board. It is essentially necessary in this case for the government to show that the defendants committed an act to influence official action on the part of Murrin, or to influence him in the per-

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formance of any duty that he was required to perform by authority of his appointment to office. United States v. Ingham (D. C.) 97 Fed. 935. See, also, United States v. Haas (C. C.) 163 Fed. 908. The evidential facts, true enough, may show that there was no intention to influence official action, but as to this no comment is required.

The demurrer is overruled.

CITIZENS' TRUST & SAVINGS BANK v. HOBBS.

(District Court, S. D. California, S. D. October 11, 1918.)

No. 647.

REMOVAL OF CAUSES ⇐79(6)—TIME FOR FILING PETITION—EXTENSION OF TIME TO PLEAD.

Under Code Civ. Proc. Cal. § 585, subd. 1, requiring defendant to answer within the time specified in the summons, "or such further time as may have been granted," an extension may be granted by stipulation of counsel, and at any time within such extension defendant may file a petition for removal.

At Law. Action by the Citizens' Trust & Savings Bank against John H. Hobbs. On motion to remand to state court. Denied.

W. E. Lady, Hunsaker & Britt, and Le Roy M. Edwards, all of Los Angeles, Cal., for plaintiff.

J. R. Whittemore and C. O. Whittemore, both of Los Angeles, Cal., for defendant.

TRIPPET, District Judge. This action is before the court on a motion to remand. Summons was served upon the defendant in Los Angeles county, Cal. According to the notice in the summons, the defendant was required to answer within 10 days from the date of service. Within that time the plaintiff and defendant entered into a stipulation in writing, extending the time for the defendant to answer. Within the time specified in the stipulation, the defendant filed a petition to remove the cause to this court. The question presented to the court is whether or not the petition for removal was filed "at the time, or any time before the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead."

There are three provisions of the Code of Civil Procedure of California that bear upon this question:

Section 407:

"The summons * * * must contain: * * *

"2. A direction that the defendant appear and answer the complaint within ten days, if the summons is served within the county in which the action is brought; within thirty days, if served elsewhere.

"3. A notice that, unless the defendant so appears and answers, the plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the court for any other relief demanded in the complaint."

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Section 585:

"Judgment may be had, if the defendant fails to answer the complaint, as follows:

"1. In an action arising upon contract for the recovery of money or damages only, if * * * no answer has been filed with the clerk of the court within the time specified in the summons or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant. * * *"

Section 283:

"An attorney and counselor shall have authority:

"1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise."

These provisions of the Code must be construed together, so as to give effect to each phrase therein. It is perfectly plain that the phrase of paragraph 1 of section 585, to wit, "Such further time as may have been granted," is a provision of law of the state of California, which provides for the time of the defendant to answer. Section 585 does not limit the right to grant extensions of time to answer to orders of the court. The granting of the extension of time, as provided by section 585, may be done by stipulation of the attorneys. A stipulation made by the attorneys extending the time to answer would, of course, be enforced by the courts, and undoubtedly has been on many occasions. These provisions of the Code are the requirements of the law of the state of California, which determine the time for the defendant to answer.

The rules of the court were introduced in evidence at the hearing. Under these rules the defendant had a right to answer or file his petition for removal at the time it was filed. The law of California established the right of the defendant to have filed his answer at the time he filed his petition so clearly "that he may run that readeth it." The opinion in Tevis v. Palatine Ins. Co. (C. C.) 149 Fed. 560, is in point, and there is no reason why that opinion should not be followed.

The motion to remand will be denied.

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FOSTER et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 28, 1918.)

No. 3157.

1. INDICTMENT AND INFORMATION ⟸59—RIGHT OF DEFENDANTS TO BE INFORMED OF NATURE OF ACCUSATION.

Defendants, charged with crime, have a constitutional right to be informed of the nature and cause of the accusation against them.

2. INDICTMENT AND INFORMATION ⟸110(4)—SUFFICIENCY—LANGUAGE OF STATUTE.

An indictment charging that defendants, in violation of the Espionage Act, conveyed false reports, with intent to interfere with the success of the military and naval forces of the United States, etc., but which did not specify the reports, or to whom they were made, but merely followed the language of the statute, *held* insufficient; the statute itself being general.

3. INDICTMENT AND INFORMATION ⟸121(1)—BILL OF PARTICULARS.

A bill of particulars may be ordered by the court, in its discretion, in cases where the indictment, while so expressed as to be good on demurrer, does not furnish defendant with all information he is entitled to have before being compelled to go to trial.

4. INDICTMENT AND INFORMATION ⟸121(4)—BILL OF PARTICULARS.

A bill of particulars, not having been made by a grand jury on oath, cannot cure the failure of the indictment to sufficiently inform defendant of the charge against him, for it is no part of the record, and is not subject to demurrer.

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Leonard Foster and others were convicted of violating the Espionage Act (Act June 15, 1917, c. 30, 40 Stat. 217), and they bring error. Reversed and remanded, with instructions to sustain demurrer to indictment.

The plaintiffs in error were civilian employés for a contractor who was doing work at the Camp Lewis cantonment. They were indictment in six counts, three of which charged offenses committed on November 10, 1917, and the others charged offenses committed on November 13, 1917. The first count charges that on November 10, 1917, at Camp Lewis, Wash., when the United States was at war with Germany, the accused "did willfully, knowingly, unlawfully, and feloniously make and convey false reports and false statements with intent to interfere with the operation and success of the military and naval forces of the United States, and to promote the success of its enemies, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America." The second count charged, in the language of the statute, that the accused "did willfully, knowingly, unlawfully, and feloniously cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States, to the injury of the service of the United States"; and the third count charged that they "did unlawfully, willfully, knowingly, and feloniously obstruct the recruiting and enlistment service of the United States to the injury of the service of the United States." The fourth, fifth, and sixth counts were framed as were the first, second, and third.

A demurrer was interposed to the indictment, and to each count thereof, on the ground that no offense or crime was charged therein against the laws of

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the United States. The demurrer was overruled, but the court directed that a bill of particulars be furnished. The order was complied with, and a bill of particulars was furnished, stating that the seven defendants were singled out as leaders spreading propaganda against the United States, that they were searched, and I. W. W. cards and papers were taken from their persons; that they carried on I. W. W. activities, working toward the spreading of dissatisfaction among the soldiers and laborers whom they got to listen to their arguments. Then followed the specification of statements made by the defendant Hodges on November 10th to a named person, and statements made by the defendants Foster and Hodges on November 13th in the sleeping quarters occupied by the defendants at Camp Lewis. There was no mention made in the bill of particulars of the activities of the other defendants, except that it was alleged that one of them, who was not named, made certain disloyal and hostile statements as to the government, and another passed around I. W. W. literature. No exception was taken to the bill of particulars as insufficient, and the cause went to trial without further objection. But objection was made to the introduction of evidence against the defendants not named in the bill of particulars, to the overruling of which an exception was allowed.

By the verdict of the jury all of the plaintiffs in error were found guilty as charged in the first count; Phelan and Hodges were found guilty as charged in the second, third, fifth, and sixth counts; and Phelan, Hodges, and Foster were found guilty as charged in the fourth count.

H. E. Foster, of Seattle, Wash., for plaintiffs in error.

Clarence L. Reames, Sp. Asst. Atty. Gen., and Robert C. Saunders, U. S. Atty., of Seattle, Wash., for the United States.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] We are of the opinion that the indictment is fatally defective and that the demurrer should have been sustained. The plaintiffs in error had the constitutional right to be informed of the nature and cause of the accusation against them. To furnish them with that information it was necessary to set forth in the indictment the particular facts and circumstances which rendered them guilty and to make specific that which the statute states in general. A statutory offense may be so defined that the indictment will sufficiently charge the violation thereof if it follows the language of the statute, but this is so only in cases where the statute apprises the offender from the mere adoption of the statutory terms of the precise nature of the offense for which he is to be tried. Here the statute is very general in its terms, and the indictment merely charges in the language of the statute. Thus in the first count it goes no further than to allege that the accused did willfully, knowingly, unlawfully, and feloniously make and convey false reports and false statements, with intent to interfere with the operation and success of the military and naval forces of the United States, and to promote the success of its enemies. It conveyed no information to the accused of what the reports were, wherein they were false, nor to whom they were made. It is as bare of information as to the nature of their offense as would have been an indictment charging that at a designated time and place they "committed larceny."

In United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819, it was said:

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"Where the offense is purely statutory, having no relation to the common law, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.' 1 Bish. Crim. Proc. § 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute."

That rule was reaffirmed in substance in United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135, and in United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, where the court said:

"The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances."

That doctrine was applied in Keck v. United States, 172 U. S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505, and in Armour Packing Co. v. United States, 209 U. S. 58, 83, 28 Sup. Ct. 428, 52 L. Ed. 681, where the court said:

"And it is true it is not always sufficient to charge statutory offenses in the language of the statutes, and, where the offense includes generic terms, it is not sufficient that the indictment charge the offense in the same generic terms, but it must state the particulars."

This court, in Peters v. United States, 94 Fed. 127, 36 C. C. A. 105, said:

"Every indictment should charge the crime, which is alleged to have been committed, with precision and certainty, and every ingredient thereof should be accurately and clearly stated; but where the offense is purely statutory, and the words of the statute fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, it is sufficient to charge the defendant in the indictment with the acts coming fully within the statutory description, in the substantial words of the statute. * * * The true test of the sufficiency of an indictment is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprised the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

Of similar import are Ackley v. United States, 200 Fed. 217, 118 C. C. A. 403; Martin v. United States, 168 Fed. 198, 93 C. C. A. 484; Knauer v. United States, 237 Fed. 8, 150 C. C. A. 210; United States v. Bopp (D. C.) 230 Fed. 723.

[3, 4] The bill of particulars could not avail to cure the defect of the indictment. A bill of particulars may be ordered by the court in

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its discretion in cases where the indictment, while so expressed as to be good on demurrer, still does not furnish the defendant all the information he is entitled to have before being compelled to go to trial. It does not constitute a part of the record, and it is not subject to demurrer. Commonwealth v. Davis, 11 Pick. (Mass.) 432. Not having been made by a grand jury on oath, it cannot cure the omission of material averments from an indictment, and it cannot "give life to what was dead when it left the grand jury." Commonwealth v. Baltimore & O. R. R. Co., 223 Pa. 23, 72 Atl. 278, 132 Am. St. Rep. 723; Floren v. United States, 186 Fed. 961, 108 C. C. A. 577; United States v. Bayaud (C. C.) 16 Fed. 376. In United States v. Tubbs (D. C.) 94 Fed. 356, Judge Carland said:

"It is because the indictment is good as against a general demurrer that the defendant is compelled to resort to a motion for a bill of particulars. If it is bad, he has his remedy by demurrer or motion in arrest."

The judgment is reversed, and the cause is remanded, with instructions to sustain the demurrer.

TREAT et al. v. ELLIS.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1918.)

No. 3082.

JUDGMENT ⊂=586(2)—RES JUDICATA—ISSUES NOT DETERMINED.

Decree in a suit for specific performance of a contract for mining property, which relief was denied, *held* not a bar to a second suit for the same relief, but based on a different contract.

Appeal from the District Court of the United States for the Third Division of the Territory of Alaska; Fred M. Brown, Judge.

Suit in equity by George C. Treat and others against H. E. Ellis. Decree for defendant, and complainants appeal. Reversed and remanded, with directions.

In May, 1915, Treat and the others, appellants here, began suit against Ellis, appellee here, for specific performance of a contract made July 9, 1908. Upon issues framed the District Court adjudged Treat to be the owner of and entitled to the immediate possession of an undivided one-tenth interest to certain mining property, and that Smith and Archibald, to whom Smith had transferred a one-half interest, were each the owner of and entitled to the immediate possession of an undivided one-twentieth interest, and required the appellant therein to convey said interests to the respective appellees in that case. Ellis appealed, and it was held by this court that the lower court erred in treating the contract involved as one to convey an interest in real estate, and not one to transfer personal property. It was also decided that, under the allegations of the bill and the prayer for such other and further relief as might be just and equitable, Treat and the other appellees were not entitled to a decree for the specific performance of the contract which they pleaded. Full report of the case will be found in Ellis v. Treat, 236 Fed. 120, 149 C. C. A. 330.

Thereafter, in February, 1917, Treat and Smith and Archibald, appellants herein, commenced the present action to enforce the specific performance of

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a contract to convey an undivided one-fifth interest in the mining claims described in the former action. The appellee herein, Ellis, among other defenses, set up res judicata. Appellants herein replied, putting in issue all of the new matter set forth in the answer, except the records of the former suit and the identity of the parties in the two causes. Ellis moved to dismiss the action, on the ground that the plea of res judicata was not fully denied by the reply. The lower court sustained the motion, on the ground that the plea of res judicata was well taken, and dismissed the suit. Treat and Smith and Archibald appeal.

Lyons & Orton, of Seattle, Wash., Donohoe & Diamond, of Valdez, Alaska, and Smith, Chester, Brown & Worthington, of Seattle, Wash., for appellants.

L. V. Ray, of Seward, Alaska, for appellee.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

HUNT, Circuit Judge (after stating the facts as above). Adherence to the decision in Ellis v. Treat, supra, makes the determination of the present suit comparatively simple. In the former suit plaintiff sought to enforce a contract concerning personal property; whereas, by this suit plaintiffs seek to enforce a contract concerning real estate. The opinion of the court in the former suit was that the allegations of the complaint failed to show that Ellis, the appellant therein, ever promised or agreed to convey to the appellees therein, Treat and Smith, any interest in the mining claims, but did agree to convey to a corporation thereafter to be formed eight mining claims, in consideration of all the stock of the corporation, and thereafter to transfer to Treat and Smith a certain per cent. of the stock. Specific performance was denied.

The remaining question considered was "whether, under the allegations of the bill and the prayer for such other and further relief as may be just and equitable, the appellees are entitled to a decree for the specific performance of the contract which they pleaded"; and it was held that such relief should be denied for these reasons: That the contract as pleaded was too indefinite and uncertain; that the appellees, Treat and others, had never performed the covenants which were to be kept, and offered no sufficient reason for nonperformance; and that the contract, even if specific, called for participation by others not parties to the contract or suit.

The present case is as if there never had been an issue tried and adjudicated as to the rights of the parties to a conveyance of an interest in the mining property described in the contract. Now, however, the plaintiffs herein have made averments which fairly state such a cause of action, and we think that the District Court erred in ruling that the judgment in the former case operated as conclusively settling the matter.

The principle which controls is the familiar one, elaborately discussed in Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195, that, where the second action between the same parties is upon a different demand, the judgment in the former suit operates as an estoppel only as to those matters which were in issue, or those controverted

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points upon the decision of which the finding was rendered. The Supreme Court also said:

"In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

See McNamara v. Home Land & Cattle Co., 121 Fed. 797, 58 C. C. A. 245; Miller v. Margerie, 170 Fed. 710, 96 C. C. A. 30.

The decree is reversed, and the cause is remanded, with directions to proceed in accordance with the views herein expressed.

Reversed.

THE MALCOLM BAXTER, JR.

(District Court, S. D. New York. October 15, 1918.)

No. 62-260.

1. SHIPPING ⊂=51—CHARTER—DEFAULT OF VESSEL.
Where the owner of a chartered vessel is willing to perform the charter, nothing short of certainty that he cannot perform can impose upon him a default on the ground of impossibility.

2. SHIPPING ⊂=39—CHARTER—CONSTRUCTION OF CHARTER PARTY.
Provision of a charter party for a vessel to carry a cargo to Holland in war time that it should be consigned to the Netherlands Overseas Trust, without whose permit the vessel could not pass the British patrols, *held* in effect one requiring charterer to obtain such permit.

In Admiralty. Suit against the schooner Malcolm Baxter, Jr., for breach of charter. Decree for respondent.

This is a suit in rem in the admiralty against the schooner Malcolm Baxter, Jr., to recover freight prepaid under the terms of a charter party entered into between the parties on January 23, 1917. The claimant was the owner of the schooner, and the libelant the owner of a cargo of corn oil meal which they wished to ship to Holland. The charter party provided that the schooner should carry the cargo to Rotterdam and that the libelant should pay $38 a ton; "full freight to be prepaid in New York when vessel loaded, without discount, and earned retained and irrevocable vessel and/or cargo lost or not lost." Later it provided: "Cargo to be consigned to the Netherlands Overseas Trust of the Netherlands government. Any detention of the vessel by Great Britain or her allies to count as lay days against charterers, if detained longer than forty-eight hours." It contained no exceptions in favor of the ship.

A permit had been issued by the Netherlands Overseas Trust on November 14, 1916, to a Dutch firm, "The Widow Cleyndert," the real consignee, under which, however, the cargo was to be shipped "by one of the shipping companies affiliated by the Netherlands Overseas Trust," and which did not, therefore, cover the Baxter. On January 26, 1917, recognizing the insufficiency of this permit, the Widow Cleyndert applied to the Netherlands Overseas Trust for another to allow the cargo to be shipped on the Baxter, upon which no action was definitely taken until April 4th, when the Trust withdrew its original permit unless the cargo went forward by steamer. The British government had meanwhile decided to pass no sailing vessels with contraband, which the cargo was. Between January 26th and shortly before April

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4th, this question had been in some doubt, and it does not certainly appear whether or not any sailing vessels had passed the blockade.

Meanwhile the loading was completed early in February, and the libelant made independent efforts to secure the necessary permit through the Widow Cleyndert, but, as has appeared, without success. As the lay days had long since expired, and as there appeared to be no prospect of the schooner's getting through the blockade, on March 29th, the libelant denounced the charter party and discharged the schooner early in April, under an agreement between the parties not necessary to detail.

The second article of the libel contained the following allegations explanatory of the practice which obtained in the forwarding of Dutch cargoes and in view of which the charter party was drawn:

"That the allies, having enforced by this means an effectual supervision over all merchandise entering Holland by sea, entered into an agreement with the Netherlands government by which all merchandise whatever should be consigned to the Netherlands Overseas Trust Company, hereinafter called the Trust. The Trust, as libelant is informed and believes, is a corporation in the nature of a Chamber of Commerce for the kingdom of the Netherlands, acting under the control of the Dutch government, to which all goods destined for Holland by sea are required to be consigned; the real interest in the merchandise being retained by the merchants dealing therein. Before the goods can be consigned to the Trust, the permission of the Trust has, by agreement between the Trust and the British government, first to be obtained, and the permission so obtained constitutes a permit recognized by the Allied patrol vessels and men of war, and requires the captains of the Allied patrol vessels and men of war to permit the cargo to proceed to the Dutch port to which they are consigned; that in the absence of such permission the British government treats such cargoes as contraband, and seizes and confiscates the same, and refuses to permit the vessel to proceed to her Dutch destination."

The libelant's position rests upon the theory that the schooner was in default, in that it had appeared that the voyage was impossible, and that it was idle to require of the claimant performance which would not only have been frustrated, but would have involved the parties in heavy loss.

A. Leo Everett, of New York City, for libelant.
Clarence Bishop Smith, of New York City, for claimant.

LEARNED HAND, District Judge (after stating the facts as above). [1] There is no absolute certainty that the claimant would have failed in performance. That he was willing to try must be assumed, and if he is to be treated as in default it can only be upon the hypothesis that the Baxter could by no possibility have escaped the blockade. That her chances were very slight is true enough, but the conclusion in some part must rest in supposition, for perhaps some schooners did slip through, and she might have been one. When, as here, the obligor remains willing, nothing short of certainty can impose upon him a default on the score of impossibility. Hence the case really fails at the outset.

[2] Passing this point, and assuming that the case is to be judged as though the Baxter had been restrained in her voyage by princes or peoples, the case is still with the claimant. I shall assume, without deciding, that the absence of any exception put the owners in default, though the voyage were frustrated by the restraint of princes; still, viewing the charter party as a whole, it seems to me clear that in accepting any such risk the owners provided for their safety by the clause written into the charter party that the cargo should be consigned to the Netherlands Overseas Trust. This the libelant answers

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by saying that the words mean no more than that the bill of lading should be in favor of the Trust, just as in an ordinary consignment. The libel itself contains allegations which refute that interpretation. The situation was this: No cargoes could go forward to Holland without the consent of the Trust, which was the only agency trusted by Great Britain to distribute supplies to the Dutch. The Trust was not the true consignee in the usual sense at all; all it did was to insure to Great Britain's satisfaction that the cargoes should not leave Holland. As a part of the system the preliminary consent of the Trust was necessary. With such a consent the ship could pass the British cordon; without it, it would be stopped, if detected.

There was, therefore, no conceivable reason for a clause, certainly intended to expedite the ship, which went no further than to provide for a consignment to the Netherlands Overseas Trust in the usual sense. Such a provision would not have helped the ship; rather it would have excited suspicion, and promoted delays and eventual discharge in a British port, if, upon being overhauled by a cruiser, the bill of lading had shown the consignment of a cargo to whose entry the Trust had not consented. It is clear, therefore, that the provision must be read in the light of the surrounding facts, all set forth in the second article of the libel, showing that the permit of the Trust was considered as a condition to a consignment of the cargo.

An analysis of the succeeding clause, also written into the charter party, makes this conclusion stronger. It is provided that for any detention over 48 hours by Great Britain or her allies the charterer shall pay demurrage. Now, if it were intended that the cargo might be consigned to the Netherlands Overseas Trust without its consent, this imposed upon the charterer a prohibitive risk. Such a consignment would not have protected the ship, but, on the other hand, would have stopped the voyage altogether. It was hardly intended that the charterer must go on indefinitely paying demurrage, yet it is hard to see how demurrage could stop, at least before the ship was discharged. What was intended was that she should be protected by a consignment fortified by a permit, which would shorten detention and insure the completion of the voyage. It is therefore unreasonable to suppose that, with such a provision in the charter party for demurrage, either party meant to attempt a venture, dependent upon the ability of a sailing vessel to escape the British cordon, and to impose upon the charterer a vague and extremely onerous liability, if she did not.

Hence from every view it seems to me clear that the consignment presupposed a preliminary permit, and this the libelant never procured. Performance of that covenant was a condition precedent to performance by the owners, who were not obliged to carry any cargo other than that described. Thus they are not in default, and the rule in The Gracie D. Chambers, 253 Fed. 182, —— C. C. A. —— applies. Indeed, since the default was the cause of the frustration of the voyage, it is not necessary to invoke the rule in that case, for, if the charterer defaults in his covenants, he is in no event in a position to recover.

The libelant's argument does not impress me, based upon the improbability of such a contract. I see no reason to suppose that it

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anticipated any difficulty in getting the permit. The "Widow Cleyndert" had already got the permit of November 14, 1916, and it must have seemed an easy thing to secure the slight change necessary. Unhappily the general situation had also changed, and performance had become impossible. That, under the hard rule which the charterer itself invokes, would not excuse performance. Even if it would, the case would then stand with each party excused by impossibility of performance, in which event the rule in The Gracie D. Chambers would again apply.

From the best possible aspect, therefore, that case controls, and the libel must be dismissed, with costs.

THE ADRIATIC.

(District Court, E. D. Pennsylvania. October 9, 1918.)

No. 46.

SHIPPING ⇐51—VIOLATION OF CHARTER—"CONTROL OF PRINCES."

Under the clause in a charter party excepting "control of princes," a foreign ship is released from the charter by the actual exercise of such control through requisition by her home government, and a court of this country cannot question the legality of its exercise.

In Admiralty. Suits by H. Baars & Co., a corporation, against the British steamship Adriatic and against W. H. Cockerline & Co., owners of the Adriatic. Sur trial hearing on libel, answer, and proofs. Decree for respondent.

The ship was chartered to libelant; the charter party containing the following provisions:

"20. The act of God, * * * arrests and restraints of princes, rulers, and people, * * * excepted."

"28. If vessel be requisitioned by the British admiralty, this charter is to be null and void."

The suit was for breach of such charter. On hearing of the case the British embassy appeared by counsel, who, as amici curiæ, filed the following suggestions:

(1) That the British steamship Adriatic was duly requisitioned by the British admiralty, which is an integral part of the government of the United Kingdom of Great Britain and Ireland, by a notice dated the 8th day of November, 1915, served on her owners, W. H. Cockerline & Co., at Hull, England, on or about that date. Pursuant to such requisition the British consul general at Philadelphia, Pa., by order of the admiralty, gave instructions to the master of the Adriatic, on November 23, 1915, as to the subsequent movements of the vessel. The period of the requisition was indefinite, and after it became operative as aforesaid the steamship Adriatic was continuously in the service of the British government until her loss at sea on or about October 31, 1916, and during that period she was operated solely under the orders and directions of the British admiralty.

(2) That the steamship Adriatic was of British registry, and belonged to subjects of Great Britain, and the requisition of said steamship was a governmental action, by the government of Great Britain, and should not be inquired into by this court.

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(3) That by reason of the said requisition the steamship Adriatic was, at the time of the service of the process of this court in these causes, a vessel in the service of the British admiralty and under its direction and control, and as such was not subject to arrest or detention by process of this court.

(4) That this court should decline to adjudicate these cases, on the ground that they involve the relations between the British government and the owners of a British steamship, and call for a determination by this court of the effect of governmental acts of the British government, and are, in effect, an attempt on the part of the libelants to hold the respondent liable for such acts.

(5) That this court should decline to adjudicate upon any rights or claims of the libelants as charterers of a British steamship against the said steamship or her owner, in so far as such rights or claims arise out of the requisition of the said steamship by the British government.

John C. Avery, of Pensacola, Fla., and Willard M. Harris, of Philadelphia, Pa., for libelant.

Kirlin, Woolsey & Hickox, of New York City, and Biddle, Paul & Jayne, of Philadelphia, Pa. (John M. Woolsey, of New York City, and Howard H. Yocum, of Philadelphia, Pa., of counsel), for respondent.

Frederic R. Coudert. and Howard Thayer Kingsbury, both of New York City, amici curiæ.

DICKINSON, District Judge. This cause, as argued, presents many interesting features and advances many questions for discussion. We see no need, however, to discuss the case in other than its main features. As thus viewed the case is this:

The respondent, as is frankly admitted, entered into a charter party, the contractual obligation of which was that the ship should render service to the libelant. The contract, however, contained the usual provision in the event of the interference expressed in the phrase "control of princes." The assertion of this control forbade performance and is given to excuse the default. The ship was requisitioned by the sovereign to whom her master and owners owed allegiance. The fact is not in dispute that there was the practical assertion of such authority over the movements of the vessel. A question is sought to be raised of the legality of the authority exercised in the respect of whether it extended to vessels outside the "home waters" of the sovereign. This question is set at rest by two considerations. One is that foreign law is a fact to be established by evidence, and that the authority asserted existed under the foreign law has been established, not only by the weight of the evidence, but by the only evidence in the cause. The other is that—

"No court [of one jurisdiction] will undertake to determine whether the conduct of duly appointed officers of [a foreign power] is within the scope of their delegated authority viewed as a question of the foreign municipal law. Either the conduct of the officials is authorized, in which case it has the only warrant of law possible, or it is unauthorized, in which case it rests upon the foreign power first to repudiate it, and so to open the question of the effect of acts thereupon conceded to have been without warrant of law." The Florence H. (D. C.) 248 Fed. 1017.

In the instant case the authority prompting the act of respondent is not only not repudiated, but the act is avowed to be in pursuance of the command of the sovereign, and the respondent supported in what was done, and full responsibility for the act is assumed by the sover-

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eign. The embassy, representing the sovereign, appears by counsel to present this state of the facts to the court.

The rule followed in like cases prevails in this, that the court should decline to adjudicate any claim of right advanced by the libelant which grows out of the requisitioning of the respondent vessel by the government to which its master and owners owe the duty of obedience.

A formal decree to carry this ruling into effect may be submitted.

CHICAGO, M. & ST. P. RY. CO. v. DRAINAGE DIST. NO. 8 OF SHELBY COUNTY, IOWA, et al.

(District Court, S. D. Iowa, W. D. August 31, 1916. Supplemental Opinion, March 6, 1917.)

No. 4013.

1. CONSTITUTIONAL LAW ⇐284(2)—"DUE PROCESS OF LAW"—TAXATION.
Taxation, general or special, is a legislative function, and it is not necessary to "due process of law" that the matter of assessment and levy shall ever come before a court, but it is sufficient that at some stage in the proceedings the parties affected shall have an opportunity to be heard.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

2. REMOVAL OF CAUSES ⇐23—SUPPLEMENTAL OPINION—RIGHT OF REMOVAL—"SUIT"—TRANSPOSITION OF PARTIES.
Under a state statute establishing drainage districts, authorizing them to construct drains and assess the cost on property benefited, and giving the property owner a right of appeal from the assessment to the district court, such an appeal is a "suit," in which the appellant is defendant, within the meaning of the Removal Act (Comp. St. 1916, § 1010).
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suit.]

3. REMOVAL OF CAUSES ⇐3—RIGHT OF REMOVAL—DESIGNATION OF PARTIES IN STATE COURT.
A state statute cannot deprive a party of the right of removal by designating him as plaintiff in a particular class of suits where he is essentially defendant.

In Equity. Suit by the Chicago, Milwaukee & St. Paul Railway Company against Drainage District No. 8 of Shelby County, Iowa, the Board of Supervisors of Shelby County, and Hans Broderson, George E. Miller, and N. H. Johnson, members of said Board, acting as and for Drainage District No. 8. On motion to remand to state court. Denied.

J. N. Hughes, of Cedar Rapids, Iowa, for plaintiff.

Cullison & Cullison and E. S. White, all of Harlan, Iowa, for defendants.

WADE, District Judge. This case was transferred to this court from the district court of Iowa in and for Shelby county, upon petition of the plaintiff. It has been submitted upon motion to remand. I

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can repeat with emphasis the language of Judge Van Valkenburgh in Drainage District No. 19 v. C., M. & St. Paul Ry. Co. (D. C.) 198 Fed. 253, in which he says:

"As stated at the outset, this question is attended by difficulties. It is a perplexing one, and we must concede that it is not entirely free from doubt, feeling, as we must, that it is highly desirable that matters of this nature should, so far as possible, be dealt with in the courts of the state especially designated and more conveniently adapted to handle such proceedings."

Many cases involving questions related to the questions at issue in this case have been decided by the federal courts and the Supreme Court of the United States, and yet the very question involved in this case has never been before any court so far as I have ascertained.

The question before Judge Van Valkenburgh in the Drainage District Case, supra, comes nearer to this case than any other I have found, and yet there is a marked distinction, which distinction I feel is decisive in this case. In the Drainage District Case, it is said:

"In its petition for removal the defendant alleges that benefits amounting to $617.50 have been illegally, wrongfully, and improperly assessed against it, and that the drainage district proposes to construct a ditch along and across the right of way and roadbed of petitioner, to its damage in the sum of $17,490."

In his opinion in this case Judge Van Valkenburgh quotes from In re Jarnecke Ditch (C. C.) 69 Fed. 161, as follows:

"Whether a removal could be had, if the sole issue presented by the remonstrants was the amount of the assessments, it is not necessary to determine."

In the case at bar the only question involved is the assessment for alleged benefits. Neither before the board of supervisors, nor in this court, is there any question raised as to the jurisdiction of the board, or the regularity of the proceedings up to the time of the appraisement and assessment. In this proceeding there can be no question tried or determined as to the establishment of the drainage district, or the necessity therefor; it is simply and solely a question of the amount of taxes for special benefits which the plaintiff is required by the assessing body to contribute to the public improvement, and it is a question as to what tribunal shall determine such amount under the peculiar provisions of the statutes of the state of Iowa. Did this question involve any question of damages to the property, or any question of eminent domain, I would have no hesitation in holding that this court had jurisdiction.

Another case which considers the questions involved, is County of Upshur v. Rich, 135 U. S. 467, 10 Sup. Ct. 651, 34 L. Ed. 196, where the defendants complained of taxes levied upon their land, and filed a petition with the county court, asking that the same be reduced, and thereupon filed a petition to remove the case to the United States court, which was sustained by the Circuit Court, which ruling was reversed by the Supreme Court of the United States. It is true that the Supreme Court says in that case:

"Even an appeal from an assessment, if referred to a court and jury, or merely to a court, to be proceeded in according to judicial methods, may become a suit, within the act of Congress."

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And yet I am not convinced that this proceeding comes within this language of the court. Kansas City v. Hennegan (C. C.) 152 Fed. 249, referred to by counsel, involved the question of condemnation of property for public purposes, and not the question of taxation.

[1] Taxation, whether general or special, is a legislative function, and the power of the county in this case to levy taxes upon the plaintiff's property was derived from the Legislature. It is well settled that the Legislature may prescribe the mode by which taxes shall be levied and the amount determined. It may fix the tribunal, or designate the body of men who shall act in making appraisement and assessment. It is not necessary to "due process of law" that the matter shall ever come before a court. All that is necessary is that at some stage in the proceedings the parties affected shall have an opportunity to be heard. In the recent case of St. Louis & Kansas City Land Co. et al. v. Kansas City, 241 U. S. 419, 36 Sup. Ct. 647, 60 L. Ed. 1072, the Supreme Court of the United States says:

"Where assessments are made by a political subdivision, a taxing board, or court, according to special benefits, the property owner is entitled to be heard as to the amount of his assessment and upon all questions properly entering into that determination. 'If the Legislature,' as has frequently been stated, 'provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.' Spencer v. Merchant, 125 U. S. 345, 355, 356 [8 Sup. Ct. 921, 31 L. Ed. 763]: Paulson v. Portland, 149 U. S. 30, 41 [13 Sup. Ct. 750, 37 L. Ed. 637]; Bauman v. Ross, 167 U. S. 548, 590 [17 Sup. Ct. 966, 42 L. Ed. 270]; Goodrich v. Detroit [184 U. S. 432, 22 Sup. Ct. 397, 46 L. Ed. 627], supra. What is meant by his 'proportion of the tax' is the amount which he should be required to pay, or with which his land should be charged. As was said in Fallbrook Irrigation District v. Bradley, 164 U. S. 175 [17 Sup. Ct. 56, 41 L. Ed. 369], when it is found that the land of an owner has been duly included within a benefit district, 'the right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax; i. e., the amount of the tax which he is to pay.' See, also, French v. Barber Asphalt Paving Co., 181 U. S. 324, 341 [21 Sup. Ct. 625, 45 L. Ed. 879]. It is a very different thing to say that an owner may demand as a constitutional privilege, not simply an inquiry as to the amount of the assessment with which his own property should rightly be charged in the light of all relevant facts, but that he should not be assessed at all, unless the assessments of other owners, who have paid without question and are not complaining, shall be reopened and redetermined. The Fourteenth Amendment affords no basis for a demand of that sort."

In Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, it is said:

"Undoubtedly, where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But, where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in Davidson v. New Orleans [96 U. S. 97, 24 L. Ed. 616]: 'In judging what is "due process of law," respect must be had to the cause and object of the taking, whether under the taxing

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power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law," but if found to be arbitrary, oppressive, and unjust, it may be declared to be not "due process of law."'"

The court also says:

"But where a tax is levied on property, not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers, in estimating the value, act judicially; and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments. The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law. In some states, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts and be there corrected, if erroneous, or set aside, if invalid, or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment, which can be deemed essential to render the proceedings due process of law."

In Kelly v. Pittsburgh, 104 U. S. 78, 26 L. Ed. 658, it is said:

"Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings in a court of justice. The necessities of government, the nature of the duty to be performed, and the customary usages of the people have established a different procedure, which, in regard to that matter, is and always has been due process of law."

Now, with these established legal principles before it, the Legislature of Iowa devised a plan for establishing drainage districts, and collecting taxes to pay for their construction. It provided for the establishment of the district, as a separate proceeding, to be first completed; then it provided for the appraisement and the assessment; then it provided for a hearing by any one dissatisfied with the assessment. It could have provided for this hearing before the board of supervisors, and, with proper notice and opportunity for hearing, it could have been made final, and would be due process of law; but the Legislature selected another tribunal, the district court of the state of Iowa, and it conferred certain powers upon the district court which it did not previously possess. It made of the district court an assessing tribunal, to the extent, at least, that the court would have to hear testimony and consider the benefits to all the land in the district, in order to determine whether or not one tract of land was assessed more than its share of the benefits.

This is a proceeding unknown to either the common law or to the courts of chancery. The Legislature directed that it should be tried by the court as "an action in equity"; but the Legislature of Iowa has no power to prescribe forms of action for the courts of the United States. In the recent case of McLaughlin v. St. Louis Southwestern Railway Co., 232 Fed. 579, 146 C. C. A. 537, it is said:

"Counsel then argue that the provision of the Constitution and laws of Arkansas, above cited, can be invoked for the purpose of conferring jurisdic-

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tion in equity upon the United States District Court, sitting in Arkansas, to entertain the present action. The result of such a contention, if it may be maintained, is to hold that the people of Arkansas, in framing a Constitution, and the General Assembly thereof, in the enactment of laws, may enlarge or limit the jurisdiction of the federal court sitting in equity."

It is further said:

"The Code of Iowa enacts that 'an action to determine and quiet the title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession,' * * * implying that the action may be brought against one in possession of the property. And such has been the construction of the provision by the courts of that state. Lewis v. Soule, 52 Iowa, 11 [2 N. W. 400]; Lees v. Wetmore, 58 Iowa, 170 [12 N. W. 238]. If that be its meaning, an action like the present can be maintained in the courts of that state, where equitable and legal remedies are enforced by the same system of procedure and by the same tribunals. It thus enlarges the powers of a court of equity, as exercised in the state courts; but the law of that state cannot control the proceedings in the federal courts, so as to do away with the force of the law of Congress declaring that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law,' or the constitutional right of parties in actions at law to a trial by a jury. The state, it is true, may create new rights and prescribe the remedies for enforcing them, and, if those remedies are substantially consistent with the ordinary modes of proceeding in equity, there is no reason why they should not be enforced in the courts of the United States, and such we understand to be the effect of the decision in Clark v. Smith, 13 Pet. 195 [10 L. Ed. 123], and In re Broderick's Will, 21 Wall. 503 [22 L. Ed. 599]."

The court further states:

"We have thus far assumed that the Constitution and laws of Arkansas, as above cited, conferred jurisdiction upon the state courts of Arkansas to enjoin the collection of taxes in cases like the one at bar; that is, where the gist of the action is an assault upon an erroneous assessment of property for taxation. We refuse to assent to the proposition that, if they do, they can be made available for the purpose of conferring jurisdiction upon the United States District Court for Arkansas in a case like the present one."

The language above quoted, "The state, it is true, may create new rights and prescribe the remedies for enforcing them, and, if those remedies are substantially consistent with the ordinary modes of proceeding in equity, there is no reason why they should not be enforced in the courts of the United States," is significant; but the remedy provided for by this appeal is not "substantially consistent with the ordinary modes of proceeding in equity." It is a proceeding never heard of in a court of equity, and in which a court of equity would have no jurisdiction, except as conferred by the statutes of the state of Iowa. It seems to be clear that the Legislature simply designated the district court as a medium of final determination of the amount of taxes to be assessed, and that as to any property located in the state the procedure fixed by the statute must be followed.

It is needless to review the numerous cases defining what constitutes a "suit," within the meaning of the Removal Act (Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [Comp. Stat. 1916, § 1010]). Some of the definitions would clearly include this proceeding, but they must be considered with reference to the particular controversy before the

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court. It must be conceded, I think, that, if this proceeding is subject to removal, every proceeding involving the taxation of property, either general or special, is also removable. I see no difference, in the principles involved, between the drainage legislation and the legislation permitting special assessments for sewers and paving, and I cannot bring myself to believe that this court has jurisdiction of all these proceedings. The Supreme Court of the United States in the Hagar Case, quoted above, says:

"The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments."

And I feel that, where the Legislature has provided that property owners may have a right to appeal to the district court of the state, public policy requires that the trial should be had in the local tribunal, convenient to the field of inquiry.

Much is said in some of the cases about the necessity of a broad construction of the statute, to enable nonresidents to avoid the effect of local prejudice; but I cannot assume that there is any more danger of local prejudice in taxation of this kind than there is in the assessment of general taxes for state, county, and city purposes, to which nonresidents must assent, without opportunity for hearing in the courts of the United States.

While I am not without doubt in this ruling, the doubt is not sufficiently strong to justify me in retaining jurisdiction of this case, and the motion to remand will be sustained.

Supplemental Opinion.

Since filing the original opinion herein, I have had before me, and have decided, the case of In the Matter of the Appeal of the Assessment of the Mississippi River Power Company, 241 Fed. 194, in the Eastern division of this district. This case involved all the questions involved in the case at bar, except the single question as to whether the Chicago, Milwaukee & St. Paul Railway Company, being designated by the Iowa statute as the "plaintiff," can for the purpose of this motion to remand be considered a "defendant." It is true that the statutes involved in the two cases differ, but in essentials, in the controversies before the court, they are the same, and my opinion in the foregoing case, in conflict with my opinion previously filed in this case, is conclusive herein.

[2] Now, upon further consideration and deeper study of the remaining question, as to whether the railway company can be considered as defendant in this proceeding within the meaning of the Removal Act, I am convinced that it can and must be so considered. This conclusion has been forced upon me, not by any specific words of the statutes involved, but rather by the reason and spirit of the law as construed by the highest courts. The Removal Act is founded in a purpose and is based upon the recognition of a right. The spirit of all our legislation providing for trials in court is that the parties shall be entitled to a trial in their own community, or as nearly in their own community as is practicable. Human experience, and a knowl-

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edge of human nature, compels us to give recognition to the fact that, under certain circumstances and conditions, there are cases—sometimes, on account of the parties; at other times, on account of the questions involved—in which a resident party, with a case tried in his own community, has some advantage over the nonresident or the party who is a stranger in the community.

This statement in no manner reflects upon courts or juries; it simply gives recognition to the fact that tribunals, whether courts or juries, are merely human, and that sometimes—rarely, it is true, but sometimes—human judgment and will are unconsciously influenced. But I think a stronger reason for granting the right of removal exists in the supreme importance of not only giving a man a fair trial in a tribunal unbiased and unaffected by local interest, prejudice, or parties, but in having every man feel that he has had a fair trial before a tribunal unbiased and unaffected by anything except the merits of the case. Therefore it was that Congress, in its effort to provide fair and just tribunals, and in its effort to maintain confidence in such tribunals, and in the results of trials, provided that, in cases involving substantial amounts, a citizen of one state should, when his rights were brought before the court in another state, have the privilege of transferring the subject-matter of litigation into the courts of the United States for trial.

The law covers all "suits," and this is a "suit," as heretofore determined by me in the case above referred to. In the opinion in that case I have held that the Legislature of Iowa, in its generous treatment of persons whose property may be assessed for any purpose, provided that such person should, before the question as to whether his property was assessable at all, and, if so, for what amount, have the right to a trial in a judicial tribunal, which trial is a "suit."

[3] In the authorities quoted it will be found that the Supreme Court of the United States has specifically held that, once this right is given, the Legislature cannot by any process or procedure, or by any designation of parties or proceedings, affect the "right" conferred by Congress (not by the Legislature) to have the cause removed to the proper court for trial. The Legislature had the power to confer the "right" to a trial, and, having conferred that right, it had no power to limit any citizen upon whom the right was conferred to any specific tribunal to try out the issues. It could not do it directly; it could not do it indirectly. It could not bar the right of removal by saying that the railway company in this case should be called the plaintiff, nor could it confer the right to removal by saying that it should be designated as "defendant."

Now, stripped of forms and methods of procedure, the railway company in this case is the owner of property subject to taxation. The question as to whether it is subject to taxation is, under the issues in this case, as I understand them, settled; but the question as to the amount of taxes the property should bear, is in issue—a question of law and fact. It does not make any difference where the burden of proof is; the thing that is transpiring in the court where the trial is held is an inquiry into the amount the railway company

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must pay to the other party to the suit, or through the other party to the suit, for certain purposes; and ultimately, whichever form it may assume, the result of the judgment in this case is to fix a liability which the railway company must pay.

In Hudson River Railway v. Day (D. C.) 54 Fed. 545, the court says: "He may be plaintiff in appeal, but he is defendant in the cause." And the court points out that at the beginning the railroad company "was the actor," just as in this case the county in the beginning "was the actor." It is further pointed out that it (the railway company, there; the county here) "originated the initiatory steps which led to the award which is now on appeal from the judgment of a lower tribunal. It invoked the execution of the law, as against the landowner, and it was, and is, in fact the plaintiff."

In Mason City & Ft. Dodge Railway v. Boynton, 204 U. S. 570, 27 Sup. Ct. 321, 51 L. Ed. 633, the Supreme Court of the United States says:

"And it is obvious that the word 'defendant,' as there used, is directed toward more important matters than the burden of proof or the right to open and close. It is quite conceivable that a state enactment might reverse the names which, for the purpose of removal, this court might think the proper ones to be applied. In condemnation proceedings the words 'plaintiff' and 'defendant' can be used only in an uncommon and liberal sense. The plaintiff complains of nothing. The defendant denies no past or threatened wrong. Both parties are actors; one to acquire title, and the other to get as large pay as he can."

Here both parties are "actors"—the one party exercising its power and duty to make a public improvement, and to compel the other party to pay its share of the cost of such public improvement; the other party insisting that it shall pay only a portion charged against it.

I have looked carefully, and find that the courts have given little consideration to the question here involved. But it is my judgment that, when Congress limited the right of removal to the "defendant," it based such limitation upon the theory that a party, resident or nonresident, who voluntarily appeared in a state court when he had a choice of jurisdictions, should not be permitted to ask for a transfer of his case out of that court, and if the railway company in this case, being a nonresident, could have gone directly into the United States court, as it could in any ordinary action against a resident of Iowa, then, of course, it would be estopped from asking removal herein, because it had voluntarily chosen its forum; but the right conferred by the Legislature gave it no such power. It proceeded in the only way authorized by the Legislature. There was no "suit" possible until it had perfected its appeal, but instantly the appeal was perfected, there was a "suit," and in the spirit of the law, I believe that it ought to have, and I believe that it has, the right to remove the case for trial.

If the Legislature of Iowa had enacted that, after the determination by the board of supervisors of the amount of the tax, any property owner would have the right, by proceeding in a court of competent jurisdiction, to have the proceedings reviewed in an action in equity, the railway company certainly could have brought its proceeding in this court. The Legislature in effect did grant the property

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owners this very thing—a trial de novo in an equity proceeding in a court of competent jurisdiction. It could not, by designating the procedure for getting into court an "appeal," destroy the right which Congress gave to the plaintiff, a nonresident of the state, to have its case tried in the United States court. In any event, under the authorities cited in my opinion in the Keokuk Case (D. C.) 241 Fed. 194, if there is any doubt, the motion to remand should be denied, because the other party has the right of appeal, and the railway company has not; and I am a firm believer in putting a case, if possible, in shape where the parties may have the final judgment of the higher courts.

Now, this overrules my previous opinion in this case. Order will be entered accordingly.

COLUMBUS RY., POWER & LIGHT CO. v. CITY OF COLUMBUS, OHIO, et al.

(District Court, S. D. Ohio, E. D. September 20, 1918.)

No. 104.

1. MUNICIPAL CORPORATIONS ⇐680, 681(7)—STATUTORY POWERS—CONTRACTS WITH STREET RAILROADS.
Gen. Code Ohio, §§ 3768–3777, 9101–9139, as construed by both state and federal courts, confer on municipal corporations full power to enter into contracts for the maintenance and operation of street railway lines.

2. CARRIERS ⇐12(9)—CHARGES—FRANCHISE—REGULATION.
A municipal ordinance, passed under statutory authority, granting a franchise for a stated term to a street railroad company, and fixing a rate of fare to endure during that term, when accepted by the company, creates a contract mutually binding and unalterable during the term, except by consent of both parties.

3. CARRIERS ⇐1—POWER TO REGULATE—REGULATION—STREET RAILWAY FARES—CONTRACTS RESPECTING RATES.
The Legislature of a state may, unless restrained by the state Constitution, contract away its power to regulate the rates of fare of a street railroad company, either by an enactment of its own, or by delegating to the municipality the power to do so.

4. CONSTITUTIONAL LAW ⇐278(7)—CONTRACTS—STREET RAILWAY FRANCHISE.
The courts cannot relieve a street railroad company from performance of a valid franchise contract by which it agreed to operate its road at a fixed rate of fare, on the ground that because of changed conditions such operation would be at a loss, and the company would be deprived of its property without due process of law.

5. COURTS ⇐280—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.
When no real or colorable, but only a fraudulent and fictitious, federal question is stated, the jurisdiction of a federal court does not attach for any purpose, and it is duty of court of its motion to refrain from exercising jurisdiction.

6. COURTS ⇐282(1)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.
Even when a threatened act may be an impairment of a contract or a deprivation of property without due process of law, still, if the only means threatened to be used are resort to the courts or legal proceedings, a case is not stated within the jurisdiction of a federal court as involving a constitutional question.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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In Equity. Suit by the Columbus Railway, Power & Light Company against the City of Columbus, Ohio, George J. Karb, Mayor, and others. On motion by complainant for preliminary injunction, and by defendants to dismiss. Injunction denied, and bill dismissed.

Henderson & Burr, of Columbus, Ohio, for plaintiff.
Henry L. Scarlett, City Atty., of Columbus, Ohio, for defendants.

WESTENHAVER, District Judge. This cause has been heard and submitted on complainant's application for a preliminary injunction, based on its verified bill and affidavits, and on defendants' motion to dismiss for want of jurisdiction, and because a valid cause of action in equity is not stated. These respective motions have been elaborately argued, both orally and by briefs. Due consideration has been given to the many authorities cited and the several contentions made, but this opinion will deal only with such as seem to me vital and controlling.

The complainant is a corporation organized under the laws of the state of Ohio. The defendant, the city of Columbus, is a municipal corporation of the state of Ohio, and the other defendants are its mayor, members of its council, and other city officials. Complainant owns and operates a system of street railways within the city of Columbus, and is engaged in manufacturing and selling heat, light, and power to the inhabitants of the city and to industrial plants therein and adjacent thereto.

Complainant's street railway lines have been constructed, maintained, and operated by virtue of certain grants or franchises. These are embodied in two ordinances duly enacted by the proper authority of the city of Columbus. The principal franchise, called the "blanket franchise," is Ordinance No. 17801, passed February 4, 1901; and the other, called the "Central Market franchise," is Ordinance No. 17802, passed January 21, 1901. In addition, complainant claims to own a perpetual franchise on certain streets; but the provisions thereof are not material to any question now to be decided. Both franchises are for terms of 25 years and will not expire, by their terms, earlier than the year 1926. They require the grantee to carry passengers for a single cash fare of 5 cents and to sell tickets in packages of 8 for 25 cents, and to give universal free transfers upon the payment of a 5-cent fare or the presentation of one of these tickets.

Complainant's bill alleges, and the supporting affidavits clearly show, that the cost of operating these street railway lines has greatly increased during the present war, owing to the rise in price of coal, materials, supplies, and labor. As a result of this increased cost, the net earnings from the operation of the street railway line for the year ending June 30, 1918, after deducting taxes, operating expenses, and a proper charge for depreciation, were only $301,987. These earnings are insufficient by the sum of $31,000 to pay interest on outstanding bonds, and are sufficient to allow a net return of only 4½ per cent. on the actual value of the capital invested in the street railway system. The value of this property, it is alleged, is $12,000,000, and the par value of the bonds issued and outstanding is $7,225,000.

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In June, 1918, complainant's street railway employés demanded an increase in wages, and, in order to avoid a strike, the controversy between the complainant and its employés was submitted to the National War Labor Board for decision. This board, on July 31, 1918, made an award granting to the employés an average increase of 50 per cent. in the rate of wages hitherto being paid. Complainant abided by this decision and granted the increase thus awarded. The amount of this increase, it is estimated, will be for the ensuing year $560,000, and as a result thereof it is estimated that the gross earnings will fall short of paying operating expenses, taxes, and a proper allowance for depreciation by approximately $250,000. This leaves no net income, either to pay interest on outstanding bonds or dividends on capital actually invested.

Complainant alleges that these facts were twice brought to the attention of the city council of defendant, and request made for permission to increase the rate of fare above that fixed by these franchise grants, so as to permit the earning of a reasonable return on the invested capital. This request being either denied or ignored, complainant on August 20, 1918, filed with defendants a communication in writing, stating that it would henceforth discontinue the selling of 8 tickets for 25 cents and the giving of universal transfers, and that it surrendered, relinquished, and canceled its two franchises; that it would no longer operate cars thereunder; that it would thereafter consider itself a tenant by sufferance only on the streets, and would withdraw therefrom whenever notified so to do by the city, but that until so notified, and in order not to deprive the traveling public of service, it would continue to operate its lines, not under these franchises, or either of them, but at a rate of fare to be fixed by itself. It thereupon fixed the rate at 5 cents for cash fare and made a charge of 1 cent for each transfer to be issued, discontinuing the sale of 8 tickets for a quarter and free transfers. This rate thus established has been in force since August 20, 1918.

On the same day as this communication in writing was filed, the bill herein was also filed. This bill, as well as the amended bill filed September 3, 1918, states that the defendants threaten, and will, unless restrained, attempt to force complainant, to continue to operate these street railway lines in accordance with the terms of these two franchise grants. The nature of the threats made and the means to which it is expected the city will resort to enforce its threats are not stated or shown.

Complainant's bill also alleges and shows that, in addition to its street railway business, it is engaged in manufacturing and selling electricity for heat, light, and power. The capital invested therein, the earnings thereof, and the franchise rights are not disclosed. The city of Columbus and its suburbs, it is alleged, contain a population of more than 250,000; that it is a large industrial manufacturing center, in which are situated shops, factories, and plants; that many of these persons and plants are employed in the making of various kinds of munitions and war materials necessary to the prosecution of the war; that within the territory served by complainant's

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street railway lines, and by its heat, light, and power, is located a military barracks, in which are quartered more than 100,000 recruits per annum. All these, it is said, are dependent upon the street railway service, and on the heat, light, and power furnished by complainant. The discontinuance or impairment of this service would cause great harm to the government of the United States, to the people of the city of Columbus, and to all persons dependent thereon.

Complainant's amended bill alleges, and the supporting affidavits show, that it has in progress a plan to enlarge its heat, light, and power business, and that it is necessary to buy and install new equipment for this purpose, and that, in order so to do, it is necessary to raise new capital, which it is unable to do because of the low rates of fare fixed for street railway service.

Such in substance and in brief is the case made upon which the jurisdiction of this court is invoked and a preliminary injunction is asked. Complainant urges that any action of the city or its officials compelling the continuance of street railway service on the terms of these franchises at less than cost, or at a loss, is depriving it of its property without due process of law, in violation of the due process clause of the Fourteenth Amendment. This position is supported by two lines of argument. One is that the fare provisions of these franchises amount only to a legislative fixing of a rate of fare for transportation service, and cannot be enforced when conditions have so changed that this rate of fare does not yield a fair return on the capital actually invested. Another is that, even if these franchises were mutually binding contracts when entered into, they are no longer enforceable because of the conditions produced by a state of war. From these positions it is argued that complainant has the right to treat these franchise contracts as terminated, and having, by its communication in writing to the city, so declared, it becomes and is thereafter a tenant by sufferance only in the streets, subject to ejection at will by the city, but that, while the city refrains from so ejecting it and permits street railway service to be given, complainant has the right to insist upon a rate of fare which will yield a fair return on the capital actually invested, and that any effort of the city to compel service on terms which will deprive it of this fair return is depriving complainant of its property without due process of law. It is, of course, insisted that the 5-cent straight fare, with a charge of 1 cent for transfer, is the rate necessary to yield that fair return on the capital actually invested, and is therefore a reasonable rate.

Defendants urge that the averments of the bill do not present a real and colorable, but only a fictitious and fraudulent, federal question, under the due process of law clause of the Fourteenth Amendment, and that, therefore, inasmuch as there is no diversity of citizenship, this bill should be dismissed for want of jurisdiction, and, further, that the bill does not state a valid cause of action in equity, such as entitles complainant to any relief.

[1] The primary and controlling question, in my opinion, depends on the nature of the relation created between the complainant and the city by these franchise grants. This relation is settled beyond con-

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troversy by numerous decisions of the Supreme Court of Ohio and of the Supreme Court of the United States. The statute law of Ohio in force when these ordinances were passed were sections 2501, 2502, 2504, 2505, 2505b, 3443, 3443—12, Bates' Annotated Statutes of Ohio. They are copied in full in the margin in Cleveland v. Cleveland City Ry. Co., 194 U. S. 531–534, 24 Sup. Ct. 756, 48 L. Ed. 1102. These sections, slightly different only in phraseology, are now sections 3768 to 3777 and 9101 to 9139 of the Ohio General Code. Cases construing these sections, and defining the rights and burdens created by franchise ordinances, such as are now under consideration, are the following: Railway Co. v. Village of Carthage, 36 Ohio St. 631, 634; City of Columbus v. Street R. R. Co., 45 Ohio St. 98, 12 N. E. 651; Interurban Co. v. Cincinnati, 93 Ohio St. 109, 112 N. E. 186; Cleveland v. Cleveland City Railway Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102; Cleveland v. Cleveland Electric Ry. Co., 201 U. S. 529, 26 Sup. Ct. 513, 50 L. Ed. 854; Cleveland Electric Railway Co. v. Cleveland, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399.

[2] The holding of all these cases is uniform. Of them the leading one is Cleveland v. Cleveland City Railway Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102. The law as settled by these cases is that the Legislature has by these sections delegated to municipal corporations full power and authority to enter into contracts for the maintenance and operation of street railway lines; that whatever the city in fact does pursuant thereto is the act of the state and is mutually binding upon the parties. Franchise grants for fixed terms not exceeding 25 years, and for a fixed rate of fare to continue during the term of such grants, may lawfully be made by the city under this legislative delegation of power. If the city passes an ordinance purporting to grant a franchise for a fixed term, with a rate of fare to endure during that term, and this ordinance is accepted, expressly or impliedly, a contract is engendered mutually binding and unalterable, except by the consent of both parties, during the term thereof.

In Cleveland v. Cleveland City Railway Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102, all these rules are fully stated and upheld. The question there was whether or not the ordinances under consideration had in fact created a contract at a fixed rate of fare for a definite term, thereby extinguishing a right reserved to the city in earlier ordinances of increasing or diminishing the rate of fare. Mr. Justice White, delivering the opinion, says (194 U. S. 536, 24 Sup. Ct. 763, 48 L. Ed. 1102):

"In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time, and no reservation was made of a right to alter; that by those ordinances existing rights of the corporation were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged. Taking all the circumstances above referred to into

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account, the case before us clearly falls within the rule as to the binding character of agreements respecting rates applied in Detroit v. Detroit Citizens' Street Railway Company, 184 U. S. 368 [22 Sup. Ct. 410, 46 L. Ed. 592], and approvingly referred to in Knoxville Water Co. v. Knoxville, 189 U. S. 434, 437 [23 Sup. Ct. 531, 47 L. Ed. 887]."

The other cases are equally in point, and, inasmuch as no conflict exists therein, a review of them is unnecessary. Numerous cases illustrating and applying the same rule are contained in the United States Supreme Court Reports arising under municipal ordinances of other states. A citation of them is for the same reasons superfluous.

[3] Complainant's further contention that the fare provision of these franchises is only a legislative regulation of the charge for service is also shown by these authorities to be untenable. There are cited, in support of this contention, Milwaukee Electric Railway Co. v. Wisconsin Railroad Commission, 238 U. S. 174, 35 Sup. Ct. 820, 59 L. Ed. 1254, and other kindred cases. These cases establish a different principle and belong to a different class. The right to regulate the charges for a public service is, as shown by these cases, a governmental function, and a municipality has not the power by contract to deprive a state of that power, unless expressly authorized so to do. In determining whether or not a state, through its agent, a municipality, has authorized and permitted this governmental power to be contracted away, all doubts will be resolved in favor of the public and against the alleged surrender of power. No question is made but that the Legislature of a state may, unless restrained by state Constitution, contract away this power, either by an enactment of its own or by delegating to the municipality power so to do. The Milwaukee Case only holds that, applying these principles, it did not clearly and unmistakably appear that the state had contracted away this function of the government, or had delegated to the municipality the power to contract it away.

The cases already cited show that as regards Ohio the state has delegated to municipalities full power to make a binding contract fixing for a definite term the rate to be charged for this service, and has thereby disabled the municipality, if not itself, from altering or changing that rate during the fixed term. The law of Ohio is, as was said by Mr. Justice White, of the same kind as that of Michigan and Indiana. See City Railway Co. v. Citizens' Street Railroad Co., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114; Detroit v. Detroit Citizens' Street Railway Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592.

No question is made but that the franchise grants now being considered did by their terms purport to create a binding contract as to the rate of fare for a term of 25 years. It follows from this settled law that a contract has been engendered, mutually binding upon the city and upon the owner of these franchises, that this contract requires the owner during the entire term of 25 years to furnish street railway service at the rates of fare therein provided, and that neither the complainant nor the city during this term has the right to change or alter that rate without the consent of the other.

The impairment of contract and the due process of law clauses of the Constitution have often been invoked to prevent cities from im-

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pairing franchise grants, or forcing a reduction in the contract rate, and the courts have uniformly, despite all criticism, sustained and upheld them, and, in so doing, have vindicated the law. It is equally the duty of the courts to uphold these contracts and vindicate the law when it is the grantee therein, and not the city, which is seeking to change the terms thereof without the consent of the other party. It is of primary importance that contracts should be upheld by the courts, for the right to contract and the binding obligation of contracts once made lie at the foundation of all public and municipal law.

This proposition is really controlling of all questions argued, but a brief consideration of some other questions should, perhaps, also be made.

[4] One proposition strongly urged is that a steam or street railway cannot be compelled by injunction or mandamus to operate all or a part of its system at a loss, and that any effort so to do is depriving it of its property without due process of law. In its final analysis, this proposition means that courts will not enforce a valid and binding contract, if so to do will inflict loss upon one of the contracting parties. Manifestly the proposition, when thus baldly stated, will not be contended for. Obviously, then, the cases cited in which courts have refused to grant an injunction or a mandamus to compel the operation of all or a part of an unprofitable steam or street railway system turns upon different facts from those here present.

Briefly, and without reviewing at length the many cases cited, the law on this proposition, as I understand it, may be summed up as follows: If a railway company is under a statutory or a contract duty to maintain and operate a line, it will be compelled by injunction or mandamus so to do, even though the further operation should be at a loss. It is only when there is no valid or binding obligation to continue operation that the company may, at its discretion, abandon an unprofitable line or branch. If there is a binding obligation to maintain and operate a part of a system, it is questionable whether that part or branch can ever be abandoned, unless the losses inflicted by its continued operation are such as will wreck the entire system. On the other hand, if the operation of a railway line cannot be continued, owing to insolvency, a court will not by mandamus or otherwise try to compel its further operation; and this is particularly true, if its continued operation will perform no useful public service. This refusal of the courts to interfere does not proceed on the view that the company had a right to abandon the operation of an unprofitable system, or of an unprofitable branch. If there is a statutory or contract duty to maintain and operate, this obligation still remains in law, just as a debtor's obligation to pay his debts remains after he has become insolvent; but a court will not attempt to compel by mandamus or otherwise that which is manifestly futile and impossible, for a court has no means of providing capital to operate an insolvent railway company, or to continue its operation after it has become insolvent. This, it seems to me, is all that can be claimed for the statement found in some cases that a court will not compel a continued operation at a loss of a railway line or branch.

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The true rule, with its limitations and exceptions, is, in my opinion, fully stated in Southern Railroad Co. v. Hatchett, 174 Ky. 463, 192 S. W. 694, L. R. A. 1917D, 1105, note L. R. A. 1915A, 549. Illustrating and supporting these statements and conclusions are the following: Northern Pacific Railroad Co. v. Washington Territory, 142 U. S. 493, 12 Sup. Ct. 283, 35 L. Ed. 1092; Interurban Co. v. Cincinnati, 93 Ohio St. 109, 112 N. E. 186; State ex rel. v. Black Diamond Co., 97 Ohio St. 24, 119 N. E. 195; Fort Loramie v. Gress (Ohio C. C. A., not reported); State ex rel. v. Bridgeton & M. T. Co., 62 N. J. Law, 592, 43 Atl. 715, 45 L. R. A. 837; State ex rel. v. Spokane Street Railway Co., 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739; City of Potwin Place v. Topeka R. R. Co., 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312; Paige v. Schenectady R. R. Co., 178 N. Y. 102, 70 N. E. 213.

These conditions are not present in this case. The complainant does not allege insolvency, or make any showing of inability to perform the terms of its contract. Its showing merely is that operation for the year ending June 30, 1918, yielded only 4½ per cent. net return on capital actually invested, after deducting operating expenses, taxes, and a reasonable allowance for depreciation, and that operation during the year ending June 30, 1919, at the increased wage schedule, will result in a loss of $250,000 on operation alone.

These statements, it will be noted, apply only to the street railway part of complainant's business. Furthermore, this is not an application by the city for a mandamus, or a mandatory injunction, to compel continued operation under present conditions, nor a suit to compel specific performance of a harsh and unconscionable bargain. Complainant here is seeking an injunction to protect it in a manifest and plain violation of its contract. Consequently the rules of law under which courts have refused to compel the operation of an unprofitable railway branch, or the performance of an unconscionable contract, have no pertinency.

Complainant further contends and urges that it has the right to end these franchise contracts because of new conditions, not foreseen when they were entered into; that is to say, the war and the increased cost of operation due to the war. In support of this proposition are cited the following: The Kronprinzessin Cecilie, 244 U. S. 12, 37 Sup. Ct. 490, 61 L. Ed. 960; Krell v. Henry, [1903] 2 K. B. 740; Metropolitan Water Board v. Dick, Kerr & Co., Appeal Cases, H. of L. 119, [1917] 2 K. B. 1; Liston et al. v. Owners of Steamship Carpathian, [1915] 2 K. B. 42, 112 Law Times Reports, 994.

In my opinion, neither the facts of these cases nor the rules of law announced therein have any application to this situation. The Kronprinzessin Cecilie involves no question, except whether its owners were excused on July 31, 1914, from continuing its journey to Bremerhaven, Germany, in view of the prospects of war and seizure. It was contended that, inasmuch as war had not been declared, and that perhaps the journey might have been completed without seizure, the contract of the vessel's owner to carry gold and deliver it in Europe might still have been possible of performance. It was not denied that actual

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seizure as a result of war would have discharged the contract, because making it impossible of performance, and the court held that the imminence of such seizure was so apparent that due prudence justified the master of the vessel in returning to the United States.

In Krell v. Henry the parties had made a lease of windows overlooking the Pall Mall for June 26 and 27, 1902, when the King's coronation procession was to take place. Owing to illness, the coronation procession was postponed. It was held that, notwithstanding the lease did not refer to the specific use for which the premises were being hired, namely, to view the coronation procession, and did not provide for ending the contract if for any reason it did not take place, the parties had made the lease in view of the expected coronation procession, and that the unforeseen and unprovided-for contingency of its unavoidable postponement excused the lessee from payment. This case is of that class which holds that a destruction of the subject-matter of a contract, or of a basis mutually assumed by the parties when entering into it, puts an end to the respective obligations.

In Metropolitan Water Board v. Dick, Kerr & Co. a contractor had agreed to construct a part of a water system within six years, and, after beginning work thereon, his equipment and the site upon which he was to do the construction work was seized by the military authorities of Great Britain for war purposes. Obviously here was a vis major, rendering impossible the further performance of the contract into which the parties had entered. It was impossible to proceed further.

No such conditions are here present. The performance of these franchise contracts has not been made illegal nor rendered impossible by any superior power. War conditions, it is true, have made the performance of them more burdensome and expensive, so far as the facts now presented tend to show. The war has in a different degree, perhaps, affected the performance of many, if not the larger part, of outstanding and unexecuted contracts between citizens of the United States; yet it would be a strong proposition to say that all such contracts are thereby rendered void, or voidable, at the option of the losing party.

The increased cost to complainant of performing its franchise contracts differs only in degree and quality from that due to other economic causes prevailing since they were made. If the war or economic changes had decreased the price of coal, materials, supplies, and labor, it would not be urged upon any one that the city would have the right to declare null and void these contracts, or the fare provisions therein, and establish a new rate in accordance with new conditions; and if the city should take such a position, it would be met, and justly, with an injunction on the ground that such action impairs the obligation of a valid and binding contract.

In order to make applicable the principles of law urged in this connection, it would be necessary to show that war or military authority had directly interfered in such a manner as to make these contracts illegal or impossible of performance. Nothing less than the equivalent of actual seizure by military authority, or a direct and

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forcible intervention, such as prevents further performance, would bring the case within the operation of these rules.

Complainant also invokes the rule announced in the majority opinion in Denver Union Water Co. v. Denver, 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649, decided by the United States Supreme Court March 4, 1918. That case, in my opinion, has no application. There the Denver Union Water Company had constructed and operated its plant under a franchise expiring in 1910, and thereafter, during a certain period, it remained a tenant by sufferance, with the right on its part to discontinue service and remove its pipes and hydrants from the streets, and with the right and power of the city at any time to compel the removal thereof. Later an ordinance was passed to regulate the terms and conditions, including charges, upon which the water company should continue to perform its public service. It was not held that the owner of a water system with an expired franchise, the property of which is subject to ejection at the will of the city, has a right to complain under the due process of law clause because the terms and conditions under which service is rendered in that situation does not yield a fair return on the capital invested. It was held that the so-called regulating ordinance granted a new franchise of indefinite duration, terminable either by the city or the company at such time and under such circumstances as may be consistent with the duty that was owing by both to the inhabitants of Denver, and while this new franchise of indefinite duration remained undetermined by the city, the water company was entitled to enjoin the rate fixed for service because not yielding a fair return on the capital actually invested. This, it was said, deprived the company of its property without due process of law. If the regulating ordinance had not been construed as granting a new franchise of indefinite duration, but had merely been one forbidding a charge higher than a certain rate during such time as the water company saw fit to leave its pipes and hydrants in the streets and perform service, the fair implication is, both from the majority and minority opinions and other cases previously decided, that no relief would have been accorded. See, also, Cleveland Electric Railway Co. v. Cleveland, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399; Detroit United Railway v. Detroit, 229 U. S. 39, 33 Sup. Ct. 697, 57 L. Ed. 1056; Denver v. Denver Union Water Co., 229 U. S. 123, 33 Sup. Ct. 657, 57 L. Ed. 1101.

Complainant's franchise contracts, as already said, have not expired. It is not a tenant of the streets under a franchise contract of indefinite duration, much less a tenant merely by sufferance. It has not the right to remove its tracks at will, or to refuse to operate a street railway line. I am of opinion that the bill should be dismissed, because it does not state facts constituting a valid cause of action in equity.

[5] I am also of opinion that on the facts stated this court has no jurisdiction. There being no diversity of citizenship, jurisdiction is invoked only because of the due process of law clause of the Fourteenth Amendment. The facts stated in the bill show a valid and binding contract, from the force and effect of which complainant is

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seeking to escape. No threatened action of the city authorities is complained of, except that it may endeavor to enforce compliance by complainant with its contract. No charge is made that other than legal methods will be adopted for that purpose, and, in the absence of a statement clearly showing a threatened resort to illegal means, a court must assume that the city officials will proceed in conformity to law.

[8] The law is well settled, as contended for by complainant, that if the facts stated make a real and colorable federal question, jurisdiction properly attaches, and will not be ousted, even if on the hearing the claim thus made is held to be without merit in law, or without foundation in fact. On the other hand, when no real and colorable, but only a fraudulent and fictitious, federal question is stated, the jurisdiction of the court does not attach for any purpose, and it is the duty of a federal court of its motion to refrain from such an unwarranted exercise of jurisdiction. And even when the threatened act may be an impairment of a contract, or a deprivation of property without due process of law, still if the only means threatened to be used are resort to the courts or to legal proceedings, a case is not stated within the jurisdiction of a federal court. Such seems to me to be the present case. For authority see the following: Penn Mutual Life Insurance Co. v. Austin, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 143, 21 Sup. Ct. 575, 45 L. Ed. 788; Defiance Water Co. v. Defiance, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140; Barney v. New York, 193 U. S. 437, 24 Sup. Ct. 502, 48 L. Ed. 737; Des Moines v. Des Moines, etc., Railway Co., 214 U. S. 179, 29 Sup. Ct. 553, 53 L. Ed. 958.

The application for a preliminary injunction will be denied. The motion to dismiss will be granted, both for want of jurisdiction and because no valid cause of action in equity is stated.

This opinion should perhaps be ended here, but the importance of the interests at stake moves me to make some further observations, in the hope that the apparently strained relations between the complainant and defendants may be ameliorated. It cannot be denied, on the showing made, that the present war has greatly increased the cost of street railway operation. The award of the National War Labor Board in the wage controversy cannot be regarded otherwise than binding on the company, and the increase of wages granted by the company pursuant thereto cannot, in any fair sense, be considered as its voluntary act. It is also undoubtedly true, on the showing made, that complainant cannot, under existing conditions finance any improvements required to meet new demands for heat, light, and power, or for increased street railway facilities, and its failure so to do must injure the interests of the defendant and its inhabitants as much as it injures the complainant.

Prolonged operation under these conditions would seem to be a manifest impossibility, and must result in impairing the street railway service and grievously harming the people and business of the city. These considerations do not, for the reasons already stated, present any ground upon which a court can grant relief, for it has power only to declare the law and apply it. A sound public policy

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forbids usurpation by the courts of governmental power lodged in other departments of the government. No power inheres in a court, either to make contracts for parties, or to absolve them from the effect of their contracts, provided the parties are competent in law to contract, and no fraud intervenes in the making thereof.

In view of these well-recognized limitations of the court's power, I can only suggest that the present emergency, likely as it is to become much graver in the near future, calls urgently for some kind of accommodation or temporary compromise between the parties. No intimation is made that blame attaches to either, much less that one more than the other is at fault, for it is undoubtedly true that the present situation is due to the rapid and unexpected evolution of uncontrollable events; but some kind of a modus vivendi fair to both, and to endure at least for the period of the war, should be agreed to, in order that loss to both may be prevented, and the public mind may not be distracted by a street railway war, when engrossed in the problems of a foreign war. If something is not done, no gift of prophecy is required to foresee that the recommendation of the National War Labor Board will be acted upon, namely, that the President of the United States, as Commander in Chief of its armed forces, by virtue of the powers inherent in his office and conferred by Congress, will seize and operate the street railway at rates yet to be fixed. Such a shifting of duty and of responsibility would not be creditable to the people of a self-governing city, nor to the business management of an efficient public service corporation.

In re MYERSON.

(District Court, E. D. Pennsylvania. November 13, 1918.)

No. 5602.

1. BANKRUPTCY ⊜136(2)—TURN-OVER PROCEEDINGS—CONTEMPT—DISTINCTION.

   While a fact which has once been judicially determined may not be again litigated between the parties, a bankrupt against whom a turn-over order has been entered may purge himself of contempt for failure to comply therewith by showing his present inability, etc.

2. BANKRUPTCY ⊜136(2)—FAILURE TO DELIVER PROPERTY—CONTEMPT PROCEEDINGS.

   A mere denial, by formal answer to motion for attachment for contempt, of the original concealment found against the bankrupt in the turn-over proceedings, and inability to deliver, will not stay attachment.

In Bankruptcy. In the matter of Myer Myerson, individually and as surviving partner of the firm of Strat & Myerson. Sur motion for attachment. Motion granted.

Alfred T. Steinmetz, of Philadelphia, Pa., for trustee.
Joseph L. Kun, of Philadelphia, Pa., for bankrupt.

DICKINSON, District Judge. [1] There is ground for surprised comment that there should be any difficulty in grasping the distinction

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which has been so clearly pointed out between turn-over proceedings and contempt proceedings. We are given a summarized statement of the doctrine of the previously adjudged cases in Frederick v. Silverman, 250 Fed. 75, — C. C. A. —. A mere surface glance over the situation presented might suggest a seeming conflict between the two doctrines which are thus distinguished. A fact which has been judicially found becomes a fact which, in the very nature of things, cannot come again into controversy between the same parties to have the same question of fact again determined, and yet, in the effort to convince the court that the bankrupt cannot comply with the order made in the turn-over proceedings, the fact there found may be sought to be again brought into controversy.

Perhaps it may be of aid in grasping the thought of the real distinction if we view the question from something of the same point of view from which we would view it, were the respondent seeking to purge himself of a contempt. This order was made. It was made to be obeyed. If, however, compliance is beyond the power of the respondent, no court will imprison or otherwise punish a man for not doing what he cannot do. In order to bring out clearly the grounds of the distinction, if the respondent frankly admitted the original concealment, but gave a clear explanation of his present inability to comply with the order, a case for indictment and trial by a jury might be presented, but no judge could impose punishment without a usurpation of power. If, however, the respondent was found to be contumaciously refusing compliance with the order, the court must enforce obedience.

[2] It is a mistake to assume that a mere denial, by formal answer to the motion for attachment, of the original concealment found against the bankrupt in the turning over proceedings, and a consequent inability to deliver up the property to the trustee will stay the issuance of the attachment. It will not. There is in this a practical policy of the law to be served, which has been pointed out in the Epstein Case, 206 Fed. 568.

Let the attachment issue.

SANDERS v. SOUTHERN TRACTION CO. OF ILLINOIS et al.

(District Court, E. D. Illinois. August 29, 1918.)

No. 927.

1. RAILROADS ⟸171(7)—LIENS—PRIORITY—MORTGAGES.
Under Railroad Lien Law Ill. § 1, declaring that persons who furnish to railroad company materials for construction, etc., shall be entitled to be paid for the same as part of the current expenses, and shall have a lien as against all mortgages which shall accrue after delivery, the lien of contractors constructing railroad is prior to a previously recorded mortgage given to secure bonds of the railroad corporation.

2. RAILROADS ⟸171(3)—LIENS—PRIORITY.
Liens against railroads for current expenses are preferred over a prior recorded mortgage.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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3. RAILROADS ⇐171(2)—LIENS—RECORDATION.
A recorded mortgage does not become a lien on property mortgaged until the money or consideration has been actually received by the mortgagor; so the mere recording of a mortgage given by a railroad company to secure bonds did not create a lien superior to contractors' mechanics' liens.

In Equity. Suit by Jared Y. Sanders against the Southern Traction Company of Illinois and others. On exceptions to the master's report. Decree in favor of priority of mechanic's lien claimant.

John C. Slade and Joseph W. Moses, both of Chicago, Ill., for trustee Union Trust & Savings Bank of East St. Louis, Ill.

Rice, Lowes & O'Neil, of Chicago, Ill. (Francis M. Lowes, of Chicago, Ill., and Dan McGlynn, of East St. Louis, Ill., of counsel), for defendant Lorimer & Gallagher Co.

ENGLISH, District Judge. The report of the master in chancery having been filed and numerous exceptions taken thereto, August 5, 1918, was set for the date on which arguments were had before court upon questions raised by the exceptors.

At the date of argument it was determined and agreed by counsel that, certain principal questions involved being first determined, other and minor questions would be materially simplified, if not fully determined.

One of the principal and perhaps the most important of all the questions raised by the exceptors is that of "priority" as between the mortgage lien held by the trustee to secure bonds issued by the railroad company and that of the mechanic's lien claimed by the construction company (Lorimer & Gallagher), which presents the single question of priority as between a prior mortgage lien and mechanic's lien.

In the argument and discussion, which lasted five days, this was the main question touched upon. Other questions were incidentally mentioned, some of which were argued at considerable length, but most, if not all, related to the one main question.

I do not deem it necessary at this time, neither do I think counsel expect the court, to consider and pass upon issues other than the one of priority as between the mortgage upon the railroad in question and mechanic's lien filed by the company which constructed and built the railroad.

The mortgage in question was executed, recorded, and delivered at a date prior to the contract entered into, upon which the mechanic's lien is based, and ordinarily is what would be termed a prior lien.

The mechanic's lien in question is authorized by the statute of the state of Illinois, the terms of which attempt to fix the status of mechanics' liens and their priority as to all other liens on railroad against which the mechanics' liens are filed.

[1, 2] This being a lien fixed, determined, defined, and allowed by the statute of the state of Illinois, such statute must necessarily largely determine the question at issue.

The railroad lien act of Illinois (Hurd's Rev. St. 1917, c. 82, § 7), which is relied on by counsel for mechanics' liens claimants, is as follows:

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"Section 1. Be it enacted by the people of the state of Illinois, represented in the General Assembly, that all persons who may have furnished, or who shall hereafter furnish to any railroad corporation now existing, or hereafter to be organized under the laws of this state, any fuel, ties, materials, supplies, or any other article or thing necessary for the construction, maintenance, operation or repair of such roads, by contract with said corporation, or who shall have done and performed, or shall hereafter do and perform any work or labor for such construction, maintenance, operation or repair by like contract, shall be entitled to be paid for the same as part of the current expenses of said road; and in order to secure the same, shall have a lien upon all of the property, real, personal and mixed, of said railroad corporation as against such railroad, and as against all mortgages or other liens which shall accrue after the commencement of the delivery of said articles, or the commencement of said work or labor."

Following this section is a provision of the statute which applies to the subcontractor, but for the purpose of this discussion the lien claimant in this case is regarded as the original contractor. Therefore only that portion of the statute above quoted applies.

A solution of the question here involved depends almost wholly upon the interpretation given statute above quoted. Some authorities cited are quite helpful, and much argument made by counsel is quite illuminating upon some uncertainties which heretofore existed in the mind of the court as to meanings to be given to certain language and words in the said statute.

At the time this statute was enacted it was then (and is now) not an uncommon practice for railroad corporations, before any considerable amount of property had been secured, and before any work had been done, to issue bonds for the purpose of securing money with which to build or construct its railroad. The framers of this law, evidently having in mind this practice of railroad corporations, drafted and enacted the railroad mechanic's lien statute as above quoted. Too, the legislative body must have had in mind the rule of law that a mortgage did not attach to or convey property not owned by mortgagor at the time of its execution and delivery.

By the use of the word "accrue" the Legislature evidently intended that same should be construed to mean that the mortgage did not accrue—that is, become attached to any of the property—until such property was actually owned by or came into the possession of the railroad company. The Legislature must have understood and intended that none of the road built by the construction company became the property or into possession of the railroad company until built, constructed, created, and put into the possession of the railroad company by the construction company. The Legislature must have further understood and intended that, when such constructed road so came into the possession of the railroad company, then, and not until then, did its mortgage attach and become a lien. Therefore, when such railroad so constructed came into the possession of the railroad company, it came charged with the statutory rights of its builder and creator in the form of a mechanic's lien, which was an incumbrance prior to the time the mortgage lien accrued, attached, or became effective.

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A mechanic's lien against a railroad shall be paid "as part of the current expenses of said road," and according to decisions of the Supreme Court of Illinois liens against railroads for current expenses are liens preferred as against a prior recorded mortgage. The expense of construction is to be paid for upon the same basis as that of current expenses, therefore the logical conclusion is that a lien for construction work must be preferred over a prior recorded mortgage to secure bonds of the corporation.

[3] A recorded mortgage does not become a lien on property mortgaged until the money or consideration therefor has been actually realized or received by the mortgagor. In the case at bar nothing was received by way of consideration until the railroad was built or constructed. The mere recording of the mortgage did not of itself create a lien, and no lien in fact existed or could exist until the railroad or some part thereof was built, or until some material was furnished; and when such road, or some part thereof, was built, or when some material was furnished, the mechanic's lien had already attached before the mortgage in fact became a lien thereon.

The Illinois Railroad Lien Law employs the following language:

"And in order to secure the same, shall have a lien upon all of the property, real, personal and mixed, * * * as against all * * * other liens which shall accrue after the commencement of the delivery of said articles. * * *"

Counsel in behalf of the construction company, in construing this provision, cites the case of Brooks v. Railroad Co., 101 U. S. 443, 25 L. Ed. 1057, which construes a lien statute of Iowa (Code 1873, § 2139) that provides in substance that:

"A mechanic has, for labor done or things furnished, a lien on the entire land upon which the building * * * was made, which has been held to include railroads, and it shall be preferred to all other liens * * * which shall be attached to or upon such building * * * made subsequently to the commencement of said building. * * *"

Counsel for mortgagee urges that there is quite a distinction between the two lien statutes. I am unable to agree with such contention, but, on the contrary, I am clearly of the opinion that there is a striking similarity between them, so much so that, without other reasons, I would feel impelled to hold in case at bar, as the Supreme Court did in that case, that the mechanic has a lien superior to the prior recorded mortgage, and that such lien extends to the entire length of the railroad in question.

It is therefore the opinion of the court that mechanic's lien in this case is entitled to priority in payment over the mortgage held by the trustee to secure payment of the bonds issued by the railroad company.

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NETHERWOOD v. RAYMER.

(District Court, W. D. Wisconsin. April 30, 1918.)

1. CONTRACTS ⇐=26—ACCEPTANCE—DEPOSIT OF ACCEPTANCE IN MAILS.
When an offer is made by letter sent by mail, the deposit of a letter of acceptance by the person to whom the offer is made, properly addressed, completes the contract, though it is never received by the one making the offer.

2. CONTRACTS ⇐=2—EXECUTION—WHAT LAW GOVERNS.
The execution of a contract must be determined by the laws of the place where the contract is made.

3. CONTRACTS ⇐=144—CONSTRUCTION—WHAT LAW GOVERNS.
The construction of a contract must be determined by the laws of the place where the contract is made.

4. SALES ⇐=22(4)—PROPOSAL—ACCEPTANCE.
Where an offer to sell is made by mail, no contract results if the acceptance is coupled with any condition which varies or adds to the offer to sell.

5. CONTRACTS ⇐=28(2)—ACCEPTANCE OF OFFER—CONSTRUCTION.
Where one to whom an offer by mail was made used the mails as a medium for acceptance, extrinsic evidence is admissible to clear up question whether the letter of acceptance intended to impose a new condition, or merely a suggestion as to the consummation of the contract.

6. SALES ⇐=22(4)—ACCEPTANCE—VARIANCE.
Where defendant, who held plaintiff's notes, given in payment for corporate stock, which was deposited as collateral offered to sell at a discount, *held*, that there was no variance between the offer and acceptance, because the acceptance did not include interest.

At Law. Action by Harry C. Netherwood against George W. Raymer. Judgment for plaintiff.

On July 1, 1911, the defendant sold to the plaintiff 23 shares of the capital stock of the Democrat Printing Company. The purchase price was $65,000, of which $5,000 was paid in cash, and 10 notes for $6,000 each, payable at the Capital City Bank of Madison, Wis., on or before 10 years from date, were given for the balance. The 23 shares of stock were pledged as collateral to the notes, and the collateral contract contained an insecurity clause, whereby the defendant, at any time when he deemed the debt insecure, could sell the stock. At the time of the negotiations between the parties, which make the subject-matter of this case, all interest had been paid when due, and $2,000 on the principal.

Early in 1914 the defendant became disturbed over the affairs of the Democrat Printing Company. In reply to defendant's letter, the plaintiff wrote that the affairs of the company were in good shape, but telling him further that, if he felt that his security was in danger, plaintiff would have no trouble in negotiating a new loan or making a sale of the stock in order to take care of his indebtedness.

On March 14, 1914, defendant wrote to the plaintiff as follows:

"Positively confidential.

"965 N. Y. Avenue, Pasadena, Cal., March 14, 1914.

"Dear Mr. Netherwood: My letter to you of Feby. 20th remains unanswered, although several others sent out in the same mail have been. I will now offer you three propositions. These are simply for you, and for no one else, not even for that trouble maker, Doc. Bryant. I think you must know by this time that you must shake him. He will ruin you if you don't do it. You must certainly see that he will wreck any business or any person with which he is connected. I fully understand the difficulty that confronts you in dis-

⇐=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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posing of Bryant, but hope you can find a way out. The first proposition may be the most troublesome, because it goes right to the end sought without frills. The second and third I think you may act upon. The second I earnestly hope you can carry out. It saves you $5,800, the equal of two years' interest on all your debt. This I will give to close out all my relations with the company. However, the third proposition is the easy one for you, and you can simply say that under the circumstances you feel that you cannot meet your indebtedness and you simply throw up your hands. Mr. Netherwood, I am so fully advised that it is beyond question that affairs cannot run but a little longer as now. There must be the change mentioned in my first proposition, to prevent a peaceful or forceful reorganization of the company. That would air some things like the monthly meeting of directors and their pay. All are in the office and already being paid large salaries. You must know that every dollar of stock not owned or controlled by you and Bryant will insist on a reorganization other than that of Doc. Bryant.

"First. You to agree to letting Bryant and Osborne out and that your pay may be fixed at $5,400, as formerly. This you can do if you will, and it will benefit you more than any one else. You know Bryant is absorbing $3,600 a year of the earnings of the company, and his services are worth nothing, besides being a pernicious and constant meddler and trouble maker. You stand by him, and he will wreck both of you; but he will not be permitted to wreck the Democrat Printing Company. *He must go out.* The salary of Osborne, fixed by Bryant, is fully three times what any service he can render is worth.

"Second. You stated in a former letter to me that you knew that you would have no trouble in negotiating a new loan or a sale of the stock for more than the amount of the unpaid notes. If you can and will, I will agree to discount for cash all the notes in the sum of $5,800, or 10 per cent.; that is, I will accept $52,200 for the $58,000 of unpaid notes. I will be more than glad to do this, but have little faith that you can, for I very much fear that the stock has been depreciated still more by Bryant's management, and I am sure it will be still more if Bryant is much longer kept in the office in any capacity whatever.

"Third. You to resell to me for your notes all the stock bought of me. I will surrender to you all your unpaid notes for the stock, and will be only too glad to sell it again at any time for $52,200 cash. While this is the easy way out of an unfortunate combination for you, it is the hardest one for me. The man Bryant will wreck any business that he has any connection with.

"Finally, I am constrained to question one or two matters in your last letter to me. I feel that you have not fully analyzed the situation. You speak of not sacrificing what you have in the company. You have paid $7,000. As I understand it, all of this was from earnings of the company, as well as all the interest you have paid out, and in addition a salary of $2,400 a year, which is $500 a year more than you were getting when I sold you my stock. Now, just what actual interest could you in fact claim? This I leave to you. Also you state that your notes are not due until 1921. Am I to understand that you can, if you choose, defer payment on all of these notes until 1921, if you find it convenient to do so. If I thought that was so, I would present you with all of them now.

"Mr. Netherwood, I am not blaming you for Bryant's mismanagement of affairs, because I know full well the bad combination you have gone into and the puzzle you have on your hands to get out of it. But you must get out or sink in the wreck that impends now in the affairs of the company. With the load you are carrying you cannot hope to pay dividends, and discontent is rampant among the outside stockholders, and that man Bryant has no more sense than to believe he can do anything he pleases with the property of others, simply because he with your assent permits him to do it, and he has no more honesty than to believe that is right. You cannot afford to longer keep such company. If you buy my stock outright, that lets me out. If you resell the stock to me, that frees you from the deal you have been in, and you are saved endless trouble and financial loss. I am anxious only to get difficulties straightened out there, and I assure you I am by no means alone in

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this. Don't plunge deeper into trouble, but get out, and do it now; and it cannot be done, except by the methods, or some one of them, offered, or of some one that will accomplish the result.

"Hoping that you will see the situation and act for your own good, and that will be for the good of all interests concerned, with best wishes, I am,

"Very truly yours, Geo. Raymer.

"Please let me have an early reply. R."

That letter reached Madison, Wis., on March 21, 1914, and on the same day the plaintiff wrote to the defendant as follows:

"Madison, Wisconsin, March 21, 1914.

"Mr. George Raymer, 965 New York Ave., Pasadena, Cal.—My Dear Mr. Raymer: I am to-day in receipt of your letter of March 14th. Since I received your letter of Feb. 13th, I have been very much disturbed about the matter. In view of the fact that you evidently feel yourself insecure, I beg to advise you that, if you will execute to Mr. Hobbins power of attorney in the form herewith inclosed and forward the same to Mr. Hobbins, with full authority and power to assign the notes in the bank to which my stock is collateral security, making the assignment in blank, but without recourse against you, my indebtedness to you on these notes will be fully taken care of.

"I want you to understand that I am not putting up this money, but that the notes are being sold by you without recourse to a third party, who takes them off your hands; the understanding being that the notes are to be turned over upon the payment of $52,200 to Mr. Hobbins, or a discount of 10 per cent. from the face of the notes and interest. Power of attorney is herewith inclosed. This is in accordance with your favor of the 14th, and gives you your money, so that you need not have any further worry as far as you are concerned about the matter. Please write to me when you forward this power of attorney to Mr. Hobbins, so that you get your money without any delay. With best regards to you and yours, I am

"Very truly yours, H. C. Netherwood."

Before the defendant received the plaintiff's letter of March 21st, Brandenberg, another stockholder in the Printing Company, went to California and saw the defendant at Pasadena on March 20, 1914. Defendant then offered to sell Brandenberg the Netherwood notes for $52,200. Brandenberg accepted the offer, and told the defendant that he would return to Madison, Wis., and place the money to purchase the Netherwood notes to defendant's credit in the Capital City Bank.

On March 26, 1914, not having heard from his letter of the 21st, plaintiff telegraphed the defendant as follows:

"Madison, Wis., March 26, 1914.

"George Raymer, 965 New York Ave., Pasadena, California:

"Please wire me whether you have received my letter of Saturday last and when you will forward power of attorney to Mr. Hobbins period. Also wire him that you are forwarding power of attorney to him at my request.

"Harry Netherwood."

On the same day defendant sent the following telegram to the plaintiff:

"Pasadena, Calif., March 26, 1914.

"H. S. Netherwood, Madison, Wisc.:

"Letter and telegram just received. Notes not owned by me.

"Geo. Raymer."

Brandenberg completed his purchase of the notes at the Capital City Bank of Madison, Wis., and immediately foreclosed on the collateral, which was sold on March 28, 1914, for more than enough to pay the balance due on the notes. At this sale the plaintiff was compelled to pay $58,000 in order to protect his security. At the time of the sale to Brandenberg, plaintiff had the money ready in Madison, Wis., to consummate the defendant's offer made in his letter of March 14, 1914.

Plaintiff contends that his letter of March 21, 1914, posted on that day and addressed to the defendant at his California home, was an acceptance of the

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offer contained in the defendant's letter of March 14th, and that a contract between the parties resulted.

Defendant claims that the plaintiff's letter of March 21st was not an acceptance of any offer made by the defendant; that it changed material terms of the defendant's offer, and amounted to, at the most, a counter proposition, which was never accepted by the defendant.

Sanborn & Blake, of Madison, Wis., for plaintiff.
Jones & Schubring, of Madison, Wis., for defendant.

CARPENTER, District Judge (after stating the facts as above). [1] The determination of this case depends entirely upon the construction to be given to the defendant's letter of March 14, 1914, and the plaintiff's reply, posted at Madison, Wis., on March 21, 1914, the date when he received the defendant's letter. If there was a contract made, it was consummated by the mailing of the letter by plaintiff at Madison, Wis., properly addressed to the defendant at Pasadena, Cal.

"For it is well settled, in England and this country, that when a proposal for a contract is made by letter, sent by mail, the deposit of a letter of acceptance in the post office by the person to whom the proposal is made, addressed to the person making it, at the proper place, completes the contract, even though the latter never receives the letter accepting his offer." Washburn v. Fletcher, 42 Wis. 152, 166.

[2, 3] The execution of the contract and its construction must be determined by the laws of the place where the contract, if any, was made. McFarlane v. Wadhams (C. C.) 165 Fed. 987; Liverpool, etc., v. Insurance Co., 129 U. S. 397, 458, 9 Sup. Ct. 469, 32 L. Ed. 788; Berget-Crittenden Co. v. Railway Co., 159 Wis. 256, 261, 150 N. W. 496.

[4] The law of the state of Wisconsin with reference to offers and acceptances by mail is well summarized in Curtis L. & L. Co. v. Interior L. Co., 137 Wis. 341, 118 N. W. 853, 129 Am. St. Rep. 1068:

"The vendee in his letter of acceptance may not attach any condition to such acceptance, even to the extent of undertaking to dictate the place where payment shall be made. If his attempted acceptance is coupled with any condition that varies or adds to the offer to sell, it is not an acceptance, but is in reality a counter proposition. N. W. Iron Co. v. Meade, supra [21 Wis. 474, 94 Am. Dec. 557]; Baker v. Holt, supra [56 Wis. 100, 14 N. W. 8]. Where the letter of acceptance contains a mere suggestion or request that payment be made at a particular place, but such a request is not a condition attached to the acceptance, it does not amount to an attempt to vary the terms of the offer to sell, and will not defeat an action for specific performance. Matteson v. Scofield, 27 Wis. 671; Kreutzer v. Lynch, 122 Wis. 474, 100 N. W. 887. Applying these principles of law to the errors under consideration, the case does not present any unusual difficulties."

The Wisconsin cases cited by counsel for the defendant are Baker v. Holt, 56 Wis. 100, 14 N. W. 8, N. W. Iron Co. v. Meade, 21 Wis. 474, 94 Am. Dec. 557, Clark v. Burr, 85 Wis. 649, 55 N. W. 401, and Russell v. Falls Mfg. Co., 106 Wis. 329, 82 N. W. 134.

In the first two of these cases the letter of acceptance changed the place of payment from the vendor's domicile to a different place many miles away. In the Clark Case it asked for a deduction of nearly one-half the purchase price, and in the Russell Case there were three material modifications.

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Other Wisconsin cases, in which, under somewhat similar conditions, the letter of acceptance has been held to contain a mere suggestion, and not a variation in the terms, are the following: Matteson v. Scofield, 27 Wis. 671; Sherley v. Peehl, 84 Wis. 46, 54 N. W. 267; Kreutzer v. Lynch, 122 Wis. 474, 100 N. W. 887; Curtis L. & L. Co. v. Interior L. & L. Co., 137 Wis. 341, 118 N. W. 853, 129 Am. St. Rep. 1068.

[5] In the Kreutzer Case, numerous Wisconsin decisions were referred to in the opinion, and we find this summary:

"Each of the letters so considered was marked by some slight differentiation from that in the present case; but these varying views of court at least serve to establish that such a letter is not necessarily clear or certain in its significance, but may contain a measure of ambiguity. In both Matteson v. Scofield and Baker v. Holt it is held that such ambiguity might be resolved by extrinsic facts surrounding the transaction and by the conduct of the parties. In the present case there was evidence of conversation between the parties which might have served as an invitation to Mr. Kreutzer to suggest a method of closing the transaction by mail—the defendant Lynch having suggested to him that that might be done. Again, correspondence between and conduct of the parties after the sending of the letter of June 17th was offered as significant upon the meaning of this letter and the understanding of it by Mr. Lynch. Upon this evidence the trial court has found that the request for transmission of the deed and abstract to a bank at Wausau was intended by Mr. Kreutzer and was understood by the defendants simply as a suggestion and request, and not as a condition of acceptance. There being extrinsic evidence admissible upon this subject, with no clear and overwhelming preponderance to the contrary, the finding of the court must conclude us on this question."

Defendant charges that the letter of acceptance contained an important variation, in that it required the defendant to appoint an attorney or agent of the plaintiff's own choosing to receive the money and to close the transaction. The agent named was J. W. Hobbins, cashier of the Capital City Bank of Madison, Wis. The original notes were payable at the bank, and plaintiff paid his interest there and part of the principal as it fell due.

Under the rule laid down in the Kreutzer Case, extrinsic evidence is admissible to clear up the question whether or not the letter in question contained a condition or merely a suggestion. The facts surrounding the transaction and the conduct of the parties make it clear that Netherwood's letter contains simply a suggestion, and not a condition. All of the notes were "on or before," and could have been paid by Netherwood at any time, had he desired to go to the Capital City Bank and deposit the money. The record shows that J. W. Hobbins was the president and cashier of this particular bank; that the notes were in the possession of the bank, and all payments of interest, and the two payments of principal on these notes had been made to Hobbins at the bank; that he was the active managing officer of the Capital City Bank, and when payments were made of principal or interest he personally indorsed them on the notes in the presence of Netherwood. The indorsements show that those payments ran over a period of years; the first being August 5, 1911, and the last March 7, 1914. Hobbins was not connected in any way with the Democrat Printing Company, or in any way with the stockholders

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of the company. The Democrat Company carried their account at the Capital City Bank, and the defendant Raymer had a checking account at the same bank; it being his working bank account, so far as he had one in Wisconsin. He also had one in California. The notes in question, when they were foreclosed on by Brandenberg, were sold at the Capital City Bank, and the transaction the defendant had with Brandenberg was also consummated through the Capital City Bank. The cash which the plaintiff had raised to consummate the purchase from the defendant was in the Capital City Bank, and he was ready, able, and willing to carry out his part of the contract.

It is plain that the plaintiff in his letter of acceptance named J. W. Hobbins simply as a suggestion, for the purpose of aiding in the immediate winding up of the transaction. It appears from the record that all parties in interest had the utmost confidence in Hobbins; that he personally had taken charge of all the dealings with regard to these notes from the time of their execution, and he naturally was the one man at the bank who would have closed the transaction, had the name of the bank been inserted in the power of attorney, instead of his name. Raymer had been dissatisfied for some time with the conduct of affairs in the publishing company, and was extremely anxious to get his money, or the major part of it. He had manifested anxiety for some time, and had committed himself on this point in writing. His letter containing the offer of sale shows that his anxiety was acute, and this anxiety the plaintiff was trying to relieve, when he wrote back, on the same day that he received the offer, accepting it and suggesting Mr. Hobbins, "so that you get your money without any delay."

The importunity on the part of the aged defendant to close out this transaction and to get as much of his money as possible at the earliest date was further evidenced by the manner in which he accepted Bandenberg's offer immediately on its presentation March 20th. This was before he had heard from Netherwood. He states:

"After a few minutes of conversation, Mr. Brandenberg said he had come out to see if I would sell him Netherwood's notes. I quickly answered that I would."

The reasons for the defendant's anxiety are clearly shown in his communication. Raymer, when he received the plaintiff's letter of March 21st, would have understood that his proposition was accepted, and that only the details of consummating the agreement remained to be disposed of. The suggestion of Hobbins seems to me to be an attempt on the part of the plaintiff to save time, so that he could comply with the very evident desire of the defendant to get his $52,200 at once.

It should be particularly noticed that the failure of the defendant to carry out his contract with Netherwood was not due to any claim on his part that he had any objection to executing the power of attorney to Mr. Hobbins. Without waiting for an answer to his offer, without leaving enough time in which an answer could possibly be received, and before his offer was received, he sold these notes to Brandenberg on exactly the same terms as contemplated in his offer

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to Netherwood. The Brandenberg transaction would have been carried out under Netherwood's letter of acceptance, with the exception that the indorsement, "Without recourse, George W. Raymer," was put on the Netherwood notes at the Capital City Bank under a general power of attorney held by Jones & Schubring, instead of the specific power of attorney to J. W. Hobbins inclosed in Netherwood's acceptance.

Under all the circumstances, I am of the opinion that the naming of Hobbins as the attorney in fact was in expedition of the sale rather than a condition of acceptance or counter offer.

I am not impressed with the argument that the three propositions were for Netherwood's sole benefit, and that no one else could be interested with him in the transaction, because Raymer's letter refers to a statement of the plaintiff that he would have no trouble "negotiating a new loan or sale of the stock for more than the unpaid notes."

[6] It is also charged that there is a variance in that the acceptance did not comprehend $52,200 principal and also the interest to date of sale. I fail to see that interest was a part of the defendant's offer. In addition to the above extract Raymer also stated:

"I will agree to surrender all your notes for a surrender of the stock, and I would gladly sell it again at once for the sum of $52,200 cash."

The interest was paid up to a very recent date, and the amount then outstanding was so small in proportion to the total amount involved that I do not believe the question of interest was considered by the defendant. It evidently was not mentioned by him as a part of his offer.

The other objections raised by the defendant do not have any particular significance in this situation.

An order will be entered, finding the issues in favor of the plaintiff, and assessing his damages at the sum of $5,800 and interest thereon from March 28, 1914.

Judgment will be entered on the finding; exceptions being preserved by the defendant.

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UNITED STATES v. COLGATE & CO.

(District Court, E. D. Virginia. October 29, 1918.)

1. MONOPOLIES ⟸17(2)—COMBINATION IN RESTRAINT OF TRADE—ANTI-TRUST ACT.
A manufacturer of products shipped in interstate trade is not subject to criminal prosecution, under Sherman Anti-Trust Act July 2, 1890 (Comp. St. 1916, § 8820 et seq.), for entering into a combination in restraint of such trade, because he agrees with his customers upon prices, claimed by them to be fair and reasonable, at which the products may be resold, and declines to sell to those who will not so agree.

2. MONOPOLIES ⟸31—ANTI-TRUST ACT—INDICTMENT FOR ILLEGAL COMBINATION.
An indictment against a manufacturer alone, charging a combination in restraint of trade in violation of Sherman Anti-Trust Act July 2, 1890 (Comp. St. 1916, § 8820 et seq.), which averred only that defendant required its customers, to whom it sold its products, individually and not collectively, to sell at established prices, not alleged to be unreasonable, and refused to sell to customers who would not so agree, which did not charge that defendant had or attempted to acquire a monopoly, that it retained any control over the purchasers, or the goods after their sale, or any interest therein, or the right to control the disposition of the same, or that there was any combination or agreement between the customers themselves, *held* not to charge an offense.

3. MONOPOLIES ⟸31—INDICTMENT—COMBINATION IN RESTRAINT OF TRADE.
An indictment for combination in restraint of trade, which charged generally that defendant, a manufacturer, entered into agreements with customers to whom it sold its products to maintain prices, but which did not join such customers, nor aver that their names were unknown, nor set out any particular transaction, *held* too general and insufficient for want of certainty.

Criminal prosecution by the United States against Colgate & Co., a corporation. On demurrer to indictment. Demurrer sustained.

G. Carroll Todd, Asst. Atty. Gen., and Henry S. Mitchell, Sp. Asst. Atty. Gen., Richard H. Mann, U. S. Atty., of Petersburg, Va., and Hiram M. Smith, Asst. U. S. Atty., of Richmond, Va.

Charles E. Hughes, of New York City, Harry K. Wolcott and Menalcus Lankford, both of Norfolk, Va., and Charles Wesley Dunn and Mason Trowbridge, both of New York City, for defendant.

WADDILL, District Judge. The indictment in this case charges in a single count that the defendant is a corporation organized and existing under the laws of the state of New Jersey, and having its general offices, factories, and salesrooms at Jersey City, in said state, and there engaged in producing laundry soaps, toilet soaps, and other toilet articles, and selling and shipping such products to wholesale and retail dealers in the Eastern district of Virginia, and throughout the United States; that during the period of three years immediately preceding the return of this indictment, to wit, on the 18th day of December, 1917, it did knowingly and unlawfully create and engage in a combination with the aforesaid wholesale and retail dealers within said Eastern district of Virginia, and throughout the United States, to procure adherence on the part of said wholesale and retail dealers in

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the products of the defendant, in selling such products sold to them as aforesaid, to resale prices fixed by the defendant, and to prevent such dealers from reselling at lower prices such products sold to them as aforesaid, thus to suppress competition amongst such wholesale dealers, and among such retail dealers, and that prices were thereby maintained and enhanced to the consuming public, in violation of the act of Congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, commonly known as the Sherman Anti-Trust Act (26 Stat. 209, c. 647 [Comp. St. 1916, § 8820 et seq.]).

The demurrer presents for the consideration of the court two questions: (1) Whether the indictment charges a criminal offense under the act referred to; and (2) if so, are the averments of the indictment made with the accuracy, definiteness, and sufficiency that the law requires in setting forth a criminal charge, in order that the defendant may be advised of just what offense he is charged with.

[1] Considering the first proposition, the government insists that, while the indictment does not descend into all the particulars of the alleged crime, it does specify the means by which the combination was formed and carried out, sufficiently to show the offense charged, namely: (1) Distributing telegrams, lists, etc., of uniform resale prices; (2) urging the dealers to adhere to those prices; (3) informing them that defendant would refuse to sell to those who did not so adhere; (4) requesting them to inform it of sales at other prices; (5) discovering and investigating sales of that character; (6) placing the names of dealers who made such sales on "suspended lists"; (7) requesting those dealers to give assurances and promises to adhere in future to the indicated prices; (8) refusing to sell to those dealers until they gave such assurances and promises; (9) selling to such dealers upon their giving such assurances and promises; (10) requesting such assurances and promises from new dealers when opening accounts; and (11) freely selling to those dealers who observed the indicated prices.

Defendant's counsel urge that many of the acts alleged are immaterial, and that when the charge is analyzed, so far as the manufacturer's conduct is concerned, it amounts only to this:

> That "a manufacturer who simply declines to sell to dealers who fail to charge fair and reasonable resale prices, indicated by the manufacturer, which are of vital importance to the industry and trade, is subject to criminal prosecution as a violator of the Sherman Act, in case it appears that dealers generally resell at such fair and reasonable prices."

The government contends that the offense charged does not consist in refusing to sell to price cutters, but in forming an unlawful combination to procure adherence to universal resale prices, and that the essential difference in law between the proposition that it is unlawful for a manufacturer to combine with dealers in its product, for the purpose of maintaining resale prices fixed by him, and that of the refusal of a manufacturer to sell to dealers who fail to observe resale prices indicated by him, is at once apparent.

Considering the case from the government's standpoint, namely, that

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of a combination on the part of the defendant with its retail customers to procure adherence to its uniform resale prices, the omissions from the indictment, as applicable to the charge of combination and conspiracy in restraint of trade, at once become apparent. No suggestion is made that the conduct complained of was a monopoly, or was an attempt to monopolize the trade in toilet and laundry soaps, and other articles referred to; that the defendant was in a position to effect such purpose; that its business bore any appreciable proportion to the general extent of the business in question; or that the defendant was under any special duty or obligation to the public, not applicable to all citizens alike in other private businesses, to manufacture its products. There is no charge that the defendant acted in what it did in concert with other manufacturers of soaps, or with other than its own customers separately, or that the prices sought to be maintained were other than fair; nor was any request made, or assurance given, that customers who gave the assurance would in turn require like assurance from persons to whom they sold, or that buyers giving the assurance would also stipulate to buy only from the defendant, or sell only to customers selected by it; and no charge is made that any contract was entered into by and on the part of the defendant, and any of its retail customers, in restraint of interstate trade and commerce —the averment being, in effect, that it knowingly and unlawfully created and engaged in a combination with certain of its wholesale and retail customers, to procure adherence on their part, in the sale of its products sold to them, to resale prices fixed by the defendant, and that, in connection therewith, such wholesale and retail customers gave assurances and promises, which resulted in the enhancement and maintenance of such prices, and in the suppression of competition by wholesale dealers and retail dealers, and by the latter to the consuming public.

It will be observed that the indictment is solely against the defendant manufacturer, and not against either a wholesaler or retailer with whom it is alleged the combination was made. No citation of authority is furnished the court of any criminal case involving the state of facts charged here, nor in support of the indictment against only one person to the unlawful combination. The government cites numerous cases to sustain their view of the case, among them the following: Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086; Dr. Miles Medicine Co. v. Park & Sons, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502; United States v. American Tobacco Co., 221 U. S. 106, 181, 31 Sup. Ct. 632, 55 L. Ed. 663; Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150; Eastern States Lumber Ass'n v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788; Straus v. Victor Talking Machine Co., 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E, 1196, Ann. Cas. 1918A, 955; Thomsen v. Cayser, 243 U. S. 66, 37 Sup. Ct. 353, 61 L. Ed. 597, Ann. Cas. 1917D, 322; Boston Store of Chicago v. American Graphophone Co., 246 U. S. 8, 38 Sup. Ct.

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257, 62 L. Ed. 551, Ann. Cas. 1918C, 447; United States v. Addyston Pipe Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; Thomsen v. Union Castle Mail S. S. Co., 166 Fed. 251, 253, 92 C. C. A. 315; United States v. Kellogg Corn Flake Co. (D. C.) 222 Fed. 725, Ann. Cas. 1916A, 78; United States v. U. S. Steel Corporation (D. C.) 223 Fed. 55; Frey & Sons v. Welch Grape Juice Co., 240 Fed. 114, 117, 153 C. C. A. 150.

These are all civil cases, in one form or another, involving the effect of acts alleged to be violative of the laws of commerce and trade, and mainly growing out of breaches of contracts alleged to have been unlawfully entered into, either under patent or copyright laws arising in connection with unfair competition, or because of alleged violation of contracts entered into between litigants in respect to their rights, or what they conceived to be their rights, in matters of trade relations, the subject of interstate commerce. No review of these several cases will be attempted; they are referred to generally in the case, relied on by the government, of Boston Store of Chicago v. American Graphophone Co. et al., 246 U. S. 8, 38 Sup. Ct. 257, 62 L. Ed. 551, Ann. Cas. 1918C, 447, and to that decision and the review of the cases by the Supreme Court reference is specially made, as it is believed, while bearing on the general subject under consideration, they do not, because of their own peculiar facts, materially affect this case.

In the view taken by the court, the indictment here fairly presents the question of whether a manufacturer of products shipped in interstate trade is subject to criminal prosecution under the Sherman Act, for entering into a combination in restraint of such trade and commerce, because he agrees with his wholesale and retail customers, upon prices claimed by them to be fair and reasonable, at which the same may be resold, and declines to sell his products to those who will not thus stipulate as to prices. This, at the threshold, presents for the determination of the court how far one may control and dispose of his own property; that is to say, whether there is any limitation thereon, if he proceeds in respect thereto in a lawful and bona fide manner. That he may not do so fraudulently, collusively, and in unlawful combination with others, may be conceded. Eastern States Lumber Association v. United States, 234 U. S. 600, 614, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788. But it by no means follows that, being a manufacturer of a given article, he may not, without incurring any criminal liability, refuse absolutely to sell the same at any price, or to sell at a named sum to a customer, with the understanding that such customer will resell only at an agreed price between them, and, should the customer not observe the understanding as to retail prices, exercise his undoubted right to decline further to deal with such person.

Authorities to sustain this view might be cited almost without number, and only some of the federal decisions bearing strictly thereon will be mentioned. In an early decision construing the Sherman Act, rendered long before the Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 730) was passed, and which latter act is not involved here (Transatlantic Missouri R. R. Case, 166 U. S. 326, 17 Sup. Ct. 551, 41 L.

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Ed. 1007), Mr. Justice Peckham, in distinguishing between a public carrier or calling and a business like the one here involved, said:

"The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses; and he may cease to do any business whenever his choice lies in that direction."

In Northern Securities Co. v. United States, 193 U. S. 361, 24 Sup. Ct. 466, 48 L. Ed. 679, Mr. Justice Brewer, speaking for the court, said:

"Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen."

In Standard Oil Co. v. United States, 221 U. S. 56, 31 Sup. Ct. 514, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, Chief Justice White, speaking for the court said:

"From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business, and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract, and to abstain from contracting, and to exercise every reasonable right incident thereto, became the rule in the English law."

In United States v. American Tobacco Co., 221 U. S. 180, 31 Sup. Ct. 648, 55 L. Ed. 663, the Chief Justice, speaking for the court, said:

"Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required, in order to give effect to the remedial purposes which the act under consideration contemplates and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us."

In Dueber Watch Case Co. v. Howard Watch, etc., Co., 66 Fed. 646, 14 C. C. A. 22 (C. C. A. 2d Circuit), the court said:

"An individual manufacturer or trader may surely buy from or sell to whom he pleases, and may equally refuse to buy from or to sell to any one with whom he thinks it will promote his business interests to refuse to trade."

In Union Pacific Coal Co. v. United States, 173 Fed. 739, 97 C. C. A. 580 (C. C. A. 8th Circuit), the court said:

"There was no law which required the coal company to sell its coal to Sharp on the terms which he prescribed, or to sell it to him at all. It had the undoubted right to refuse to sell its coal at any price. It had the right to fix the prices and the terms on which it would sell it, to select its customers, to sell to some and to refuse to sell to others, to sell to some at one price and on one set of terms, and to sell to others at another price and on a different set of terms. There is nothing in the act of July 2, 1890, which deprived the coal company of any of these common rights of the owners and venders of merchandise, and, if it did not combine with some other person or persons so to do, its refusal to sell its coal to Sharp, unless he would withdraw his

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advertisement of a reduction in his retail price of it, was not the violation of the Sherman Anti-Trust Act charged in the indictment."

The case of Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co. (D. C.) 224 Fed. 566, on appeal 227 Fed. 46, 141 C. C. A. 594 (C. C. A. 2d Circuit), will be found to contain a comprehensive and able discussion of the right of manufacturers to sell their wares or not, to fix retail prices, or to decline dealing with any particular retailer. To these cases, and the authorities therein cited, and especially to the able discussion by Judge Hough on pages 572–575 of the first report (224 Fed. 566, supra), attention is especially drawn.

[2] The pregnant fact should never be lost sight of that no averment is made of any contract or agreement having been entered into whereby the defendant, the manufacturer, and his customers, bound themselves to enhance and maintain prices, further than is involved in the circumstance that the manufacturer, the defendant here, refused to sell to persons who would not resell at indicated prices, and that certain retailers made purchases on this condition, whereas, inferentially, others declined so to do. No suggestion is made that the defendant, the manufacturer, attempted to reserve or retain any interest in the goods sold, or to restrain the vendee in his right to barter and sell the same without restriction. The retailer, after buying, could, if he chose, give away his purchase, or sell it at any price he saw fit, or not sell it at all; his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer, who could refuse to make further sales to him, as he had the undoubted right to do. There is no charge that the retailers themselves entered into any combination or agreement with each other, or that the defendant acted other than with his customers individually. It cannot be said that the defendant has no interest in the prices at which its goods shall be sold. On the contrary, it had a vital interest, in so far as cutting the same would tend to demoralize the trade, and might have been more injuriously affected by the result of this disorganization than the public would be benefited by a temporary reduction in the prices of its products. The sale of the defendant's particular soaps cannot be said to be a necessity, or that the same bears a large proportion to the entire manufacture of soaps of the kind and grade involved. The successful prosecution of the defendant's business, and the continued use of its soap by the public, depend upon its ability to find and maintain a market for its output. Price cutting would almost inevitably result in reducing the defendant's business in a given community to only those engaged in that practice, and deprive it of the patronage of the great body of wholesalers and retailers engaged in what they believed to be a fair and legitimate conduct of their business. It by no means follows that, in the end, the public would be benefited, as the price cutter could easily raise prices after the demoralization caused by his conduct had been brought about, and profit individually by so doing. What the public is interested in is that only reasonable and fair prices shall be charged for what it buys, and it is not claimed that the defendant's manner of conducting its business has otherwise resulted.

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The indictment should set forth such a state of facts as to make it clear that a manufacturer, engaged in what was believed to be the lawful conduct of its business, has violated some known law, before it is haled into court to answer the charge of the commission of a crime. In the instant case, the court's conclusion is that the averments of the indictment, when carefully considered, and read in the light of the defendant's inalienable right to deal lawfully with his own property, the handling, trading in, and disposing of which is made the subject of this indictment, fail to charge any offense, either in restraint of trade and commerce, under the Sherman Act, or any other law of the United States.

[3] Second. This brings us to the consideration of the form of the indictment. Ordinarily, this would be deemed immaterial, the indictment failing to charge a criminal offense, as held by the court; but it will be perhaps better, if the case is to be reviewed by the appellate court, to have the sufficiency of the indictment also determined.

The indictment, it will be observed, is only against a manufacturer alleged to be in combination with wholesale and retail dealers, and not against the wholesale and retail dealers referred to. It is not averred that the names of the latter were unknown to the grand jury, and no reason is given why they were not made parties defendant. Assuming, but without deciding, that it is permissible to indict only one party in an unlawful combination, it does not seem to the court that the alleged offense with which the defendant is charged is stated and set forth with that degree of accuracy and certainty required in criminal pleading. The facts in no particular combination, against any one set of wholesalers or retailers alleged to have been in combination with the defendant, are given, but merely that assurances and promises were made by the wholesale and retail dealers doing business with the defendant throughout the United States, and the Eastern district of Virginia, that its products would not be resold at retail other than at prices fixed by the defendant. This language is too general, and the defendant has the right at least to be informed of some one particular infraction of the law that it is claimed it has committed. It would be impossible to intelligently prepare a defense or answer to this indictment, as it involves the defendant's dealings with its wholesale and retail customers throughout the territory named, covering a period of three years. This is too indefinite, and there ought to be no difficulty, if such conditions exist, as set forth in the indictment, to name some specific instance of the alleged combination, and state the same in detail.

The demurrer will be sustained, and the indictment quashed.

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HAWKINS v. DANNENBERG CO. et al.

In re WARLICK BROS. CO.

(Circuit Court of Appeals, Fifth Circuit. November 2, 1918.)

No. 3215.

1. CHATTEL MORTGAGES ⟸196 — WITHHOLDING FROM RECORD — VALIDITY AGAINST CREDITOR.
An unrecorded mortgage on a stock of goods is subject to be vacated as a fraud on subsequent creditors, if withheld from record by agreement or understanding between its parties, so as not to affect mortgagor's credit.

2. APPEAL AND ERROR ⟸1177(6)—REMAND FOR NEW TRIAL—MISAPPREHENSION OF FACT.
It fairly appearing from trial court's opinion that the conflicting evidence, on the question of an unrecorded mortgage on stock of goods being in fraud of subsequent creditors, was not duly considered, because of misapprehension that mortgagee had agreed to sell mortgagor all the goods it needed, and so did not contemplate that mortgagor would seek credit elsewhere, there will be a reversal and remand for new trial.

Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Suit by Robert T. Hawkins, trustee of the Warlick Brothers Company, bankrupt, against the Dannenberg Company and others. From an adverse decree, complainant appeals. Reversed, and remanded for new trial.

See, also, 234 Fed. 752.

Max F. Goldstein, of Atlanta, Ga. (Ellis, Webb & Ellis, of Americus, Ga., and Little, Powell, Smith & Goldstein, of Atlanta, Ga., on the brief), for appellant.

Orville A. Park and Edward P. Johnston, both of Macon, Ga. (Hardeman, Jones, Park & Johnston, of Macon, Ga., on the brief), for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge. This was a bill in equity filed by the appellant, as trustee of Warlick Bros. Company, a bankrupt, praying that a mortgage made in January, 1914, by the bankrupt, to the defendant the Dannenberg Company, be adjudged fraudulent and void as to creditors of the bankrupt. The mortgage was not recorded until July 18, 1914, a few days prior to the filing of the involuntary petition under which the bankruptcy was adjudged. The bill contained averments to the effect that the mortgage was fraudulently withheld from record, with the understanding that the mortgagor would buy merchandise from others who, in ignorance of the existence of the mortgage, might extend credit for goods sold.

The following statement made in the opinion rendered by the District Judge indicates what was relied on to support the conclusion that the mortgage was not withheld from record to give the mortgagor a fictitious credit:

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"The Dannenberg Company, who are wholesalers, agreed that they would sell Warlick all the goods he needed. It follows that they did not contemplate that he would seek credit elsewhere. Nor was the mortgage withheld from record to impart to Warlick a fictitious credit, to the injury of those subsequently having dealings with him. Warlick had just failed, and a mortgage for a large amount was already of record against him. It follows that no creditors could have been deceived by the failure to record the subsequent mortgage of the Dannenberg Company."

The quoted statement manifests a material misapprehension of the state of facts disclosed by the evidence in the case. The property covered by the mortgage was the mortgagor's stock of goods, "constant in bulk, but changing in specifics," contained in the Planters' Bank Building in Americus, Ga. The evidence disclosed that at the time the mortgage was made it was known to a representative of the mortgagee, who acted for it in taking the mortgage, that the mortgagor had and was doing business in two stores in Americus, the one in the Planters' Bank Building and another on Lamar street. The mortgage was signed and delivered in the Lamar street store. It was given to secure the payment of the price of about $500 of goods presently sold—

"and all other credits and advances which may be extended to us by the said Dannenberg Company during one year after this date, so that the balance due after making all credits for payments will not exceed $10,000, whether evidenced by note or open account charged in the books of said the Dannenberg Company against us."

The testimony of the representative of the mortgagee, who in its behalf extended the credit evidenced and secured by the mortgage, showed, not, as stated in the above-quoted part of the opinion rendered, that the mortgagee agreed to sell the mortgagor all the goods the latter needed, but that the latter only agreed to buy all the goods it needed for the store containing the mortgaged stock. The evidence did not show the existence of the supposed state of facts relied on to support the conclusion that the mortgagee did not contemplate that the mortgagor would seek credit elsewhere. Having knowledge that the mortgagor was conducting a store or stores other than the one containing the mortgaged stock, for which alone the mortgagee was to sell goods, and that the mortgagor made no promise as to where it would buy goods for such other store or stores, it might well be inferred that the mortgagee contemplated that the mortgagor would seek credit from sellers other than the mortgagee.

It is true that prior to the date of the making of the mortgage the mortgagor had been through bankruptcy, and that at that time a mortgage given by it to secure an amount borrowed to carry out a composition of the debts owing to creditors affected by the prior bankruptcy was on the public record, which did not then show that that mortgage had been satisfied. But undisputed evidence showed that the debt secured by the last-mentioned mortgage was paid in full a considerable time before there was anything on the record to show that it was satisfied, and that the mortgagor bought goods on credit from merchants who were apprised that the debt secured by that mortgage had been paid in full, and who, before such information was imparted to them, sold the mortgagor goods only when the payment of the price

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of them was guaranteed by a third party of unquestioned solvency; and it further appeared that the mortgagor so obtained credit for goods sold after the seller was apprised of the payment of the debt secured by the recorded mortgage, and while the mortgage to the Dannenberg Company was withheld from the record and the seller was ignorant of its existence.

In view of the evidence just mentioned, plainly it is an unwarranted conclusion that no creditors could have been deceived by the failure to record the subsequent mortgage to the Dannenberg Company. While the Dannenberg mortgage was withheld from record the mortgagor conducted a store at Dothan, Ala., and bought goods on credit which were consigned to it at that place. Nothing in the evidence indicated that this was contrary to any understanding or agreement between the mortgagor and mortgagee. The evidence plainly indicates that credits were extended by other sellers of goods while the Dannenberg mortgage was withheld from record, which would not have been obtained if the existence of that mortgage had been known to such other creditors.

[1, 2] The mortgage in question was subject to be vacated as a fraud upon creditors, if it was withheld from record by agreement or understanding between the parties to it, so as not to affect the mortgagor's credit. Clayton v. Exchange Bank, 121 Fed. 630, 57 C. C. A. 656; National Bank of Athens v. Shackelford, 208 Fed. 677, 125 C. C. A. 575. The evidence on the subject was conflicting. It consisted mostly of oral testimony given in the presence of the trial judge. The conduct of the mortgagor's representative who executed the mortgage in its behalf was such as plainly to indicate to the mortgagee's representative that secrecy was desired. In the course of his testimony the latter stated:

"Mr. Warlick had two stores, and I went to both stores. We went to the Planters' Bank Building store, and, being smaller, more crowded, he suggested that we go around to the Lamar street store, where the clerks would not overhear our conversation, and we went there, and sat way off in a corner under the steps."

Warlick stated that the mortgagor's representative, with whom he dealt when the arrangement for a credit was made, said, with reference to the paper which was signed, that—

"It was just a paper between him and myself, and nobody would know anything about it except us; he would put it in the back end of his safe; the safe was in the room, and no one would know anything about it."

The person to whom that statement was attributed denied that anything like it was said. When asked why he did not put the mortgage on record, he first said that it was not necessary. Afterwards he said it was carelessness. It fairly appears, from the opinion rendered by the trial judge, that this conflicting evidence was not duly considered, and that the court, in reaching its conclusion, was influenced by the supposed existence of attending circumstances not disclosed by the evidence. We will not undertake to pass on the conflicting evidence, as obviously the trial court is in a better position to weigh it properly. The opportunity for it to do so uninfluenced by unwarranted considerations

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will be afforded by reversing the decree appealed from and remanding the cause.

In the course of the argument the ruling made by this court in the case of Martin v. Commercial Bank of Macon, Ga., 228 Fed. 651, 143 C. C. A. 173, was called to our attention. There is an obvious distinction between the facts of that case and those of the instant one. The conclusion that there was an absence of fraud in withholding from record the mortgage in question in that case was supported by a finding, sustained by the evidence, that when the mortgage was given it was expressly stipulated that no subsequent credit should be given. Not only was no such stipulation shown by the evidence in the instant case, but at the time the mortgage here in question was made the mortgagee was apprised that the mortgagor's situation and business occupations were such that it was to be anticipated that it would seek credit from sellers of goods other than the mortgagee. The evidence was such as to justify an inference that the mortgagee was aware that the mortgaged stock of goods was really subject to no incumbrance other than the mortgage in question. Other sellers of goods on credit, who were apprised of the actual satisfaction of the only incumbrance disclosed by the public records, may well have been influenced to extend credit by the buyer's apparent unincumbered ownership of the considerable stock of merchandise in the Planters' Bank Building store in Americus.

Reversed.

BASSETT v. EVANS et al. (two cases).
In re PHILLIPS.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1918.)

Nos. 192, 4991.

1. BANKRUPTCY ⊂⊃440—REVIEW—MODES.
   Where review of the facts in a proceeding to set aside a mortgage as a preference is sought, appeal is the proper remedy, and a petition to revise should be dismissed.

2. BANKRUPTCY ⊂⊃166(4)—"PREFERENCE."
   A mortgage given by a bankrupt to secure certain creditors *held* preferential, within Bankruptcy Act, § 60 (Comp. St. 1916, § 9644); the circumstances being sufficient to charge the creditors with reasonable notice they were securing a preference.

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Preference.]

3. BANKRUPTCY ⊂⊃166(4)—PREFERENCES—NOTICE.
   Actual knowledge or belief of an intent to prefer is not necessary to render a transaction open to attack under Bankruptcy Act, § 60 (Comp. St. 1916, § 9644), as preferential, nor is a mere suspicion of a preference enough to invalidate; but the rule applicable to negotiable paper should not be applied, and instead "what is reasonable cause to believe," etc., must depend on the facts of each case.

4. BANKRUPTCY ⊂⊃166(4)—"REASONABLE CAUSE TO BELIEVE."
   "Reasonable cause to believe," under the Bankruptcy Act, covers substantially the same field as "notice," under the equitable doctrine of good-faith purchaser.

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Cause.]

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Appeal from the District Court of the United States for the District of Kansas.

Petition to Revise Order of the District Court of the United States for the District of Kansas.

In the matter of the bankruptcy of Dave Phillips. Petition by George R. Bassett, trustee in bankruptcy, against Ferd Evans and others to set aside a mortgage as a preference. From a decree denying the petition, the trustee appeals, and also petitions to revise. Petition to revise dismissed, and decree reversed.

E. L. Foulke, of Wichita, Kan. (Jesse D. Wall, of Wichita, Kan., on the brief), for appellant and petitioner.

George Gardner, of Wichita, Kan. (T. A. Noftzger and George W. Cox, both of Wichita, Kan., on the brief), for appellees and respondents.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. [1] This was a proceeding brought by Bassett, as trustee in bankruptcy of Dave Phillips, to set aside a mortgage as a preference. The referee and the trial court denied the petition and sustained the mortgage. The trustee brings the case into this court both by petition and appeal. As he seeks a review of the facts, appeal is the proper remedy, and the petition is dismissed.

[2] The controlling facts are as follows:

In 1910 Phillips, the bankrupt, purchased a stock of drugs and fixtures at Coldwater, Kan., for $4,000, all of which was secured by a chattel mortgage back on the property. He ran the business until January, 1913, when he had reduced the mortgage debt to $1,800, but had built up a large indebtedness to the trade. His principal creditors were C. E. Potts Drug Company, $2,271.26, the Southwestern Drug Company, $533.11, and C. A. Tanner & Co., $838.87. These concerns were wholesalers at Wichita who had acted together for many years in matters affecting retail merchants. In January, 1913, they felt dissatisfied with Phillips' condition, and sent Mr. Wintle, credit manager of the Potts Drug Company, to Coldwater to make an investigation. He not only talked with Phillips personally, but made a careful examination of his books, and ascertained the course and state of his business, and what he was owing to other creditors. What he ascertained is, in our judgment, indicated fully as well by what he did as by what he says he discovered. He took notes for the Potts Drug Company account for $200 each, payable monthly, and for the other accounts notes for $100 each, payable at like periods. The accounts were closed, and a new arrangement made by which Phillips, instead of having the usual commercial credit, was required to settle by cash for all new goods supplied him by these parties twice a month, and certainly not to exceed 30 days. Phillips went forward with his business. At the end of the year he had paid on the notes, so that the indebtedness stood C. E. Potts Drug Company, $1,490.40; Southwestern Drug Company, $347.62; C. A. Tanner & Co., $521.16. It is manifest, therefore, that he was badly in de-

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fault on his notes. During this time he kited checks in paying debts for new purchases, and allowed some of them to go to protest, but finally made them good. At the close of the year 1913, Phillips had made no further payment on the purchase-price mortgage on his stock. He owed unsecured debts, in addition to what he was owing appellees, amounting to $2,731.80. He must have known that he was near the road's end.

Early in January, 1914, he agreed with one Dykes to exchange his stock and fixtures for a lot and store building valued for purposes of the trade at $6,000, Dykes to pay the boot in cash. To these negotiations appellees were parties, and, we think, were fully informed. They canvassed the whole transaction with Dykes personally, and discussed it by phone with Phillips. Notes for the amounts due them, and a mortgage upon the store property which Dykes was to deed to Phillips in the trade, were prepared by counsel for appellees, and delivered to Mr. Fisher, an employé of the Potts Drug Company, to take to Coldwater for execution by Phillips. Fisher had talked with Dykes about the property, and was employed by him as his representative in taking an inventory of the stock of drugs. He was engaged in that work for about three days. When the inventory was completed, and before it was footed up, he had Phillips sign the notes and mortgage, and sent them to appellees. The footings of the inventory showed the stock to be worth $7,475. This was $325 less than the $6,000 at which the store building was valued, and the $1,800 which was still due on the mortgage for the purchase price against the stock. Dykes was to have a clear title. He had only $1,000 cash to put into the deal. The Potts Drug Company loaned him $500 with which to make up the sum needed to pay off the mortgage on the stock. The holders of the mortgage accepted Dykes' note for $325 for the balance.

Appellees insist that at the time they accepted the notes and mortgage they believed that Phillips would get enough in the trade to pay all other creditors. They were very careful, however, not to wait for the inventory to be footed up, so they could ascertain as a fact whether this would prove to be the case. Notwithstanding their testimony, we do not believe they really entertained any such expectation. They themselves loaned Dykes $500 with which to pay off the mortgage. Their man, Fisher, had participated in making the inventory. He had a very good chance, as the result of that work, to make a close estimate as to what the stock would foot up, and, although he was not appellees' employé for purposes of taking the inventory, the knowledge which he acquired in view of the fact that he held the notes and mortgage as their agent, and was sent to Coldwater to close up the deal by taking the notes and mortgage, can fairly be imputed to appellees. It is also true that appellees must have been thoroughly familiar with Phillips' business during the year 1913. They were urging him all the time to pay his notes and to take care of his protested checks. Their traveling salesman visited his place of business twice a month to collect for current sales. Through Mr. Wintle, their credit man, they had carefully canvassed Mr. Phillips' situation at

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the time the first notes were taken. It is likewise true that the mortgage here involved covered all of Phillips' property except such as was already encumbered for its full value. It covered all that Phillips received in exchange for his stock of drugs. If the mortgage had been taken on the stock of drugs direct, its preferential character would have been plain. What difference can it make that the mortgage was taken on the property which Phillips received in exchange for his stock?

From all the facts we think the conclusion is inevitable that they had reasonable cause to believe that Phillips was insolvent, and that the taking of the notes and mortgage would result in a preference to themselves over the other unsecured creditors. If they did not actually know the facts, the evidence leaves no doubt that they willfully abstained from getting the knowledge until after the notes and mortgage were executed and delivered to them. A circumstance occurred a few days later which throws a strong backward light upon the frame of mind of appellees at the time the mortgage and notes were taken. The Potts Drug Company wrote a letter to Phillips, urging him to move into the store building, so that he could claim it as a homestead. This would not only put the building beyond the reach of creditors, but it would likewise put appellees in a place where the other creditors could not complain, because their mortgage was taken upon exempt property. Reluctant as we are to disturb a finding concurred in by a referee and the trial court, we feel constrained to hold that the mortgage constitutes a voidable preference and ought to have been set aside. Courts must hold parties standing in the position which appellees occupied to have "reasonable cause to believe" what sensible business men standing in their place and possessing their knowledge would have believed. When such a standard is applied to appellees, we think the conclusion is too strong for any reasonable doubt.

The observations of Judge Hook in Pittsburgh Plate Glass Co. v. Edwards, 148 Fed. 377, 78 C. C. A. 191, are equally applicable to the mortgagee here:

"An examination of the record impresses us with the belief that the appellant's attorney was so well satisfied of the bankrupt's insolvency and its effect upon the mortgage he was about to take that he purposely traveled as close to the edge of actual knowledge as he could without obtaining it."

[3] The authorities tell us that section 60 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [Comp. St. 1916, § 9644]) does not, on the one hand, require actual knowledge or actual belief of an intent to prefer (In re Eggert, 102 Fed. 735, 43 C. C. A. 1; In re Virginia Hardwood Mfg. Co. [D. C.] 139 Fed. 209); and, on the other hand, that mere fear or suspicion of a preference will not invalidate a transfer (Powell v. Gate City Bank, 178 Fed. 609, 102 C. C. A. 55). Thus between actual knowledge and actual belief, on the one side, and fear and suspicion, on the other, lies the "reasonable cause to believe" mentioned in the section. This classification, however, is not as helpful in the decision of a concrete case as it appears. Fear and suspicion of insolvency, if they be strong enough, become belief, and the

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difficulty with the classification is that there are no criteria by which it can be said that one set of facts ought to engender fear or suspicion only, while another set of facts furnish reasonable cause for belief. It is impossible to group the ever-changing facts of business life into hard and fast categories, and say that one category produces fear, another suspicion, and another belief. Again, the rule of negotiable paper, that facts which arouse suspicion will not defeat the title of a holder (Hotchkiss v. Bank, 21 Wall. 354, 22 L. Ed. 645; Clark v. Evans, 66 Fed. 263, 13 C. C. A. 433), ought not to be applied to a question of preference because that rule "was framed in order to encourage the free circulation of negotiable paper" (Goodman v. Simonds, 20 How. 343, 356, 15 L. Ed. 934), and has no proper application to transfers of property. "Reasonable cause to believe," under section 60 of the Bankruptcy Act, covers substantially the same field as "notice" in determining whether a person is a bona fide purchaser of property. Both relate to transfers of property rather than negotiable paper. Hence, under section 60, the same as in the equitable doctrine of good-faith purchaser, "notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances, is notice of all the facts which a reasonably diligent inquiry would develop." Coder v. McPherson, 152 Fed. 951, 82 C. C. A. 99; Grandison v. National Bank of Commerce, 231 Fed. 800, 809, 145 C. C. A. 620.

[4] What constitutes "reasonable cause to believe" under this section is a pure question of fact, and each case is best disposed of by an independent consideration of its own facts. What the statute requires is that the facts and circumstances known to the purchaser shall be ascertained, and then the question answered whether those facts and circumstances would have caused an intelligent business man to believe that a preference was intended, or would have put such a man upon an inquiry that would have discovered the true character of the transaction. If such be the case, the transfer is void. Otherwise it is valid.

We think the mortgage here involved was void, and should have been set aside. The decree below is reversed.

KEEFE v. WORCESTER TRUST CO.

In re RUSSELL FALLS CO.

(Circuit Court of Appeals, First Circuit. October 22, 1918. On Petition for Rehearing, November 27, 1918.)

No. 1361.

1. BANKRUPTCY ⊂=205—TRUSTEE—RIGHTS OF.

Though the trustee in bankruptcy of a mortgagor be conceded to have the rights of an attaching creditor, and not mortgagor, in property of bankrupt, he would not have any greater rights than mortgagor to fixtures annexed to mortgaged property prior to bankruptcy.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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2. APPEAL AND ERROR ⇐501(3)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—ASSIGNMENTS OF ERROR.
An assignment of error, based on an offer of proof therein set forth, presents nothing for review, where the record fails to disclose that it was excluded, or, if excluded, that an exception was taken thereto.

Appeal from the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Jr., Judge.

In the matter of the bankruptcy of the Russell Falls Company. Certain property and the proceeds thereof were claimed by the Worcester Trust Company, which claim was opposed by Joseph P. Keefe, trustee. From a decree for claimant (249 Fed. 260), the trustee appeals. Affirmed.

Arthur T. Johnson, of Boston, Mass. (Joseph P. Keefe, of Boston, Mass., on the brief), for appellant.

Edmund K. Arnold, of Boston, Mass. (Peabody, Arnold, Batchelder & Luther, of Boston, Mass., on the brief), for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and ALDRICH, District Judge.

PER CURIAM. This case presents the question whether certain machines in a paper mill were so annexed to the realty and with such an intent as to become fixtures, so that they passed to the mortgagee of the realty.

The referee in dealing with the matter has classified the machines into groups. The first group consists of machines which both the referee and the District Court found the trust company, as mortgagee, was entitled to under its mortgage. The second group consists of what is called the second paper machine. This machine the referee awarded to the trustee in bankruptcy, but the District Court reversed the referee and awarded it to the Trust Company. 249 Fed. 260. The question involved, as to each group, is a mixed one of law and fact. The parties are practically in accord as to the law; the divergence is as to the weight to be given the evidence and the deductions to be made therefrom. The case was very fully presented and carefully considered in the court below, and, after a re-examination of the evidence and a consideration of the arguments of counsel, we are of the opinion that the findings and rulings of the District Court as to the annexation of both groups of machines to the realty were correct.

[1] If the trustee in bankruptcy, as he contends, has the rights of an attaching creditor and does not stand in the place of the mortgagor (the bankrupt), his rights in the mortgaged property did not accrue before bankruptcy, and, if prior to that event the machines had become annexed to the mortgaged realty, the rights of the trustee in the property would not be different, whether he stood as an attaching creditor or as the bankrupt. When the District Judge in his opinion said the case is one wholly between the mortgagor and the mortgagee, and that the trustee in bankruptcy stood in no better position than the mortgagor, he meant nothing more than that, in determining the question of intention with which the machinery was annexed to the realty,

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the circumstances attending the ownership of the property at the time of the annexation could be taken into account, and that, as the property was then subject to a mortgage, it might be inferred from this fact that the mortgagor intended that the machinery should be permanently annexed rather than temporarily.

[2] The appellant takes nothing by his fifth assignment of error. If the offer of proof there set out was made, the record fails to disclose that it was excluded, or, if excluded, that an exception was taken thereto.

We think the question of fees, costs, and charges was rightly determined.

The decree of the District Court is affirmed, with costs to the appellee.

On Petition for Rehearing.

PER CURIAM. The appellant's petition for rehearing is denied. If the record ought to be corrected to show that the appellant duly excepted to the exclusion of his offer of proof, and if the proof therein disclosed was competent and should have been received, we are still of the opinion that, taking it into consideration with the other evidence in the case, no other conclusion should be reached than the one arrived at in our opinion handed down October 22, 1918.

The petition for rehearing is denied.

O'HARE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5111.

1. ARMY AND NAVY ⟸40—OBSTRUCTION OF RECRUITING—INDICTMENT.
An indictment charging that defendant made statements in a public address that any person who enlisted for service in France would be used for fertilizer, etc., with the intent of obstructing the enlistment service of the United States, *held* sufficient to charge the offense of obstructing the recruiting and enlistment service, in violation of Espionage Act, tit. 1, § 3.

2. ARMY AND NAVY ⟸40—ENLISTMENT AND RECRUITING—"OBSTRUCT."
A speech in which defendant stated that any one enlisting for service in France would be used for fertilizer, etc., *held* to violate Espionage Act, tit. 1, § 3, denouncing the offense of willfully obstructing the recruiting or enlistment service of the United States; the expression "obstruct" contemplating more than a physical obstruction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Obstruct.]

3. CRIMINAL LAW ⟸829(1), 834(2)—TRIAL—INSTRUCTIONS.
The refusal of a requested instruction substantially covered by the principal charge was not error, for the court is not required to use the precise language of counsel.

4. ARMY AND NAVY ⟸40—OBSTRUCTION OF ENLISTMENT—ESSENTIALS.
To sustain a conviction of willfully obstructing the recruiting and enlistment service, etc., in violation of Espionage Act, tit. 1, § 3, by speeches calculated to have that effect, it is not necessary to show any particular person was prevented from enlisting.

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In Error to the District Court of the United States for the District of North Dakota; Martin J. Wade, Judge.

Kate Richards O'Hare was convicted of violating Espionage Act June 15, 1917, tit. 1, § 3, and she brings error. Affirmed.

Chester H. Krum, of St. Louis, Mo., and V. R. Lovell, of Fargo, N. D. (H. F. Horner, of Fargo, N. D., on the brief), for the plaintiff in error.

Melvin A. Hildreth, U. S. Atty., of Fargo, N. D. (John Carmody, Asst. U. S. Atty., of Fargo, N. D., on the brief), for the United States.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

HOOK, Circuit Judge. [1] On July 17, 1917, when the United States was at war with the Imperial German government, and was engaged in enlisting or recruiting its forces for the army and navy, Kate Richards O'Hare, a professional Socialist lecturer, delivered an address at a public meeting in the town of Bowman, N. D., before an audience of 100 or more people, in the course of which she said in substance and effect:

That any person who enlisted in the army of the United States for service in France would be used for fertilizer, and that is all he was good for, and that the women of the United States were nothing more nor less than brood sows, to raise children to get into the army and be made into fertilizer.

She was indicted for violating that part of section 3, title 1, of the Espionage Act of June 15, 1917 (40 Stat. 219, c. 30), which provides that "whoever, when the United States is at war, * * * shall willfully obstruct the recruiting or enlistment service of the United States to the injury of the service or of the United States" shall be punished as therein provided. She was tried, convicted, and sentenced to imprisonment for five years. It is contended that the indictment did not charge an offense under the statute, and that the trial court erred in excluding evidence, and in giving and refusing instructions to the jury. Of these in their order.

The first count will illustrate the claim of the insufficiency of the indictment. It charged that at the time and place mentioned the defendant "did commit the crime of willfully obstructing the enlistment service of the United States to the injury of the service of the United States, committed as follows, to wit." Then follow averments that she made the statements under the circumstances already recited, that she did so with the intention of willfully obstructing the enlistment service of the United States, to the injury of that service, and that there was then war between the United States and the Imperial German government. We will assume, without consideration, that the attack upon the indictment was seasonably made. It is urged that the defendant was merely charged with an attempt and an intention to obstruct the service, whereas the statute requires an actual willful obstruction. But counsel ignore the first part of the count, which, coupled with those following, is equivalent to a charge that the defendant did not merely attempt to obstruct, but

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actually did so, and willfully. The final averment of intent may be taken as an additional elaboration of the element of willfulness.

[2] Again, it is asserted that to "obstruct" the recruiting or enlistment service some physical force, obstacle, or impediment must be employed; that mere speech is not sufficient. Doubtless in some relations the word has that meaning; but manifestly it is not so limited in the statute before us. In the very nature of the evil sought to be avoided there could be no more potent means of obstructing, or even defeating, a country in raising its forces for war, especially in a time of voluntary enlistment, than a campaign of abuse calculated to inflame the ignorant or lawless against the operations of their duly constituted government, and to incite or encourage them to resistance. In the sense of the statute to obstruct means also to hinder, impede, retard, or embarrass, and any efficient means to that end is within the condemnation. If counsel were right in this, the picketing of recruiting stations by orators and lecturers would be admissible, if they stopped short of physical violence.

Complaint is made of the exclusion of some evidence of a local political controversy, upon which witnesses for the government and for the defense were divided. The defendant was not a party to it, and it did not affect her, except as it bore upon the feeling of the witnesses toward each other, and therefore rather remotely upon their credibility, and for that limited purpose sufficient of the evidence was admitted by the trial court.

[3] As to the instructions: It is urged that the court erred in refusing a requested instruction that the defendant could not be convicted, unless she used the language set forth in the indictment literally or in substance. The full effect of the instruction was given in the general charge. The court was not required to use the precise words of counsel.

[4] Finally, it is said that the court erred in instructing the jury that it was not necessary that the government show that some particular person was induced not to enlist. The instruction was right. The phrase "recruiting or enlistment service," as employed in the statute, signifies more than the mere induction into service of identified individuals. It means the particular governmental function or establishment as a whole, and comprises the means, agencies, and instrumentalities which it adopts, or upon which it relies, to accomplish its object. If language and the time and circumstances of its use are such as would necessarily result in obstructing the recruiting or enlistment service as so defined, the result will be presumed to have followed. That is the case here. Moreover, there was substantial proof that the defendant embraced the occasion, and that her language set forth harmonized with the trend of her address and accorded with her design.

The other criticisms of the court's charge are clearly without merit.

The sentence is affirmed.

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ROGERS et al. v. CHICKAMAUGA TRUST CO. et al.

(Circuit Court of Appeals, Fifth Circuit. November 2, 1918.)

No. 3213.

1. COURTS ⟸308—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.
Suit is not maintainable in federal court on ground of diversity of citizenship, defendants and one of plaintiffs being citizens of the same state.

2. BANKRUPTCY ⟸293(1)—SUIT ANCILLARY TO BANKRUPTCY PROCEEDING.
A suit having for one object discharge of one plaintiff from liability on payment of fund into court, to be interpleaded for by defendants, one of whom was trustee in bankruptcy, and for its other object enjoining proceedings by the trustee against the other plaintiff, *held* not ancillary to bankruptcy proceeding, as regards jurisdiction of federal court without diversity of citizenship.

Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Suit by the Chickamauga Trust Company and another against Effie Rogers and others. From an adverse decree, defendants appeal. Reversed, with direction.

R. A. Hendricks, of Nashville, Ga. (W. E. Martin, Jr., of Macon, Ga., on the brief), for appellants.

Geo. S. Jones and Orville A. Park, both of Macon, Ga., E. K. Wilcox, of Valdosta, Ga., and John P. Knight, of Nashville, Ga. (Wilson & Bennett, of Waycross, Ga., and Hardeman, Jones, Park & Johnston, of Macon, Ga., on the brief), for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge. [1] This was a bill in equity, filed in the District Court by the appellees, the Chickamauga Trust Company, a Tennessee corporation, and W. R. Smith, a citizen of Georgia, against the appellants, citizens of the state of Georgia. One of the plaintiffs being a citizen of the same state of which the defendants are citizens, the suit was not maintainable in the court in which it was brought, unless that court had jurisdiction upon some ground other than diversity of citizenship of the opposing parties.

[2] In behalf of the appellees it is contended that the suit was such a one that the court's jurisdiction was not dependent upon a diversity of citizenship. This contention is based upon the circumstance that an object of the suit, as disclosed by the bill, is to enable one of the plaintiffs, the Chickamauga Trust Company, to obtain a discharge of liability for a fund in its possession upon the payment of it into court, which was asked to require the several defendants to interplead and set up conflicting claims, which it was alleged they asserted against the fund; one of the defendants being the trustee in bankruptcy of Effie Rogers. The fund was that part of the purchase price of land of the bankrupt, sold under a foreclosure of a

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first lien or charge given or created to secure a debt to the Chickamauga Trust Company, which was left after satisfying that secured debt and paying other amounts claimed to have been properly disbursed out of the purchase price. It was contended that the suit was ancillary or auxiliary to the bankruptcy proceeding, and, because of that fact, was maintainable in the court in which it was brought, though one of the plaintiffs was a citizen of the same state of which the defendants are citizens.

The bill did not profess to be in aid of the bankruptcy proceeding. It made no mention of that proceeding, except by averments to the following effect in regard to a petition which it was alleged the defendant trustee in bankruptcy, several months before the filing of the bill, addressed to the referee in bankruptcy:

The petition mentioned averred that said Smith was in possession of a sum alleged to be the balance of the amount paid on the sale under the above-mentioned foreclosure, after paying the secured debt owing to the Chickamauga Trust Company and the costs of foreclosure, and that said trustee claimed that balance, but said Smith failed and refused to pay it over to the trustee; that, pursuant to the prayer of said petition, the referee made an order requiring said Smith to appear and show cause why he should not turn over said alleged balance to said trustee in bankruptcy; that said Smith duly made answer to said petition; and that the proceeding so brought by the trustee in bankruptcy was pending and undisposed of at the time the bill in this case was filed. The relief sought and obtained in this case included an injunction restraining the further prosecution of the proceeding commenced by the filing by the trustee of the above-mentioned petition in the bankruptcy proceeding.

So far as the object of the pending suit was to obtain relief inuring to the benefit of the plaintiff Smith, there was nothing in it to suggest that it was in aid of the bankruptcy proceeding. It was not alleged that any fund was in Smith's possession at the time the bill was filed. The bill contained no offer to surrender to the court anything in the possession of Smith. So far as he was concerned, the bill sought an injunction restraining the further prosecution of a proceeding instituted by the trustee in bankruptcy, which was pending and undisposed of. As to this phase of the pending suit, instead of it being one auxiliary to or in aid of the bankruptcy proceeding, it is rather to be regarded as one seeking to interrupt and thwart the prosecution of a petition filed by the trustee in the bankruptcy proceeding. If the Chickamauga Trust Company had been the sole party plaintiff, it seems that the suit could not properly have been regarded as ancillary to the bankruptcy proceeding, when it was not made to appear that that plaintiff had or sought to have any connection with the bankruptcy proceeding, and that the only relief sought in behalf of that plaintiff was an injunction restraining the defendants from proceeding against the plaintiff after its payment into court of the fund in its possession; the bill showing that the defendant trustee in bankruptcy was one of several adverse claimants of that fund. If, without bringing this suit, the Chickamauga Trust Company had

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paid into the bankruptcy court the fund in its possession, that court could have required all claims against that fund to be there asserted.

But the Chickamauga Trust Company was not the sole plaintiff. So far as the suit was in behalf of its coplaintiff, Smith, it had no semblance of a suit ancillary to the bankruptcy proceeding. As to this phase of the suit it was one independent of the bankruptcy proceeding against several defendants, one of whom happened to be the trustee in bankruptcy. It was suggested in argument that the presence of Smith as a plaintiff in the suit may be ignored, and the suit treated as one by the Chickamauga Trust Company alone, because Smith was a mere formal and unnecessary party. A sufficient answer to this suggestion is that the bill sought relief inuring to the sole benefit of the plaintiff Smith, and that such relief was awarded by the decree appealed from. The bill showed that Smith was materially interested in relief sought. The prosecution of a pending proceeding against him alone was enjoined.

Nothing is disclosed which prevents the fact that one of the plaintiffs materially interested in the relief sought and granted is a citizen of the same state of which the defendants are citizens, having the effect of making the case one not within the jurisdiction of the court in which it was brought.

It follows that the decree appealed from was erroneous. It is reversed, with direction that the bill be dismissed for lack of jurisdiction.

Reversed.

HUGHES v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5139.

1. INTERNAL REVENUE ⊜11—HARRISON ANTI-NARCOTIC ACT.
   The Harrison Anti-Narcotic Act (Comp. St. 1916, §§ 6287g–6287q) is valid as a revenue measure, having substantial relation to the raising of revenue, by bringing the traffic in such drugs into the open, and it is immaterial that another purpose of Congress may have been the suppression of the drug habit.

2. CRIMINAL LAW ⊜304(4)—JUDICIAL KNOWLEDGE—MEANING OF WORDS.
   Evidence that morphine, heroin, and cocaine are derivatives of opium and coca leaves is unnecessary, on prosecution for violation of the Harrison Anti-Narcotic Act (Comp. St. 1916, §§ 6287g–6287q); it being a matter of meaning of words long in common use, about which there is no obscurity, controversy, or dispute.

3. POISONS ⊜4—HARRISON ANTI-NARCOTIC ACT—SALE BY PHYSICIAN AS DEALER.
   Relative to violation of the Harrison Anti-Narcotic Act (Comp. St. 1916, §§ 6287g–6287q) by selling without written orders from purchasers, it is immaterial that defendant is a physician; his sales not being in the practice of his profession, but as a registered dealer.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

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*Rehearing denied January 13, 1919.

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J. H. Hughes was convicted of violation of the Harrison Anti-Narcotic Act, and brings error. Affirmed.

B. F. Pursel, of Kansas City, Mo., for plaintiff in error.

Francis M. Wilson, U. S. Atty., and William G. Lynch, Asst. U. S. Atty., both of Kansas City, Mo.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

HOOK, Circuit Judge. Hughes complains of a conviction and sentence for violating section 2 of the Harrison Anti-Narcotic Act of December 17, 1914 (38 Stat. 785, c. 1 [Comp. St. 1916, § 6287h]), by the sale of morphine, heroin, and cocaine to persons not producing written orders on forms issued by the Commissioner of Internal Revenue. He contends that the statute is unconstitutional, that the indictment charged no offense, and that the evidence at the trial was insufficient to justify his conviction.

Section 1 of the act (section 6287g) requires, among other things, all dealers in and dispensers of opium and coca leaves, their salts, derivatives, or preparations, to register with the collector of internal revenue and pay a tax. Section 2 prohibits, with exceptions, the sale or dispensing of the drugs, except upon the written order of the person seeking to purchase, made upon blank forms issued by the Commissioner of Internal Revenue. It also provides that to obtain the blanks the applicant must have registered and paid the tax required by section 1. Duplicate orders in each sale must be made, one to be retained by the purchaser and the other delivered to the dealer, both to be kept for a prescribed period and subject to official inspection. Section 9 (section 6287*o*) prescribes the penalty for violations. The effect of the provisions is to limit sales to registered dealers, save the excepted instances. One exception authorizes physicians and certain others to dispense the drugs in the course of "professional practice only," and the obtaining of them from a dealer upon a physician's prescription, both without the written order above referred to. The accused registered as a dealer and paid the tax, but he sold without written orders from the purchasers.

[1] It is urged that the purpose of the statute was the suppression of the drug habit, and that it is therefore not a revenue measure, but one of police, within the exclusive province of the states. But we think it cannot be said that the provisions referred to have no real or substantial relation to the raising of revenue. If they have such relation, we have nothing to do with any other purpose of Congress. The traffic in such drugs is of a peculiar character. Considerable of it is carried on covertly by peddlers, and the small bulk of the articles facilitates clandestine distribution. The difficulties of subjecting the traffic to excise and preventing frauds on the revenue are obvious, and it was competent for Congress to bring the traffic into the open. That there may be consumers of the drugs, who cannot or will not obtain them in the ways provided, is not enough to condemn the statute. Substantially the same result might have followed a heavy tax on such transactions, as to which there would be no col-

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or for claim of unconstitutionality. In a case involving another provision, this same statute was held to be a revenue measure. United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854; Id. (D. C.) 225 Fed. 1003.

[2, 3] It is also urged that there was no evidence that morphine, heroin, and cocaine are derivatives of opium and coca leaves. We think that is a matter of which notice may be taken. In a sense the question is one of the definition or meaning of words long in common use, about which there is no obscurity, controversy, or dispute, and of which the imperfectly informed can gain complete knowledge by resort to dictionaries within reach of everybody. Had it deemed it necessary, the court might have affirmatively told the jury the nature of the drugs sold by the accused, but instead of doing so it assumed without question that they were of the kind covered by the statute, as in fact they were. The entire trial proceeded without objection upon that assumption. Common knowledge, or the common means of knowledge, of the settled, undisputed, things of life, need not always be laid aside on entering a courtroom.

It may be said, in conclusion, that, though the accused was a physician, he was not indicted and charged as one, and it was clearly shown that his sales were not in the practice of his profession. His position was that of any other nonprofessional dealer.

The sentence is affirmed.

HUGHES v. UNITED STATES. *

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5140.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

U. S. G. Hughes was convicted of violation of the Harrison Anti-Narcotic Act (Act Dec. 17, 1914, c. 1, 38 Stat. 785 [Comp. St. 1916, §§ 6287g–6287q]), and brings error. Affirmed.

B. F. Pursel, of Kansas City, Mo., for plaintiff in error.

Francis M. Wilson, U. S. Atty., and William G. Lynch, Asst. U. S. Atty., both of Kansas City, Mo.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

HOOK, Circuit Judge. This case is like No. 5139 (253 Fed. 543, —— C. C. A. ——) in all essential particulars. The sentence is affirmed for the same reasons.

*Rehearing denied January 13, 1919.

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McNEE v. WHITEHEAD.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5126.

1. TAXATION ⟸181—INDIAN LANDS.
The Atoka Agreement (Curtis Act) § 29, providing that allotted lands shall be nontaxable while title remains in the original allottee, did not continue the exemption from taxation which a Choctaw Indian of the half-blood enjoyed to his heirs of less than half Indian blood.

2. TAXATION ⟸181—INDIAN LANDS.
Under Act May 27, 1908, §§ 1, 2, 4, 6, 9, relating to restriction on alienation of lands allotted to Indians, and declaring that death of any allottee removed restrictions, *held* that on the death of a half-blood allottee and descent of lands to heirs of less than half Indian blood the lands became subject to taxation prior to their sale through the Oklahoma probate court; the provisions as to minority not changing the matter.

In Error to the United States District Court for the Eastern District of Oklahoma; J. W. Woodrough, Judge.

Action between George A. McNee and James E. Whitehead. There was a judgment for the latter, and the former brings error. Reversed and remanded for further proceedings.

James S. Twyford and Solon W. Smith, both of Oklahoma City, Okl., for plaintiff in error.

F. E. Riddle, of Tulsa, Okl., and J. E. Whitehead, of Oklahoma City, Okl., for defendant in error.

S. P. Freeling, of Oklahoma City, Okl. (Hunter L. Johnson, of Oklahoma City, Okl., on the brief), amicus curiæ.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

HOOK, Circuit Judge. The question in this case is whether lands in Oklahoma allotted to a Choctaw Indian of the half-blood, and therefore exempt from taxation while held by him, become taxable upon his death and the descent of the title to his heirs of less than half Indian blood, prior to their sale through the probate courts of the state. The trial court held them exempt.

[1] There was no vested, contractual right of exemption beyond the power of Congress to abrogate. The Atoka Agreement (section 29 of the Curtis Act [Act June 28, 1898, c. 517, 30 Stat. 495]) provides that the allotted lands "shall be nontaxable while the title remains in the original allottee," but manifestly this does not apply when the title has passed to his heirs by inheritance. To hold otherwise would require the judicial interpolation of the words "or his heirs" after the word "allottee," and we are not authorized to make it.

[2] The case really turns upon sections 1, 2, 4, 6, and 9 of the Act of May 27, 1908 (35 Stat. 312, c. 199). So far as pertinent they are as follows:

Section 1: "That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five

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Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. * * *"

Section 2 provides that the term "minor" or "minors," as used in the act, shall include all males under the age of 21 years and all females under the age of 18 years.

Section 4: "That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes. * * *"

Section 6: "That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the state of Oklahoma."

Section 9: "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee. * * *"

As regards restrictions upon the alienation of allotted lands and their exemption from taxation, it was the practice of Congress, recognized by repeated decisions of the courts, to make a clear distinction between those lands still held by the original allottees and those acquired from them by inheritance, and that distinction should be borne in mind in the present case. It is conceded here that, if sections 1, 4, and 9 stood alone, the lands in question would be taxable; but it is argued that the definite prescription of ages of minority and the subjection of the lands of minors so defined to the orders of the local probate courts amount to the imposition of another restriction upon alienation, with its accompanying exemption from taxation, notwithstanding the removal of "all restrictions" in sections 1 and 9. We do not think the argument is sound. Where Congress so unmistakably manifested an intention to remove all restrictions, it would take language more clear than that before us to indicate that it imposed another at the same time. In one sense the definition of minority and the commission of jurisdiction to the probate courts of the state constitute a limitation or restriction but the purpose was to avoid the rules, sometimes loosely applied, of estoppel, waiver, and ratification in respect of the acts of minors and to prevent premature majority by decree of a court or by marriage as provided by state statutes. This was but a recognition and strengthening of the ordinary disabilities of minority in behalf of those of Indian blood, not an exception to the removal of restrictions upon alienation generally.

The judgment is reversed, and the cause is remanded for further proceedings in conformity herewith.

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DALY-WEST MINING CO. et al. v. SAVAGE et al.*

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 4914.

APPEAL AND ERROR ⊂⊃766—BRIEFS—SPECIFICATION OF ERRORS—COURT RULES.
Brief for plaintiffs in error not containing a specification of errors on which they rely, as required by Circuit Court of Appeals rule 24 (188 Fed. xvii, 109 C. C. A. xvi), judgment must be affirmed.

Hook, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Action by Catherine Savage and others, widow and minor children of John Savage, deceased, against the Daly-West Mining Company and others, for death of deceased. Judgment for plaintiffs, and defendants bring error. Affirmed.

Hiram E. Booth, of Salt Lake City, Utah (William H. King, P. T. Farnsworth, Joel Nibley, E. O. Lee, Carl A. Badger, and Benjamin L. Rich, all of Salt Lake City, Utah, and William E. Hutton, of Denver, Colo., on the brief), for plaintiffs in error.

Culbert L. Olson, of Salt Lake City, Utah (Albert J. Weber, of Salt Lake City, Utah, on the brief), for defendants in error.

Before HOOK and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. The brief filed by counsel for plaintiffs in error does not contain a specification of errors upon which they rely, as required by rule 24 of this court (188 Fed. xvi, 109 C. C. A. xvi). In City of Lincoln v. Sun Vapor Street Light Co., 59 Fed. 756, 8 C. C. A. 253, decided on January 29, 1894, this court announced that this rule "will be enforced by the court, to the end that the vital issues in the case may be clearly presented." It has been enforced ever since. Kinser v. United States, 231 Fed. 856, 146 C. C. A. 52, Cooper v. Jewett, 233 Fed. 618, 628, 147 C. C. A. 426. The latest case is City of Goldfield v. Roger, 249 Fed. 39, —— C. C. A. ——.

The judgment must therefore be, and is, affirmed.

SMITH, Circuit Judge (concurring.) I fully concur in the foregoing opinion and if I had any doubt upon the question raised by Judge Hook still I think there is no prejudicial error shown and the case must in any event be affirmed.

HOOK, Circuit Judge (dissenting.) Our rules of appellate practice, like those of the Supreme Court, are not rules of substantive law determining rights, but are designed merely to facilitate the machinery of justice. Being made by the court, they are applied not inexorably and literally in all cases but with a tempered consideration of their purpose and the efforts of counsel to observe them. We have so ap-

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*Rehearing denied January 7, 1919.

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plied them in innumerable instances, and in very many in which compliance has been much less apparent than in the case at bar.

The brief for plaintiffs in error is admirable for its conciseness. True, it does not contain a formal assemblage in one place of the assignments of error relied on, but there is what I think should be regarded, consistently with our custom, as an equivalent. After a narrative of the case and of the trial the brief is divided into eight separately numbered divisions, each disclosing a matter of complaint. I will refer to but two of them, one relating to an instruction asked and refused, and the other to an instruction given. The two instructions, one denied and the other given, are antithetic, and they present a question that goes in a direct way to the very root of the verdict and judgment. At the hearing that question was argued at length without suggestion that it was not sufficiently brought to our notice. What does the brief contain by way of specification of the two errors asserted? The heading of the division relating to the instruction denied gives the number of the assignment of error covering it. Then are given the pages of the record where the assignment, the request for the instruction and the exception to the ruling of the court may be found. Following this, the requested instruction itself it set out "totidem verbis," to use the expression of our Rule 24, with a statement that the court erred in refusing it. Then the argument. The division of the brief allotted to the instruction which the court gave is similarly arranged and is equally specific.

Beyond doubt counsel sought to comply with our rules and they succeeded in all that concerns substance as distinguished from form. We could not help but know from the brief alone precisely what the trial court did, that exceptions were reserved and that our jurisdiction and duty to review were specifically invoked, all with appropriate references to the printed record, and an orderly presentation and discussion of each point separately.

GRAVELLE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5087.

INDIANS ⇐13—ALLOTMENT—SELECTION.

As Act Feb. 8, 1887 (Comp. St. 1916, § 4195 et seq.), Act Jan. 14, 1889, and Act April 28, 1904, do not require the distribution of all lands embraced in the White Earth reservation, reservation of land by the Secretary of the Interior in accordance with the treaty of 1867 for an agency farm, etc., will not be reviewed, and, there being other land, an Indian is not entitled to select such land as an allotment.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by Annie Fairbanks Gravelle against the United States. From a decree for the United States, complainant appeals. Affirmed.

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George B. Edgerton and Charles N. Dohs, both of St. Paul, Minn., for appellant.

Alfred Jaques, U. S. Atty., of Duluth, Minn., and Francis J. Kearful, Asst. Atty. Gen., and Leslie C. Garnett, of Matthews, Va., for the United States.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

HOOK, Circuit Judge. This is an appeal by Annie Fairbanks Gravelle from a decree denying her right to an allotment of a particular 80-acre tract of land in the White Earth Indian reservation in Minnesota. She is a mixed-blood Indian of the Mississippi band of Chippewas and resided on the reservation. Under the treaty of 1867 (16 Stat. 719) and subsequent acts of Congress she was entitled to 160 acres of the lands in the reservation, half of which had been allotted to her before the present controversy arose. In February, 1901, the Secretary of the Interior reserved from allotment a large tract of land in the reservation, including the 80 acres in controversy, for administrative and school purposes, and particularly the 80 acres as an agency farm and pasture. Notwithstanding this the appellant in May, 1916, selected it, and insisted that it be set apart to her to complete her allotment right. She contended that the withdrawal of the land by the Secretary was without authority of law. The trial court held otherwise.

Of course, the Secretary of the Interior has no power to defeat the purpose of an act of Congress directing the disposition of Indian lands, but as the general representative of the government in its relation to the Indians there is much that he may consistently do to carry out its policy towards them while they are still in a state of dependence, and especially in fulfilling its continuing treaty obligations. While the acts of Congress bearing on the present case (Act Feb. 8, 1887, c. 119, 24 Stat. 388 [Comp. St. 1916, § 4195 et seq.]; Act Jan. 14, 1889, c. 24, 25 Stat. 642; Act April 28, 1904, c. 1786, 33 Stat. 539) do not expressly authorize the Secretary to withhold from allotment any part of the White Earth reservation, on the other hand, they do not require the distribution of the entire 36 townships of land embraced in it. Undoubtedly there was a substantial surplus after the completion of the allotments to all entitled. At any rate there is no question here of an insufficiency in quantity or quality created by the withdrawal by the Secretary.

The treaty of 1867 made provisions, rather comprehensive for that period, for the establishment of schools and the promotion of agriculture on the reservation, and pledged substantial aid by the government for those objects. We need not recite in detail what has been done in fulfillment of the treaty. It is sufficient to say that in the years following extensive buildings and other facilities have been provided for the education of the Indians and their instruction in the arts of husbandry. The setting apart of 80 acres for an agency farm and pastures fits well within the treaty, and is not inconsistent with the allotment statutes. It is for the common benefit of all the In-

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dians of the reservation, like schools for a city or an agricultural college and farm for a state, and not merely for part of them, as was the case in Leecy v. United States, 111 C. C. A. 254, 190 Fed. 289. The quantity reserved does not appear unreasonable for the purpose, and the location was for the judgment of the Secretary of the Interior, which the courts will not review. That the tract reserved has not yet been used as an agency farm and pasture is unimportant. A view of future needs was permissible, especially when they might be defeated by individual selections and allotments.

The decree is affirmed.

URY et al. v. MAZER CIGAR MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5045.

1. COURTS ⟸328(10)—FEDERAL COURTS—JURISDICTIONAL AMOUNT.
The federal court had jurisdiction of a suit for unfair and fraudulent competition, where the value of the right to be protected by the injunction exceeded the jurisdictional amount, even though the damages recovered were less than such amount.

2. TRADE-MARKS AND TRADE-NAMES ⟸78—UNFAIR COMPETITION—WHAT CONSTITUTES.
Where defendant copied complainant's cigar containers, the fact that each did business in distant cities, and defendant's containers did not come into competition with those of complainant, other than containers on which complainant pasted a customer's name, *held* not to defeat a suit for unfair competition.

3. TRADE-MARKS AND TRADE-NAMES ⟸93(3)—UNFAIR COMPETITION—EVIDENCE.
Evidence *held* to show that defendant, who was bookkeeper and salesman, engaged with another, who was guilty of unfair competition, was a guilty participant.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by the Mazer Cigar Manufacturing Company against Harriet Ury and another. From a decree for complainant, defendants appeal. Affirmed.

Chester H. Krum, of St. Louis, Mo., for appellants.

James Love Hopkins, of St. Louis, Mo., for appellee.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. In a suit by the Mazer Cigar Manufacturing Company against Harriet and Richard Ury for unfair trade and fraudulent competition by closely copying the size, color, and marks of its tin containers for hand-made cigars, the trial court gave plaintiff a decree of injunction and for an accounting. Upon the accounting plaintiff was awarded $346.60 and interest. The defendants appealed, and have specified four errors on which they rely.

[1] 1. That the amount in controversy was not sufficient to confer jurisdiction. But there was proof that plaintiff's property right

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which it sought to protect by the suit was of a value much more than the jurisdictional requirement. It is a familiar rule that the test is the value of the right to be protected against a continuing violation, not the amount of loss or damage actually caused by the trespass to date.

2. That plaintiff's claim on the merits was without equity. Upon this a comparison of the containers shows a close resemblance well calculated to deceive the ordinary purchaser. Moreover, there was convincing proof that the defendants had the plaintiff's containers copied in form, marks, and appearance, with the evident intention of appropriating to themselves its trade and good will.

[2] 3. That defendants were not competitors of plaintiff, and therefore there was no unfair competition. This contention rests upon the fact that plaintiff, a Michigan corporation, made and sold its product from Detroit, and that defendants' sales were confined to St. Louis, Mo., and neighborhood; also that the only competitive contact in St. Louis was with a customer and distributor of plaintiff, whose name was printed on the containers. This practice was in accord with established business methods, in which there was no intent to deceive the public, and it does not affect the right to protection. There was in fact a fraudulent competition.

[3] 4. That the liability of defendant Richard Ury was not shown. The evidence disclosed that the business in which the unfair and fraudulent acts were committed belonged to Harriet Ury, and was conducted largely by her two sons. One of them, Richard, was a salesman and the bookkeeper. He conducted the correspondence with the concern in Pennsylvania which resulted in the manufacture of the imitating containers. We have no doubt of his guilty participation.

The decree is affirmed.

In re PORTER.

HANECY v. TAYLOR (two cases).

(Circuit Court of Appeals, Seventh Circuit. May 16, 1918. Rehearing Denied September 6, 1918.)

Nos. 2543, 2560.

BANKRUPTCY ⟸170—ATTORNEY'S FEES—RETURN.

Where payment by bankrupt to his attorney, in contemplation of bankruptcy and for services rendered or to be rendered in the bankruptcy proceeding, was in excess of the fair and reasonable value of the services rendered, the attorney was properly required to return the excess.

Petition to Review and Revise Order of, and Appeal from, the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of Francis G. Porter, bankrupt. Petition by James W. Taylor, trustee in bankruptcy, against Elbridge Hanecy. There was an order in favor of petitioner, and defendant petitions to review

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and revise, and also appeals. Petition to review and revise dismissed, and order affirmed.

William A. Rogan, of Chicago, Ill., for petitioner.
Carlos S. Andrews, of Chicago, Ill., for respondent.

Before BAKER, KOHLSAAT, and EVANS, Circuit Judges.

PER CURIAM. On the hearing upon trustee's petition to have certain moneys paid to him, the referee found that the bankrupt, Porter, had paid his attorney for legal services rendered and to be rendered in the matter of the bankruptcy the sum of $2,491.21; that the maximum reasonable attorney's fees for such services were $500. The referee directed the attorney to pay the excess to the trustee. This order of the referee was duly approved by the District Court, and is here attacked, both by petition to review and revise and by appeal.

Petitioner, Hanecy, asserts that the money was paid to him pursuant to an agreement made shortly before the bankruptcy proceedings were instituted, and the agreement thus made called for services to be by him rendered in matters entirely disconnected with these bankruptcy proceedings; that such petitioner was in fact not even aware that bankruptcy proceedings were contemplated. He also asserts that part of the moneys by him received came directly from the bankrupt's wife, while the trustee contends the property converted into cash, if ever the wife's property, was given by her to her husband, and thereby became a part of the bankrupt's estate. The issues thus presented go to the sufficiency of the evidence to support the findings of the referee, and not to the sufficiency of the findings to support the order.

We have examined the evidence carefully and find it conflicting. Nothing could be gained by setting forth the conflicting statements. We conclude that such evidence amply supports the referee's finding that the payment was made by the bankrupt out of his estate in contemplation of bankruptcy, and was for services rendered or to be rendered such bankrupt in the matter of his bankruptcy proceedings. The amount thus received being in excess of the fair and reasonable value of the services rendered, the recipient was properly required to return the excess.

The petition to review and revise is dismissed, and the order affirmed.

BRINKMAN v. MORGAN, Warden.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5114.

CRIMINAL LAW ⇐1216(2)—SENTENCE—SUFFICIENCY—"CONCURRENTLY."

Where petitioner pleaded guilty to an indictment charging eight forgeries of postal money orders, and under Criminal Code, § 218 (Comp. St. 1916, § 10388), he might have been sentenced to cumulative imprisonment for 5 years for each offense, a sentence to 10 years' imprisonment, to run concurrently on all counts, is valid, and cannot be treated as a sen-

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tence for 5 years, because of the word "concurrently," as that means in unity, and may be treated as providing the imprisonment should run on all the counts in the aggregate.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Concurrently.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Petition for a writ of habeas corpus by August Brinkman against Thomas M. Morgan, Warden of the United States Penitentiary at Leavenworth, Kan. From an order denying his discharge, petitioner appeals. Affirmed.

August Brinkman, of St. Louis, Mo., pro se.

Fred Robertson, U..S. Atty., and L. S. Harvey, Asst. U. S. Atty., both of Kansas City, Kan., for appellee.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

HOOK, Circuit Judge. This is an appeal from an order in habeas corpus denying the discharge of Brinkman, the appellant, from imprisonment in the United States penitentiary at Leavenworth, Kan. He was indicted in eight counts for that number of separate offenses by forging and uttering postal money orders. He pleaded guilty and was sentenced to imprisonment in the penal institution mentioned for 10 years, commencing on a day specified "and to run concurrently on all counts of the indictment." He contends that the words above quoted from the sentence either make it one of imprisonment for 5 years, which with credit for good conduct he claims to have served, or that they are without sense and render the sentence wholly void.

Under the statute applying to his case the appellant might have been sentenced to cumulative imprisonment for 5 years on each count, a total of 40 years. Section 218, c. 8, Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1131). But he contends that a sentence in gross on several counts greater than the statutory provision for one is invalid, and that the 10 years imposed upon him, being more than the punishment authorized for a single offense, cannot properly be said to run "concurrently" on 8. We can conceive of no sound legal objection to a single sentence for several offenses charged in one indictment, if it does not exceed the statutory maximum for all. We have held such a sentence valid. Myers v. Morgan, 139 C. C. A. 641, 224 Fed. 413. It is true that the word "concurrently" is generally used when terms of imprisonment are imposed separately for each of two or more offenses charged in the same indictment, and to indicate that while the convicted prisoner is serving one he is serving all. When so used, the sentence is the opposite of cumulative. But that use is not exclusive. Concurrently is also defined as "in combination or unity." When found in a sentence like that before us, the reasonable construction is that the years of imprisonment specified run as a unit upon all the counts in the indictment; that is to say, not upon each of the counts severally, but all of them in the aggregate

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The prior history of this case—a first sentence, a decision in habeas corpus, and then the present sentence—indicates that the above was intended by the court in which the appellant was tried.

Some other contentions are made. They are either not sustained by the record or not open in habeas corpus.

The order is affirmed.

CHICAGO, R. I. & P. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5046.

MASTER AND SERVANT ⇐13—REGULATIONS—RAILROAD TELEGRAPHER—HOURS OF SERVICE.

An hour allowed a telegrapher for meals, during which he was subject to recall, etc., cannot be deducted from the whole time he was on duty within the Hours of Service Act, § 2 (Comp. St. 1916, § 8678), so as to allow a railroad company to escape penalty for violating the act by keeping the telegrapher on duty more than 9 hours.

In Error to the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Proceeding by the United States of America against the Chicago, Rock Island & Pacific Railway Company for violation of the Hours of Service Act. There was a judgment for the United States, and defendant brings error. Affirmed.

Paul E. Walker and Luther Burns, both of Topeka, Kan., for plaintiff in error.

Fred Robertson, U. S. Atty., of Kansas City, Kan., and Roscoe F. Walter, Sp. Asst. to U. S. Atty., of Washington, D. C.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. The railway company was held by the trial court to have violated section 2 of the Hours of Service Act of March 4, 1907 (34 Stat. 1415, c. 2939 [Comp. St. 1916, § 8678]), by requiring or permitting a telegraph operator in one of its day and night stations to remain on duty more than 9 hours in a 24-hour period. On November 25, 1913, the operator went on duty at 2 p. m. and left at 11:40 p. m., but in the meantime had been absent an hour for supper. The question in the case depends upon the conditions of his absence for supper, and is whether the time should be deducted from the 9 hours and 40 minutes, or whether he was still on duty within the intent of the statute.

The usual daily service of the operator was from 2 p. m. to 11 p. m., with an hour out for rest and his evening meal. The hour, generally from 6 o'clock to 7, was not definitely fixed, but depended upon the requirements of the work. The understanding between him and the company, and the practice, was that, though at some time he should have his hour off, it was alterable and adjustable to

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the needs of the office; also that, while off duty during the hour, he was subject to recall by the company whenever its business required. It is clear that the time allowed was so uncertain and restrained that it was not a period for refreshment, rest, and recreation within the meaning of the law. It was not his own, to occupy as he deemed best. He was at his employer's beck at any time, and might even be called to the office from the table. He was not free to go from his home beyond reach of a summons to active duty, but had to hold himself within call and in readiness to respond at any moment. Instead of that sense of freedom essential to mental and physical relaxation, a tenseness was imposed as by an alarm clock sounding peremptorily, but with uncontrolled irregularity. The hour of rest and refreshment was dominated by the business requirements of the company. That on the day in question he was not called before it expired is immaterial. The arrangement between them and the practice determined their relation, and whether the operator should be regarded as free or on continuing duty. This conclusion is in harmony with the decisions of this and other courts. It is enough to cite Missouri, Kansas & Texas R. Co. v. United States, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. Ed. 144.

The judgment is affirmed.

HUNNICUTT et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. October 18, 1918.)

No. 3222.

CRIMINAL LAW ⊜1038(1)—APPEAL—OBJECTIONS TO CHARGE.

Errors in charge are not available in reviewing court, where court's attention was not directed thereto before jury's retirement.

In Error to the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Will Hunnicutt and others were convicted of illicit distilling, and they bring error. Affirmed.

John R. Cooper, of Macon, Ga. (E. W. Butler and Sam Hunter, both of Macon, Ga., on the brief), for plaintiffs in error.

E. M. Donalson, U. S. Atty., of Macon, Ga.

Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

PER CURIAM. A reversal is sought because of alleged errors in parts of the court's charge to the jury. The record fails to show that before the jury retired any exception was so made as to direct the court's attention to either of the parts of its charge now complained of. The judgment is not to be reversed because of rulings made in the course of the trial, of which complaint was not made to the court before the case went to the jury.

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UNION SPECIAL MACH. CO. v. QUAKER CITY FLOUR MILLS CO.
QUAKER CITY FLOUR MILLS CO. v. UNION SPECIAL MACH. CO.

(Circuit Court of Appeals, Third Circuit. August 2, 1917.)

Nos. 2201, 2202.

1. PATENTS ⟸328—NOVELTY—USE OF PRIOR ART.
Bigelow patent, No. 875,314, claims 67–75, inclusive, for a machine for sewing the mouths of filled sacks, is valid; the production of such machine not being, in view of the prior art, the mere exercise of mechanical skill in assembling existing mechanisms, but a problem calling for a high order of inventive genius.

2. PATENTS ⟸328—INFRINGEMENT.
Bigelow patent, No. 875,314, claims 67–75, inclusive, for a machine for sewing the mouths of filled sacks, *held* infringed by defendant's machine, which is illustrated by the drawings of the Burghardt patent, No. 766,111, for a thread cutter for bag-sewing machines, but which, in so far as the issues are concerned, does not purport to be made under a patent.

Cross-Appeals from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Bill by the Union Special Machine Company against the Quaker City Flour Mills Company. Bill dismissed (236 Fed. 246), and complainant appeals; defendant prosecuting cross-appeal. Decree vacated, and record remanded, with directions.

Fraley & Paul, of Philadelphia, Pa. (Joseph C. Fraley, of Philadelphia, Pa., and C. L. Sturtevant and E. G. Mason, both of Washington, D. C., of counsel), for appellant.

J. Edgar Bull, of New York City, and Wm. N. Cromwell, of Chicago, Ill. (Cromwell, Greist & Warden, of Chicago, Ill., of counsel), for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the Union Special Machine Company filed a bill in equity against the Quaker City Flour Mills Company, charging infringement of two patents granted to it as assignee. One of said patents, No. 875,314, to John Bigelow, on December 31, 1907, was for a filled-bag sewing machine; the other, No. 875,339, to Charles H. Foster, also dated December 31, 1907, was for apparatus for delivering filled bags to sewing machines. That court adjudged each patent invalid as to the claims in suit, holding, in an opinion reported at 236 Fed. 246, that:

"In view of the prior art, the subject-matter claimed therein involved only the exercise of mechanical skill, and did not require invention."

The case is an important one. It concerns machines in general use, of high mechanical effectiveness, and of much economic and commercial value in industries where the mouths of filled bags of different sizes are sewed. The plaintiff is a large manufacturer of special sewing machines for factory, as distinguished from domestic, use, and,

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while the defendant is engaged in milling flour, its bag-sewing machine is manufactured by the Washburn-Crosby Company, which is defending this test case. No questions of title or accounting for past profits are here involved, and the purpose of the parties is to make this a test case between the two manufacturers. It will therefore be seen the issues involved are simply validity and infringement.

[1] Turning first to the question of validity, we note that it is now clear that the successful solution of the problem of constructing a filled-bag sewing machine involves the successful co-ordination of several dependent mechanical elements. In the first place, for successful commercial practice, it is necessary that the passage of the bags on the endless conveyor be rapid; otherwise, the machine could not be used. In the next place, for mechanical reasons, it is necessary that the travel of the bags be continuous and nonintermittent, as it is obvious that a conveyor should not be subjected to the sudden and numerous jerks incident to an intermittent, interrupted forward movement of a number of heavy filled bags. In the next place, the sewing by machine of a fabric requires that there must be an intermittent dwell or interrupted movement of the fabric during the instant the needle is in it. It follows, therefore, that to make a bag-sewing machine mechanically operative, that portion of the bag which is immediately adjacent to the stitch-forming mechanism, and which is being sewed, must have an intermittent forward movement to permit needle disengagement from the fabric, while at the same time there must be a continuous, nonintermittent advance of the main body or bulk of the bag; in other words, there must be a distinct, individual, intermittent fabric feed, and a distinct, individual, continuous bag feed, different in themselves, but so coupled and co-ordinated by combining mechanism that the continuous travel of the body of the bag and the intermittent travel of the mouth of the bag shall be actuated from a single driving shaft, so as not to conflict with each other.

That filled bags could be conveyed rapidly was, of course, well known. That filled bags could be successfully machine sewed was equally well known. That bag conveyance was and must be continuous and nonintermittent, and that sewing was and must be intermittent, were recognized facts. It was, however, to the very difficult problem of the harmonizing of these two latter seemingly antagonistic, indispensable factors, that the patent of Bigelow was, in the claims here concerned, addressed. In addition to the above antagonistic elements of fabric feed and bag feed, three other complicating factors were also involved. In the first place, the bag was filled and open-mouthed, and it had to stand upright on the conveyor; hence the sewing mechanism had to overhang the upright bag, and therefore the fabric to be sewed must be presented to the needle in a vertical position, and the needle must reciprocate back and forth in a horizontal, instead of in the customary vertical, way. Moreover, as the bags themselves were of different heights, it is evident that the conveyor, which has continuous motion, as we have seen, and had to be co-ordinated to the intermittent motion requirement of the sew-

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ing mechanism, had to be so constructed that it could be adjusted to handle different heights of bags without disturbing such co-ordinated relation between it and the sewing machine. These several features are aptly described by one of the plaintiff's witnesses in these words:

"In such a machine it is important that the feed or carrier belt or conveyor should be capable of being moved up and down relatively to the sewing machine, so that the same machine may be used for bags of different sizes. The movement of the conveyor or carrier belt is automatic; it being fed or moved along by a connection with the same driving mechanism which drives the stitching mechanism, thereby insuring a proper feed of the bag as the stitching proceeds. This involves co-ordination between the automatic driving mechanism and the mechanism for raising and lowering the carrier belt, in order that the carrier belt may be driven at the proper speed, irrespective of its elevation. The feed of the material in an ordinary sewing machine is commonly an intermittent or step-by-step feed. In dealing, however, with so large a weight as a filled bag, it is important that it should be fed continuously, to avoid the abrupt movement of an intermittent feed."

The final development in this art of a successful filled-bag sewing machine has now brought into clear light that these fundamental factors and conflicting elements confronted the art, and had to be overcome and co-ordinated, if a commercially successful machine was to be produced. It is also clear from the testimony that the need of such a machine was felt in the art, that sewing machine constructing companies of long experience recognized the difficulty of its solution, and that men of large mechanical ability addressed themselves to the problem. It has therefore seemed probable to us from the proofs that the production of such a machine was not the mere exercise of mechanical skill in assembling existing mechanisms, but rather a problem that called for a high order of inventive genius. That such was then the view of those versed in the art is shown by the correspondence in 1897 between two such experienced firms as the Washburn-Crosby Company, the real defendant in this case, and the well-known Willcox & Gibbs Sewing Machine Company. The letter which is printed in the margin [1] shows that the Washburn-Crosby Company were un-

[1] New York, November 16, 1897.

Washburn-Crosby Co., Minneapolis, Minn.—Gentlemen: We duly received your esteemed favor of October 21st, and since its receipt have had under consideration this matter of *stitching the mouths of flour sacks when filled.* Several of our experts have looked the subject over, and we regret to say to you that none of them are able to advise us that the thing is very easy of accomplishment, nor is it very clear to any of them how the thing is to be done at all, and, under any circumstances, it cannot be discovered that there is very much money in this thing, however well it might be done. You tell us in yours of October 21st that some Chicago people already have "a large machine for packing seeds and grain from the spout and sewing them into the automatic stitch." It would seem to us (and the same recommendation comes from every one who has looked into this matter in your behalf) that those are the people to go to, to get done the work you want on flour sacks. If they have got so far as to have a machine successfully working in the stitching of sacks filled with seeds, it would appear to be a simple matter to apply it to sacks filled with flour. If we wanted anything of this kind done, we should betake ourselves at once to these Chicago people, in preference to attempting any device of our own getting up. In this way we should avail of experience already gained, and in all probability find the broad ground so covered with patents by these Chicago people as to make anything outside

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able to solve the problem of a filled-bag sewing machine, and had appealed for help to the Willcox people. The experts of the latter, however, were unable to see how it could be done, but advised the Washburn people to confer with Bigelow, the patentee, as a man with large experience in mechanical matters. It is also clear that the Timewell machine, made under patent No. 607,810 of July, 1898, applied for July 31, 1897, and several others, and which is now urged as an anticipation, was confessedly inadequate to meet the standard of efficiency required in a commercially successful bag-sewing machine. In that regard the testimony of Harding, the superintendent of the Washburn-Crosby Company, was that they returned the Timewell machine to the manufacturer because it was not a success in their work; that he suggested some changes, which were made; that these were not successful, and the machine was again returned to the Timewell people. As to the capacity of the machine, the testimony of Scott, a millwright, was:

"We can sew all the way from 6 to 10 bags per minute, but 6 bags a minute is about as fast as they can handle them and truck them away, 100-pound bags."

So, also, Harding's testimony was:

"Q. Do you know about how many bags per minute or per hour you were able to sew with that machine? A. I think while the machine was running we were able to sew about 6 or 8 a minute. Q. Is that sufficient speed to make a machine of that kind desirable and profitable to the owner? A. It is not. Q. In your opinion, about how many sacks per minute ought to be the capacity of a machine to be a successful and desirable one for that purpose? A. From 15 to 20."

From the testimony of the same witness, it appears that he himself sought to solve the problem, and had a machine built, but that even a skilled operator was only able to get a speed of from 12 to 15 per minute on it, and that its use was finally abandoned. From our examination of the prior art, we may regard Timewell as the high-water mark of development prior to Bigelow; but as such it is clear that it left no impress on the milling industry, and had it, or indeed any other attempt prior to Bigelow, been all the art developed, that art would never have gone to the use of bags and the discard, in large part, of barrels. Moreover, it is clear that in Bigelow selecting from the prior art the separate individual elements not only was a wise choice required in the selection of usuable elements, but there was a corresponding wisdom required in discarding elements or parts of elements

of them somewhat inefficient. Mr. John Bigelow, of your city, is a long-time friend of ours, and during the past week he was in here. Being in the same business as yourselves, we interviewed him on the subject and went over the correspondence. He suggests that upon his return to Minneapolis he will look into the matter a little, and he thinks, if you will see him, a talk over the matter might be interesting and to your benefit. Mr. Bigelow has had a large experience in mechanical matters. We wish, after his return home (which will be about the 1st of December), you will see him for a talk; he will give you some idea of how we feel about this subject.

Yours very truly, [Signed] Willcox & Gibbs S. M. Co.,
J. Parmly, Treasu.

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inconsistent with the co-ordination essential to the successful working of a bag-sewing machine. The state of the art when Bigelow turned his attention to it, and its failings, and what he had to do, are fairly set forth in the summary made by counsel, viz.:

"In the case of the Timewell machine, which constituted the high-water mark of the prior art, the inventor mutilated the sewing machine, by omitting its feed mechanism, and thus precluded the possibility of proper co-operation between the needle and the feed of the fabric, so that imperfect sewing and breakage of needles must occur. So, also, the frame of the machine was made to completely inclose the critical portion of the bag where the stitching was being performed, and hence the operator could not have access thereto at the critical moment. The fabric at the region of the seam was rigidly clamped in a vertical plane. * * * The prior patentees, Onderdonk and Williams, associated a complete sewing machine (which otherwise might have worked properly) with a belt driven wholly by gravity, and consequently at a nonuniform rate, and without the co-ordination between the progress of the bag, as a whole, and the progress of the seam, as an individual part of that whole. Curtis and Timewell, who employed an adjustable carrier, persisted in driving it by a chain and sprocket device, which would not permit the carrier to be raised or lowered without at the same time actuating it backwards and forwards. Curtis had no supporting table, and only raised or lowered one end of the carrier. Taking the most extreme view against the Bigelow invention, and asserting that he only took one element from one inventor, a second element from another inventor, and so on, his work has this double aspect: First, intelligent recognition of the proper elements to select for a total new combination; and, second, rejection of certain structural features which theretofore had been associated with these elements in old combinations, and which would have precluded the realization of their latent possibilities, if united in the total new combination. These mistakes in the former machines were due to the fact that the inventors did not appreciate the tout ensemble, and failed to see the practical disadvantage of certain structural features. Bigelow, on the other hand, not only perceived all the desiderata, for the total combination, but recognized the non desiderata of various old elements, and eliminated the disadvantageous details. * * * In popular language, Bigelow found certain very desirable elements of the prior art, in bad company. He disassociated the individuals from their undesirable companions and recombined them in such form as to permit the efficient assertion of their own best qualities."

Bearing these matters in mind, we turn to the disclosure made by Bigelow, first noting that his machine, in addition to the co-operating mechanism adapted to the sewing and the conveying of the bags and for adjustment of the conveyor to different sized bags, also embodied other mechanism; e. g., for cutting thread, etc., which need not be here discussed. Putting, therefore, these nonessential matters aside, it suffices to examine the specification with a view to understanding the several claims which embody the sewing, conveying, and conveyor adjusting features above referred to; and in that connection it should be noted that Bigelow developed these different separate features of his machine at different times, and his testimony that he completed his machine at a certain time must be understood, not as referring to the completion of these separate agencies involved in the present case, but to the completion of the machine as a whole and involving these other mechanisms. Turning, therefore, to the patent, and confining our attention to the sewing, conveying, and the conveyor adjusting mechanism, and to the mechanism by which these three elements are co-ordinated, we note that Bigelow states:

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"The invention relates to means for sewing filled bags; and the object of the invention is to provide means whereby bags of flour or other material may be quickly closed and sewed. A machine for this work must be capable of holding the filled bags, grasping the folded tops thereof, feeding the same to the sewing machine proper, sewing the bag top, and clipping the thread, so that the bag will be delivered from the machine ready for shipment. Such a machine should be constructed and adapted for very rapid operation, and in order to permit the same, and the rapid manipulation of the parts by the operator and in accordance with the hand movements that are required, it becomes necessary to add many novel features to the sewing machine as it is commonly known. Portability is another feature which it is desirable to secure, as a single bag-sewing machine, if capable of being moved about a mill, will take care of the product of a number of packers. The difficulties that arise in this art are due to the weight of the bags to be handled, the lack of uniformity both in shape and size of the bags, the nature of the cloth or the paper from which the bags are made, the adjustments necessary in the sewing and feeding members, the necessity for stopping and starting the machine frequently, and the weight and cost of the mechanism that must be assembled to perform the various functions of a bag-sewing machine. These difficulties I have avoided in the invention fully described and claimed hereinafter."

He further says:

"My invention may be briefly described as comprising a frame carrying an adjustable automatic feeding table and a sewing head, which latter comprises a stitch-forming mechanism provided with a much longer work plate than usual, and which work plate carries or has associated with it an automatic bag starting and feeding mechanism, wherein the operator may arrange the flap of the bag when the machine is stopped, and which mechanism will automatically feed the bag forward to the sewing mechanism when the machine is started."

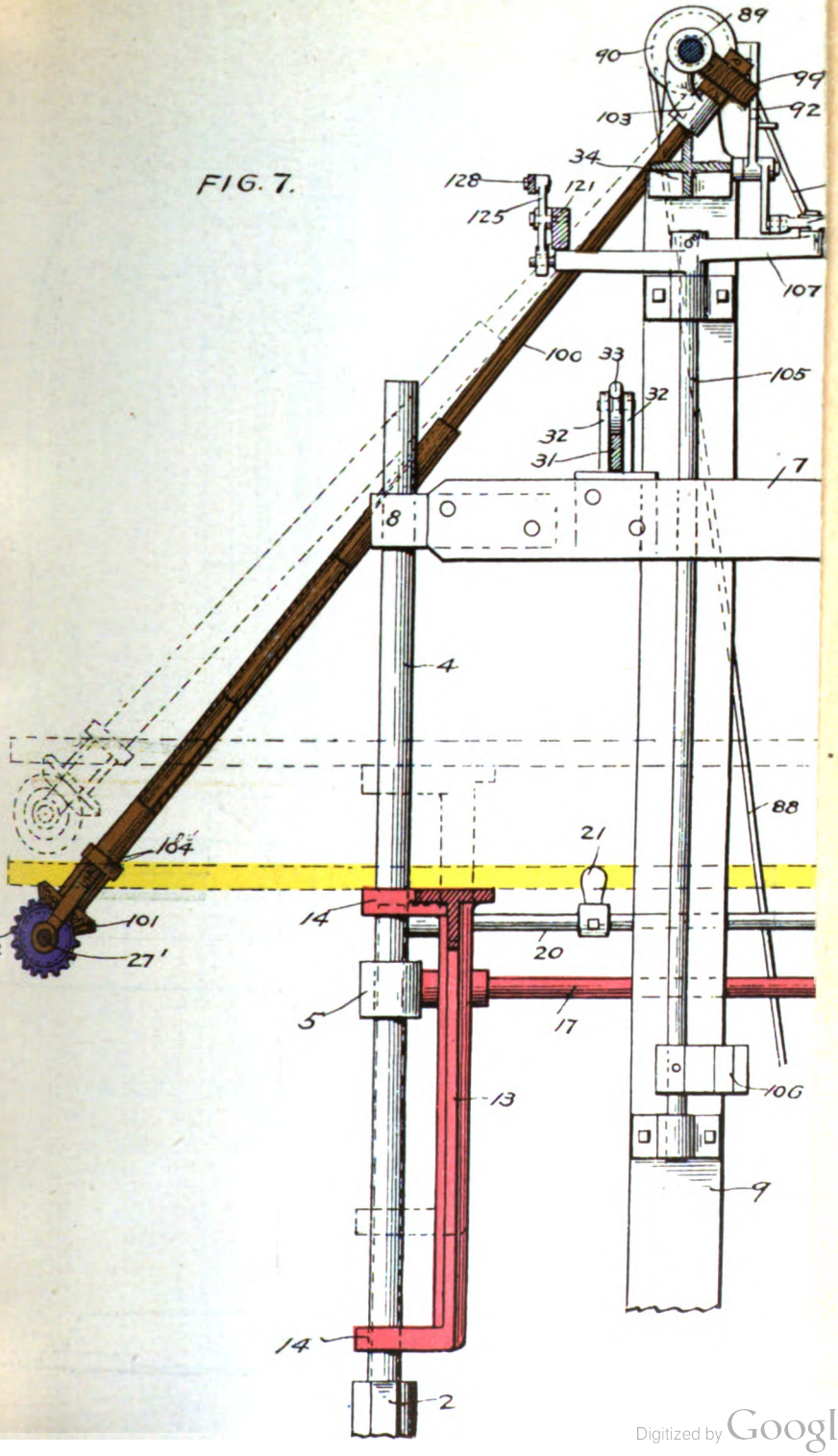
Turning to Figure 1, we note, first, that the central and novel element in combination of Bigelow's machine, around which all the elements here concerned center, and which co-ordinates the sewing feed, the bag feed, and the conveyor shift, is the (brown) telescopic shaft member, *100*. Turning first to the conveyor, we note that it consists of the rigid (yellow) table *12*, over which moves the (green) flexible belt *23* which travels on (purple) pulleys *28* and *27*, the latter being driven from the head of the machine. This table, *12*, is adjustable vertically (see Figure 3).

"The table preferably comprises a long plank or plate *12*, fastened upon the brackets *13*, which have horizontal extensions or ends *14* (see Figure 1) adapted to slide up and down upon the guideposts *4*, being arranged upon opposite sides of the sleeve *5*. The backs of the brackets *13* are provided with the racks *15*, with which the pinions *16* mesh. These pinions *16* are fixed upon the shaft *17*, having bearings in the tops of the brackets *6*, and provided with a handwheel *18* at one end. By turning the handwheel the brackets *13* and hence the table *12* may be raised and lowered. For securing the table at the desired elevation I provide the pawls *19* to engage the pinions *16*. These pawls, in order that they may be adjusted at the same time, are preferably placed upon a single shaft *20*, held in the tops of brackets *6*, and which shaft may be rocked by the handle *21* thereon, which being thrown back will withdraw the pawls from the pinions."

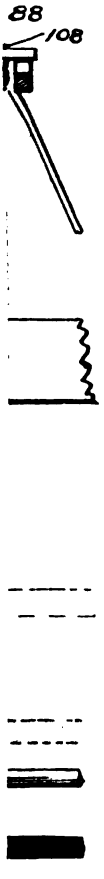
It will be noted that the shaft *27'* of (purple) pulley *27*, which actuates the conveyor, intermeshes (see Figure 7) with the dominating (brown) telescopic shaft *100*.

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FIG. 7.



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Turning next to the sewing mechanism, we note (see Figure 5) that the (saffron) machine head is mounted on bracket *34* and overhangs the feed table. As it is stated in the patent in suit that any conventional form of bag-sewing machine can be used, and as the particular type here employed is a matter of indifference, we refrain from a detailed description of the sewing machine, and confine ourselves to pointing out that its intermittent feed is controlled by engagement with the (brown) dominant telescopic shaft *100*. In that regard, referring to the feed bar *45* (a number on patent sketches not here shown) Bigelow says:

"The whole forward edge of the bar is toothed or serrated. As the (saffron) operating shaft *37* of the sewing head is rotated, the bar will be alternately moved out through the work plate and toward the needle, and drawn back and returned, to *intermittently* advance the goods or fabric upon the work plate."

That this intermittent feed of the sewing mechanism is regulated by the (brown) telescopic shaft *100*, is shown by Fig. 5, where (saffron) shaft *37* is provided with (pink) cog *96*, which intermeshes with cog *94* mounted on (blue) shaft *89*, provided with threads *98* engaging cogged wheel *99*, mounted on (brown) dominating shaft *100*, which also dominates the various mechanisms extending by another path from the outer end of (blue) shaft *89*, through parts *93*, *109*, *110*, etc., to the sewing head.

The operation and function of the (brown) dominating telescopic shaft *100* is thus described by the patentee:

"The feed on drag belt *23* on the table *12* moves very slowly compared to the shaft *37* of the sewing head, *but should be driven from the same shaft in order that it may be started and stopped in exact time with said shaft* 37 *and the parts dependent thereon.* Therefore I provide the (blue) shaft *89* with a worm to drive the worm gear *99* on the upper end of the (brown) telescoping shaft *100*. The lower end of this telescoping shaft (see Figure 7) is connected with the shaft *27'* (see Figure 4) of the (purple) belt pulley *27* by the bevel gears *101* and *102*. The ends of the shaft *100* are held in yokes *103* and *104*, journaled respectively upon the shafts *89* and *27'*. A *slow* movement is thus communicated to the feed belt of the *table, and this movement remains constant and positive*, regardless of the height to which the table is adjusted."

It will thus be seen that the telescopic shaft *100* is the element which served to co-ordinate and properly synchronize the intermittent feed of the sewing machine and the continuous feed of the conveyor, and that it also, by its telescopic function, enabled the table to be shifted vertically without affecting the co-ordination of such bag and fabric feeds. This telescopic shaft, in itself a known mechanical agency, had never before been used for the purpose of co-ordinating the fabric and bag feed of a bag-sewing machine, and to our mind the use of its function in such art was novel, useful, and of marked inventive character. It follows, therefore, the patent for such device is valid, if Bigelow was the inventor thereof. In that regard we have the record of the interference between him and Foster, the patentee of No. 875,339, wherein Bigelow was awarded priority, and the grant to him of the generic claims involved in such interference.

The status of the bag-sewing art in 1894 is shown in patent No. 529,769, granted to Williams that year, wherein he says:

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"Heretofore it has been the common practice, in flour mills and other establishments where cotton sacks or sacks of other fabric are employed, to sew the lips of the same together by hand, which, as is well known, is a slow and tedious process. The closing of the sacks by machine such as herein described must, as will readily be seen, not only result in the sack being rapidly closed, but in the production of such close and uniform stitches as to prevent the leakage or sifting through of the powdered or pulverized contents of the sack."

This shows the art was then practically without any mechanical sewing device. It is quite clear that Williams' contribution to the art was of small moment; that it left no practical impress upon it; that it wholly lacked the telescopic bar of Bigelow, and embodied no mechanism or relation of parts which in any degree suggested the use of such co-ordinating member between a sewing mechanism and a conveyor. In Williams, the conveyor moved by gravity—had no co-ordinating relation to the sewing mechanism. Indeed, we may dismiss Williams from the situation by saying we agree with the estimate of his device given in defendant's brief, viz.:

"A bag-sewing device in its most primitive and elementary form."

Three years later Onderdonk, by patent No. 583,388, of May 25, 1897, disclosed a filled-bag sewing machine in which there was an inclined feeding mechanism and an overhang sewing machine; but it lacked any co-ordinating shaft connection between the sewing mechanism and the conveyor, the latter being moved by gravity and a foot brake used to prevent its too rapid movement. It is needless to say its separate, non-co-ordinated movement of fabric feed and bag feed shows that Onderdonk was wholly lacking in the connecting mechanism which gave inventive character to Bigelow's disclosure. Both Williams and Onderdonk, lacking this central and co-ordinating element, had no commercial value, and it is quite apparent that other designers realized the problem of a filled-bag sewing machine was not solved by them, and that there was room and a call for those further efforts evidenced by the efforts of Foster and Harding. We have not overlooked the contention, earnestly made, that Bigelow was visited with knowledge of what Williams and Onderdonk did, and that by combining features separately disclosed in the two and adding known mechanical agencies he evolved his machine. Of course, Bigelow is visited with knowledge of those devices and of the functional work of their several parts. But what, after all, did Williams and Onderdonk teach Bigelow, but the way to the scrap heap?

Of the work of the Timewell Company we have already spoken; but, in view of the fact that the evidence shows that the Timewell machine, as well as an attempted improvement of it by Harding, a man experienced in the art, were unsuccessful, we deem it needless to discuss its mechanism, simply noting that one all-sufficient reason for failure of machines of that type can be attributed to limitations set forth in a criticism of them by Curtis in patent No. 639,216, of December 19, 1899, for a filled-sack sewing machine, where he says:

"In both these types of machines the forward movement or travel of the holder or sewing mechanism, the one in respect to the other, is relied upon to accomplish the feed of the sack mouth to the needle during the sewing opera-

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tion and to hold the sack mouth in position against the thrust of the needle; the sewing mechanism itself not having the customary feed device."

In other words, the Timewell machines had no intermittent feed movement, but had simply the continuous feed movement of the conveyor. Apart from the other consideration of the machine not being of the speed required, this characteristic of the Timewell device, viz. absence of intermittent bag feed, stamped it as of a different class from Bigelow's.

We turn next to this Curtis patent, No. 639,216, just referred to. It was taken out by Curtis' assignee, the Timewell Sack-Filling & Sewing Machine Company, which company, as we have already noted, had attempted unsuccessfully to make a bag-filling sewing machine for the Washburn-Crosby Company. The proofs show that Curtis, the patentee, was familiar with the Timewell patents and had made the drawings for a number of them. He was called by defendant as a witness, and was evidently familiar with the development of the Timewell machines. He gave no testimony whatever as to the use of his own device, whether any practical use had been made of it, or, indeed, whether a machine embodying its features had ever been constructed. In view of the business in which the Timewell Company was engaged, of its desire to make a successful machine, its inability to do so, its ownership of the Curtis patent, and of Curtis himself being on the stand and silent as to its merits, we are justified in regarding this patent as representative of the mere paper, as contrasted with the practical art. To allow such paper failure of Curtis to nullify the practical success of Bigelow would defeat the whole spirit of the patent law, which seeks to reward successful disclosures and avoids nullifying such successful disclosures by abortive and unsuccessful suggestions. We do justice to the situation by refusing to give to the Curtis patent any more practical weight than its patentee, its owner, and the art gave it, which was no merit whatever. We may add, further, that we are satisfied, as noted below, that the combination of elements in the claims here involved was completed by Bigelow before March 27, 1899, and therefore, whatever the significance of Curtis' patent, the application for which was made March 27, 1899, it could not affect the earlier invention of Bigelow.

This brings us to a consideration of Harding's alleged prior use. The court below found against Harding on this issue, and with that finding we agree. We have carefully considered the contentions as to Harding's machine, as it was originally built and as it has been since altered. It would serve no useful purpose to here enter upon a lengthy discussion of the evidence, since our conclusion is that, whatever the alterations that have since been made upon the machine were, and however much or little they changed the Harding machine, three things stand out in uncontradicted prominence, viz.: First, Harding was a man in authority in a business where there was a call for a successful bag-sewing machine; second, that with power to use his own machine for such work, it was not after trial used by

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his own company; and, third, Harding's own letter of March 31, 1899, in which he says:

"The Union Special Sewing Machine Co., Chicago, Illinois—Gentlemen: The writer learned in a roundabout way that you have a sewing machine sewing sugar sack. We have been agitating the sewing of our small sack, by power, for some two years back, but up to this time have nothing satisfactory to do the work. If you have perfected anything that will do our work rapidly, we should be pleased to hear all about it and try one of the machines at once. Kindly address the writer care of this company"

—clearly shows either that at that date he had produced no machine of his own, or that, if he had produced one, it would not do the work. The evidence clearly satisfies us that, while Bigelow did not complete his machine as a whole until midsummer, 1899, that part of his machine which is embodied in the claims here in issue was conceived and perfected by him in advance of March 27, 1899. We are therefore of opinion, as was the court below, that no such prior use by Harding has been established as will invalidate the claims here involved.

[2] We turn next to the question of infringement. This involves the several claims quoted in the margin.[2] They all involve, in various terms, the mechanical operation effected in Bigelow's machine by the (brown) telescopic shaft, marked *100*, which co-ordinates the

[2] 67. An apparatus for feeding and sewing filled sacks, including a supporting framework and a driving shaft, a sewing mechanism, connections between the two for operating the latter, said sewing mechanism embodying a head overhanging the edge of the framework, a conveying mechanism outside the framework and in proper relation to the sewing mechanism, with connections between the conveying mechanism and driving shaft, for operating the former, and means for adjusting the conveying mechanism bodily with respect to the sewing mechanism, and simultaneously automatically adjusting its operative connections with the driving shaft, substantially as described.

68. An apparatus for feeding and sewing filled sacks, including a supporting framework, and a driving shaft, a sewing mechanism, said sewing mechanism being arranged to overhang the edge of the framework, connections between the driving shaft and the sewing mechanism for operating the latter, a conveying mechanism arranged outside the framework and in proper relation to the sewing mechanism, and including a horizontal endless carrying belt, connections between the same and the driving shaft for operating said conveying mechanism, and means for adjusting the conveying mechanism bodily with respect to the sewing mechanism, and simultaneously automatically adjusting its operative connections with the driving shaft, substantially as described.

69. In an organized apparatus for feeding and sewing filled sacks, a suitable supporting framework, a sewing mechanism thereon, a driving shaft, a horizontal conveying mechanism outside the supporting framework, connections between the driving shaft and the sewing mechanism and between the driving shaft and the conveying mechanism, and means for raising and lowering the conveying mechanism bodily and simultaneously raising and lowering the operative connections between the conveying mechanism and the driving shaft, substantially as described.

70. The combination in a filled-bag sewing machine, with a sewing head of a table, open at one side to receive the filled bags, a driven carrier belt arranged upon said table and adapted to continuously move the filled bags along said table and past said sewing head, driving connections for the carrier belt and the sewing mechanism, and means for relatively adjusting the

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sewing feed and the bag feed. They were framed by the Patent Office and constituted the issue in the interference proceeding between Bigelow and Foster. On the determination of that issue in favor of the former, these claims, which embody the real gist of Bigelow's invention, were embodied in Bigelow's application at the suggestion of the Patent Office authorities.

The defendant's machine is illustrated by the drawings of patent No. 766,111, granted August 23, 1904, to E. H. Burghardt, for a thread cutter for bag-sewing machines. It should be noted that, while the defendant's machine is represented in Burghardt's patent, that such patent being for a thread cutter only, which is not here involved, the defendant's machine, in so far as the issues here involved are concerned, does not purport to be made under a patent. Turning to the claims of Bigelow, we note, for example, that in claims 67 and 68 is the element, "Means for adjusting the conveying mechanism bodily with respect to the sewing mechanism and simultaneously automatically adjusting its operative connections with the driving shaft;" in claim 69, "connections between the driving shaft and the sewing mechanism and between the driving shaft and the conveying mechanism;" in claim 70, "driving connections for the carrier belt and the sewing mechanism;" and in 71, "means for relatively adjusting the

sewing head and table, and means for maintaining the driving connections in various adjusted positions.

71. An organized machine for feeding and sewing filled sacks, a suitable supporting framework, a sewing mechanism thereon, a driving shaft, a conveying mechanism outside the supporting framework, operative connections between the driving shaft and the sewing mechanism and between the driving shaft and the conveying mechanism, and means for relatively adjusting the sewing mechanism and the conveying mechanism and simultaneously adjusting said operative connections between the driving shaft and the conveying mechanism, substantially as described.

72. The combination in a filled-bag sewing machine of a sewing head, a table open at one side to receive the filled bags, and a driven carrier belt supported upon said table and adapted to continuously move along the upper face of said table to carry the filled bags along the same and past the sewing head, substantially as described.

73. An organized apparatus for feeding and sewing filled sacks, comprising a table, open at one side, to receive the filled sacks, a sewing head carrying stitch-forming mechanism overhanging the table, a driven carrier, arranged upon said table, and adapted to move the filled sacks along the table and past the sewing head, and means for relatively adjusting the sewing head and table whereby varying sizes of sacks may be sewed, substantially as described.

74. An organized apparatus for feeding and sewing filled sacks, comprising a supporting framework, a sewing head supported thereby and projecting beyond the edge of said framework and carrying a needle reciprocating substantially horizontally, a table beneath the sewing head, and a carrier on said table upon which the filled sacks are supported, means for operating the carrier, and means for relatively adjusting the sewing head and carrier, substantially as described.

75. An organized apparatus for feeding and sewing filled sacks, comprising a supporting framework, a sewing head supported thereby and projecting beyond the edge of said framework and carrying a needle reciprocating substantially horizontally, a driven carrier arranged beneath the sewing head upon which the filled sacks are supported and fed past the sewing mechanism, and means for operating the carrier, and means for relatively adjusting the sewing head and carrier, substantially as described."

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sewing mechanism and the conveying mechanism, and simultaneously adjusting said operative connections between the driving shaft and the conveying mechanism."

The claims embodying this general element of means for so connecting the stitch and bag progression were in the interference proceeding, as we have seen, awarded Bigelow, who illustrated such means by a two-part shaft, one part telescoping within the other, and relative engagement between the two parts being maintained by means of a longitudinal spline and groove. It will thus be seen that the generic claim for means was awarded Bigelow, while a claim, inter alia, for the specific means of a sliding worm splined upon a one-part shaft and engaging a worm wheel, was allowed to Foster. Now, as Foster's claim was specific, and was servient to Bigelow's generic claim for means, it is manifest that defendant, who has followed Foster's specific means, has thereby subjected itself to the generic claim of Bigelow. As the claims of Bigelow we have cited afford ground for enjoining the defendant's machine, and no accounting is here involved, we limit ourselves to holding claims from 67 to 75, both inclusive, are infringed. Although no appeal was taken as to the finding of the court below in reference to the Foster patent, that patent has necessarily been considered as a part of the history of the case; but it is proper to add that we are not to be understood as passing upon the question of its validity.

The decree below will therefore be vacated, and the record remanded to that court, with directions to reinstate the bill, to enter a decree adjudging claims 67 to 75, inclusive, of Bigelow's patent, valid and infringed, and to issue an injunction thereunder.

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HAILEY et al. v. OREGON SHORT LINE R. CO.

(District Court, D. Idaho, S. D. September 4, 1918.)

1. CARRIERS ⇐218(10)—CARRIAGE OF LIVE STOCK—INTERSTATE SHIPMENT—NOTICE OF LOSS.

Where an interstate shipment of horses was unnecessarily and carelessly held in the railroad yards at an intermediate point, notice of claim for loss was unnecessary; the shipping contract following Act Feb. 4, 1887, § 20, as amended by Act March 4, 1915, § 1 (Comp. St. 1916, § 8604a), declaring notice unnecessary for damage in transit by carelessness or negligence, etc.

2. PLEADING ⇐364(3)—STRIKING REDUNDANT MATTER—ANSWER.

Notice of damage to live stock in transit, caused by the carrier's negligence, being unnecessary, under Act Feb. 4, 1887, § 20, as amended by Act March 4, 1915, § 1 (Comp. St. 1916, § 8604a), an allegation, in answer in action for such damage, as to lack of notice, will be stricken as redundant and immaterial.

At Law. Action by J. A. Hailey, J. W. Smeed, and C. R. Smeed, copartners doing business as the Caldwell Horse & Mule Company, against the Oregon Short Line Railroad Company, a corporation. On motion to strike a portion of the answer, and demurrer thereto. Motion allowed.

Wood & Driscoll, of Boise, Idaho, for plaintiffs.

Geo. H. Smith, of Salt Lake City, Utah, and H. B. Thompson, of Pocatello, Idaho, for defendant.

DIETRICH, District Judge. [1, 2] The plaintiffs, doing business under the firm name of Caldwell Horse & Mule Company, have brought this action to recover from the defendant the aggregate sum of $6,553.40, on account of damages which they claim to have suffered as a consequence of the negligence of the defendant company and connecting carriers in transporting for them 139 head of horses from Caldwell, Idaho, to East St. Louis, Ill., on the 24th day of January, 1917. In substance it is charged that the time consumed in the transportation was 16 days, whereas it should have been only 7, and that the horses were unnecessarily and carelessly held at Green River, Wyo., for 8 days, in the yards of the railroad company, without proper shelter and care, or proper facilities therefor. As a consequence of such delay and carelessness, it is alleged, 1 horse was never delivered at all and 2 of the horses were dead at the time the shipment arrived at St. Louis, an aggregate loss of $450; $585 was necessarily spent by plaintiffs for feed at Green River; $518.40 in caring for and feeding the horses at East St. Louis, in bringing them up to a fair condition for the market; and there was a depreciation in the market value of $5,000.

As a part of its defense the defendant sets forth the shipping agreement, one provision of which is to the effect that, unless notice of damages was presented in writing within 90 days from the unloading

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of the horses at St. Louis, all claims would be deemed to have been waived, with the proviso, however, that:

"If loss, damage, or injury complained of was due to delay or damage caused or contributed to by the carrier, or its employés, while being loaded or unloaded, or if damaged in transit by carelessness or neglect of the carrier, or its employés, then no notice of claim or filing of claim" would be required.

The plaintiff interposes a motion to strike out the part of the answer setting up this defense, and also interposes a demurrer to reach the same point. The question raised by both the motion and demurrer, upon which the cause is presently submitted, involves a construction of the language above quoted from the shipping contract, or, more accurately, a construction of substantially the same language contained in the amendatory act of March 4, 1915 (38 Stat. 1196, c. 176, § 1 [Comp. St. 1916, § 8604a]). In so far as it is material, this act is as follows:

"It shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

So far as appears, the plaintiffs never gave any notice or made any claim of loss. As already stated, the horses were held at Green River for the period of 8 days, and it is to be inferred from the complaint that most, if not all, of the damage resulted from such detention. It is the defendant's position that while the horses were so detained they were not "in transit," within the meaning of the proviso above quoted, and that therefore the plaintiffs were not relieved from presenting a claim within the time prescribed, and, having failed to present such claim, they cannot now recover. It must be admitted that the meaning of the proviso is extremely obscure. The subject-matter which Congress had under consideration was the extent to which the carrier should be permitted to go in exacting notice and the presentation of claims for damages. In the principal clause it is declared that it shall be unlawful to require notice in less than 3 months, the filing of claims in less than 4 months, or the bringing of suit in less than 2 years. Such a provision would seem to be both clear and reasonable. But why an exception to it? Why, in the absence of fraudulent concealment or some extraordinary disability, excuse the shipper in any case from giving notice or filing his claim or commencing his suit within the period prescribed? No satisfactory answer has been suggested, and apparently none is at hand. We cannot with assurance, therefore, interpret the proviso in the light of the object intended to be accomplished, nor can a construction be condemned merely because thereunder the provision does not commend itself to us as being entirely reasonable.

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If, then, we take the only course open to us and give to the terms employed their common import, what is the result? To say that the phrase "in transit" is applicable only while a shipment is actually moving is to give to it an unusual and strained construction. Ordinarily a shipment is understood to be in transit from the point of origin until it reaches the point of destination. So long as it is in the course of being delivered to the place to which it is being shipped, it is in transit. A piece of baggage billed from New York to Boise is in transit all the time it is in the possession of the carrier for delivery at Boise—just as much when it is upon a car standing at a station, pursuant to or awaiting orders, or upon a truck or station platform for transfer to another car, en route, as when it is upon a car moving 40 miles an hour. Not only would we do violence to the ordinary meaning of the phrase if we hold that here it is to be understood as equivalent to "while actually moving," but such a construction would necessarily result in absurd distinctions. As to the duty of giving notice or filing a claim, why should a discrimination be made between the case of a collision, where the car carrying the shipment is standing on a siding, and one where it is moving on a siding? Nor, if we say "in transit" is limited to cases where the shipment is actually in a car, is the construction any more defensible. No semblance of reason can be assigned for requiring notice if the freight is burned in or stolen from a car, and at the same time relieving the shipper from such obligation if the theft or fire was in an adjacent freight depot. True, the phrase may sometimes be used in a narrow sense; but there is nothing here in the attendant language to suggest the exceptional use, and, to say the least, such a use would contribute nothing to the reasonableness of the provision as a whole. The phrase is therefore to be understood in the sense in which it is commonly employed.

Upon consideration, I am inclined to the view that the basis of classification intended by Congress must be found in the phrase "by carelessness or negligence." It is used in no other place in the entire section, and in the absence of some other ground for classification it appears to be not improbable that the legislative mind made a distinction between liabilities resulting from the carrier's negligence and those which rest upon a different basis, and accordingly declared that the carrier should not require notice of claims for damages arising out of its own negligence. While, for reasons which it is unnecessary to explain, we may be unable to assent to the wisdom or justice of denying to the carrier this right, such seems to be the intent of the proviso. So far as the facts in this case are concerned, the construction involves no lexical or grammatical difficulties. The damages claimed were not the result of delay or injury in loading or unloading the horses; they were damaged "in transit," as that phrase is ordinarily understood, and by the carelessness and negligence of the carrier, if the averments of the complaint are true. The phrase "carelessness and negligence" undoubtedly qualifies "damaged in transit."

In the case of a claim for damages suffered in the loading or unloading of a shipment, the grammatical relation of the phrase, especially when we consider the punctuation, is more difficult. But in

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some particulars the grammatical construction is manifestly defective, and, that being true, it may very well be that the use of a comma is the result of inadvertence rather than of design. If in other respects the structure were artistic, perhaps a different view should be taken; but under the circumstances it is thought we are warranted in entirely ignoring the comma after "unloaded" or inserting it after "transit." In this view the proviso in effect relieves the shipper from giving notice or filing claim for such damages, and such damages only, as result from the carrier's negligence, either in loading the shipment at the point of origin, or in carrying it to the point of destination, or in there unloading it. A claimant must either allege and prove notice, and the filing of a claim, or must allege and prove negligence. Here the plaintiffs have alleged negligence, but neither the giving of notice nor the filing of a claim, and to succeed it will therefore be incumbent upon them to prove negligence.

It follows that the matter in the answer to which their motion is directed is redundant and immaterial, and accordingly the motion will be allowed.

CARDONER v. DAY et al.

(District Court, D. Idaho, N. D. January 25, 1918.)

No. 680.

1. DESCENT AND DISTRIBUTION ⊜84—PURCHASE BY ADMINISTRATOR FROM HEIR—EFFECT OF DISTRIBUTION—"PROPERTY OF ESTATE."
   Rev. Codes Idaho, § 5543, providing that no executor or administrator may purchase any "property of the estate" he represents, nor must he be interested in any sale, does not apply to property which has been distributed to an heir by a formal order of the probate court.

2. DESCENT AND DISTRIBUTION ⊜84—PURCHASE BY ADMINISTRATOR FROM HEIR—VALIDITY.
   The purchase by an administrator in person directly from an heir of the latter's interest in the estate is not absolutely void, but voidable only, at the option of the vendor.

3. MINES AND MINERALS ⊜55(8)—SALE OF INTEREST IN MINE—RESCISSION FOR FRAUD.
   Evidence *held* insufficient to entitle complainant to a rescission of the sale of her one-sixteenth interest in a mine to defendant, part owner and manager, on the ground of fraud in misrepresenting or concealing facts about the mine.

In Equity. Suit by Mathilde Cardoner against Eugene R. Day and others. Decree for defendants.

Graves, Kizer & Graves, of Spokane, Wash., Morgan J. O'Brien, of New York City, and Joseph R. Wilson, for plaintiff.

C. W. Beale, of Wallace, Idaho, James E. Babb, of Lewiston, Idaho, John P. Gray, of Cœur d'Alene, Idaho, and I. N. Smith and John H. Wourms, both of Wallace, Idaho, for defendants.

DIETRICH, District Judge. Plaintiff prays for a rescission of the sale by her to certain of the defendants of her one-sixteenth undi-

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vided interest in the Hercules mine, one of the large operating lead properties in Shoshone county, Idaho. The sale was definitely agreed upon October 28, 1916, at which time a part of the consideration was paid and the deed executed, and the balance of the consideration was paid and the deed delivered on November 14, 1916. Pursuant to the direction of defendant Eugene R. Day, to whom, through the agency of defendant Allen, the plaintiff negotiated the sale, the deed was made to the defendant Eleanor Day Boyce. At the time of the transaction each of the defendants, with the exception of Allen, had separate undivided interests in the property, the operating organization being in the nature of a mining partnership, as provided by the laws of the state. Besides a mill, which it had maintained from the beginning, the company had recently made provision for the more direct marketing of its product by the acquisition of stock in a smelter and refinery. For her entire interest—that is, a sixteenth of all the partnership assets, including the cash reserve carried for operating purposes—the plaintiff received $350,000. Eugene R. Day, who for convenience will hereinafter be referred to as Day, was, and for several years had been, the partnership manager. He was also the administrator of the estate of Damien Cardoner, the plaintiff's deceased husband, from whom she inherited her interest. At the time of the commencement of the suit the interest was owned in four several parts, by Day, his sister, Eleanor Day Boyce, and his brothers, Harry L. Day and Jerome J. Day, who are the only defendants having any real interest in the controversy; the others having been joined for procedural purposes only.

There are charges of both actual and constructive fraud. As to the former, in substance the plaintiff's claim is that the defendant Allen, instigated by, and in collusion with, Day, made false representations to the plaintiff as to the condition of the property and its future prospects, for the purpose of alarming her and inducing her to make a hasty and improvident sale, and that, because of her friendship for and confidence in him, she believed him, and was thus fraudulently induced to sell at a grossly inadequate price. In bringing about the sale, Allen undoubtedly acted as the plaintiff's agent, and the few circumstances which upon their face were perhaps sufficient to warrant suspicion of collusion are satisfactorily explained. Allen was not in the employ of Day or his sister, nor did he act in concert with or at their suggestion. I am convinced that he endeavored to get as high a price as possible. True, he suggested certain considerations to the plaintiff, which it may be assumed were intended to put her in a frame of mind to give serious thought to Day's offer; but such is the practice of real estate brokers who are trying to bring together the owner and prospective purchaser. He made no misrepresentation of facts, and laid before or discussed with her only possibilities which furnished legitimate subjects for consideration. Moreover, I am satisfied that at no time did the plaintiff entertain the view that he was representing Day's interests, rather than hers. To say the least, the earlier conferences between them are entirely consistent with the theory that she regarded him as her agent, and later, be-

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fore the sale was consummated, she so designated and empowered him by a formal written instrument.

True, at the bank, when the escrow was being deposited, upon the question of Allen's compensation being raised, she seems to have made the suggestion that he was working for the Days. But I am inclined to think that the remark is more significant of thrift than of candor, and was not very seriously intended. Certain it is that she did not press the point, but, without objection or protest, aside from the single suggestion, she promptly turned over to Allen a check which she held, for $5,000, the amount mutually agreed upon. Their relations continued to be friendly, and Allen continued to act as her agent in looking after her property interests in Shoshone county. In respect to all other matters, as appears from the letters in evidence, he seems to have been painstaking and to have protected her with the most scrupulous care. His apparent candor and directness as a witness left no doubt in my mind of his good faith, and, besides, to take the plaintiff's view is necessarily to accept the wholly improbable theory that not only Day and Allen, but the latter's aged father-in-law, a state district judge, with whose family the plaintiff had long been upon terms of intimate friendship, and his wife, had entered into a conspiracy to defraud her. I have no hesitation in dismissing this charge.

It is urged, however, that Day's relations to the plaintiff were of such character that (1) under the statutes of Idaho he was without the capacity to make the purchase, or (2) if not wholly incompetent, his disability was such that he could purchase only for a fair price, after disclosing to plaintiff all the information within his possession, and that not only did he withhold material facts from her, but the price paid was in fact grossly inadequate.

[1] The first contention is predicated upon section 5543 of the Idaho Revised Codes, which provides that "no executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale"; and the precise question is whether, at the time of the transaction of sale, or the negotiations pertaining thereto, the property sold was "property of the estate" of Damien Cardoner, of which Day was the administrator. The material facts are as follows:

Damien Cardoner died in February, 1915. Upon the request of his daughter, and apparently with the plaintiff's approbation, Day was appointed administrator (with the will annexed) on July 29, 1915, and immediately qualified and entered upon the discharge of his duties. On September 27, 1916, he filed his final account, praying for its approval, and also for a decree distributing the estate. Upon the same day the plaintiff filed a petition representing that all claims had been paid, and that the estate was ready for distribution, and prayed for a decree distributing the whole thereof to her. Upon October 14, 1916, both plaintiff and Day, and their respective attorneys, being present, the court duly entered an order approving the account, and in compliance with the plaintiff's prayer, distributing the entire residue of the estate to her, consisting of about $120,000 in cash, and

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other property of the value of approximately $35,000, besides the mining interest here in controversy, all of which Day forthwith turned over to her. This order or decree was filed for record in the office of the county recorder of Shoshone county on October 25, 1916.

The order formally closing the estate and discharging Day from further responsibility was not entered until November 1, 1916; but this fact, upon which the plaintiff chiefly relies to support her contention, is thought to be unimportant. Under the state laws, the property of a deceased person passes to the heirs "subject to the control of the probate court, and to the possession" of the administrator. Section 5701. But upon the entry of a decree of distribution the right of possession in the administrator terminates and his authority relative to the property ceases. Sections 5626 and 5627. The property distributed is no longer a part of the estate intrusted to the care of the administrator. Touching it, both his rights and his obligations are at an end. If upon such distribution the property does not cease to be a part of the estate, when, if at all, is it withdrawn from administration? In a popular sense, of course, it may always be spoken of as the deceased's estate. But section 5543 is to be understood in a legal sense. The principle or reason upon which the section is predicated is obvious: A trustee (the administrator) is not to purchase property to which his trust relates. But distributed property is no longer a part of his trust; it is out of the trustee's possession and control.

Plaintiff directs attention to section 5631 et seq., where provision is made for the partition by proceedings in the probate court of distributed property; but, even if it were conceded that this is a matter with which the administrator is in any wise concerned or touching which he has any right or duty (which is extremely doubtful), it will be noted that to invest the probate court with jurisdiction for this purpose some person interested must file a petition for partition before the decree of distribution is made. Section 5632. In the absence of such petition the property not only ceases to be under the control of the administrator, but passes out of the jurisdiction of the court. Buckley v. Superior Court, 102 Cal. 6, 36 Pac. 360, 41 Am. St. Rep. 135; Morffew v. San Francisco & S. R. R. Co., 107 Cal. 587, 40 Pac. 810; Moore v. Lauff, 30 Cal. App. 452, 158 Pac. 557. There is no pretension here that such petition was filed, or, indeed, that it was a case where it could be filed. Hence, when the decree of distribution was entered upon October 14th, not only did Day lose control of the property, but it passed beyond the jurisdiction of the court. Cases like Jones v. Broadbent, 21 Idaho, 555, 123 Pac. 476, McCrea v. Haraszthy, 51 Cal. 151, and Dohs v. Dohs, 60 Cal. 255, are not thought to be in point.

We are not concerned with the question when the administration of an estate terminates, but when specific property ceases to belong to the estate—when it ceases to be held by the administrator in trust. It would be quite as reasonable to say that property which an administrator has sold and conveyed, pursuant to valid orders of the court, continues to be property of the estate until the administration is closed

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and the administrator discharged. The decree of distribution in the one case is quite as effectual as the administrator's deed in the other to terminate the trust. (Incidentally it may be observed that, were the California cases in point, plaintiff would not be warranted in her contention that we are bound to give to the Idaho statutes the same construction as was there given to the corresponding California statutes. Assuming that Idaho adopted the statutes from California, such adoption took place in 1864, long before the cases relied upon as controlling were decided. See Laws Idaho [First Sess.] 1864, Probate Practice Act, §§ 193, 258, 259, 264, 279.)

[2] But, if a different view could be taken, the result must be the same. The purchase by an administrator in person directly from the heir, of the latter's interest in the estate, is not absolutely void, but voidable only, at the option of the vendor. Mills v. Mills (C. C.) 57 Fed. 873, 878, 879; s. c. (C. C.) 63 Fed. 511; Haight v. Pearson, 11 Utah, 51, 39 Pac. 479; Golson v. Dunlap, 73 Cal. 157, 14 Pac. 576; French v. Phelps, 20 Cal. App. 101, 128 Pac. 772; Littell v. Hackley, 126 Fed. 309, 61 C. C. A. 295; Black on Rescission and Cancellation, vol. 1, p. 114, § 48; Perry on Trusts (6th Ed.) § 205; Woerner's American Law of Administration (2d Ed.) § 487. And compare Hammond v. Hopkins, 143 U. S. 224, 249, 12 Sup. Ct. 418, 36 L. Ed. 134, with the earlier case of Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076. In Blackinton's Estate, 29 Idaho, 310, 158 Pac. 492, there are expressions of ambiguous import upon the subject, but these were expressly declared by the court itself to be obiter. The administration here was technically closed, and Day discharged as administrator, upon November 1st. Thereafter admittedly he had the capacity to purchase, and from that time on for over two months the plaintiff stood upon the contract of sale. After November 1st she accepted the larger part of the purchase price, and, by such acceptance and her failure to object or protest, approved the transaction and authorized the escrow holder to deliver the deed. Indeed, if I have correctly read the record, never was this objection raised or suggested by her until urged by counsel in the oral argument at the close of the trial. It would be necessary, therefore, to hold that she acquiesced in and ratified the transaction, even were the view taken that the original agreement was made when Day was under disability to contract by reason of the estate not having been formally closed. 39 Cyc. 370; Hammond v. Hopkins, 143 U. S. 224, 251, 12 Sup. Ct. 418, 36 L. Ed. 134; Mills v. Mills, supra. I do not hold that the comparatively short delay necessarily constitutes laches or estoppel. But by actively participating in the consummation of the unexecuted agreement, after such disability as Day may have had was removed, she directly confirmed the sale.

[3] Finally, can a reason be found in the fact that Day was, and for a long time had been, the manager of the mine, for holding the sale voidable? In this aspect we have the case of an agent dealing with his principal touching property to which the agency relates. Under what limitations or subject to what conditions could he make a valid purchase? His position doubtless gave him peculiar oppor-

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tunities for knowing all the facts and estimating the reasonable probabilities, and it was his duty to deal fairly with the plaintiff. He could lawfully purchase her interest, but before doing so he was bound to disclose to her the facts and conditions, which had come to his knowledge as manager, bearing upon the value of the property. He could take no advantage by misrepresentation, concealment, or omission to disclose. He was not required to express himself relative to matters merely of speculation or surmise, but in so far as he chose to give an opinion he was bound to act honestly and in good faith. Byrne v. Jones, 159 Fed. 321, 90 C. C. A. 101. In a sense, of course, the two parties could not be put upon the same footing. Personally the plaintiff had had no practical experience in mining, and presumably, therefore, was less competent than Day to form an intelligent opinion, or to speculate upon the ultimate question of the commercial value of the property. But the sale cannot be set aside for that reason alone. The plaintiff was not an ignorant, unsophisticated woman, nor was she without knowledge of the mining business. While her speech is marked by a strong foreign accent, she is not without facility both in using and understanding our language. She has not lived a cloistered life, nor does she give the impression of being by nature abnormally trustful or confiding. She is fairly well educated, to say the least, and has the poise and self-reliance which come from travel and the rigorous experiences of a pioneer life. In short, I would think that in any ordinary business transaction she could not easily be deceived or overreached. She came into the Cœur d'Alenes from France in 1886 with her husband, who thereupon engaged in merchandising. Their controversies with each other need be referred to only in so far as, in a circumstantial way, they tend to disclose a disposition upon her part to assert her rights. For 20 years she resided in Shoshone county, during which period the defendants and her husband had gradually developed the Hercules claim into a producing property. Mining was the one industry of the community, and living a considerable part of this period, as the plaintiff did, within a "stone's throw" of the Hercules and other claims and operating properties, she must have gotten some conception of mines and mining. In 1906 she went with her husband and daughter to Spain, where they all remained until her husband died, in 1915. Apparently he at once became active in mining operations there, with which, as she somewhat reluctantly disclosed, she had a measure of familiarity. But, retaining his interest in the Hercules and in other property in Idaho, he not infrequently came to this country, presumably upon business relating thereto. They subscribed for and read a Spokane paper and a Wallace paper, each of which, it is to be inferred, published mining news of the Cœur d'Alenes, and reported mine dividends.

Upon Mr. Cardoner's death, their daughter came to Idaho, and while here procured the appointment of Day as administrator. Later, the plaintiff, who in the meantime had had some disagreement with her daughter and son-in-law, returned, after an absence of 10 years, arriving at Spokane on April 17, 1916. In the meantime, too, it ap-

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pears, she had decided to ignore her husband's will, by which a considerable part of the estate was bequeathed to the daughter and some legacies were left to religious or charitable orders, and to claim all of the property, upon the theory that, belonging to the community, it was not subject to testamentary disposition, but came to her as of right under the state law of succession. When Day first learned of this change of attitude does not clearly appear, but it was doubtless after her return. It would unduly extend the discussion to relate with any detail the subsequent course of events. Plaintiff took up her residence at Spokane, from which point it was easy to communicate with the mine, and especially with Wallace, where the principal offices of the company were maintained, and where the court sat in which the estate was being probated. At Spokane, too, the defendants Paulsen and Hutton, two of the wealthiest owners of the Hercules, lived and had large business interests. In so far as she knew or the record discloses, their relations with her husband had been friendly, and they would not be inclined to treat her ungenerously. Immediately upon arriving at Spokane she communicated by telephone with Day at Wallace, and by appointment visited him there, at the offices of the company, two days later. Upon at least three other occasions prior to the distribution of the estate, twice in August, she conferred with him there. He is insistent that she came to his office and discussed the affairs of the company with him at least a dozen times. But, inasmuch as she may have spent several days at Wallace upon a single visit, the apparent conflict in the testimony may be reconciled by assuming that she went to the office more than once during each visit.

Unfortunately, upon the important question of what information relative to the mine Day gave her, the direct evidence, consisting almost exclusively of the testimony of the two parties most concerned, is highly conflicting. In substance her contention is that he made no disclosures at all, but repeatedly put her off, generally with the excuse that he had no time. Upon the other hand, he very positively testifies that again and again he explained truthfully and in detail the status of the property, and advised her of what had been done and what they were planning and expecting to do. With equal emphasis, too, she makes the specific contention that she did not learn that the company had engaged in the smelting or refining business until she read about it in a mining journal, in November, 1916, after she had gone to New Mexico. Upon this point I am wholly unable to give her testimony credence. If we are not permitted to take judicial notice of facts of local and familiar history, still we cannot avoid the inference or presumption that this smelter enterprise, together with the conditions out of which it grew, must have been an important event in the industrial life of the "Inland Empire," including North Idaho and Eastern Washington. It must have been in the newspapers, and the chances of its success or failure must have been common topics of discussion. True, the plaintiff came to this country after the public interest had abated; but, as already stated, she was receiving newspapers from Wallace and Spokane while in Spain, and, besides, her son-in-law and daughter were here in the sum-

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mer of 1915, and it is wholly unlikely that they failed to hear of it or inform her.

But, if we put aside these considerations, we find that in the monthly statement of the company for February, 1916, which admittedly she received soon after coming to Spokane, there is shown a large expenditure on account of the smelter. Day testified that at their first conference she told him that her husband had been opposed to going into the smelting business, and questioned him about it. Allen testified that immediately after the decree of distribution, in conversation with him about the mine, she discussed the new smelter and refinery. Paulsen, a disinterested witness, testified that when she called upon him in October, shortly before the sale, and inquired why certain dividends had been passed, he explained "that the Hercules had gone into the smelter business and branching out, and that they had to build up a reserve to take care of these additional business propositions, and also that we had a large amount of ore in transit to the smelter, which had not then been settled for"; and he also sought to quiet her apparent agitation over a newspaper report to which she directed his attention, to the effect that the "Guggenheims or the American Smelting & Refining Company * * * were going to absorb all of the Day interests in the Cœur d'Alenes, and smelters and everything they had."

With much alacrity, I thought, and with unnecessary frequency, the plaintiff, in testifying, sought to give the impression that she knew nothing about business customs in general, or about her husband's business or the Hercules mine in particular. Admittedly her husband regularly received the monthly statements which the company had long been accustomed to send to its members, upon which were shown, not only the summarized items of operating receipts and disbursements for the month, but the aggregate of all dividends paid during the entire life of the mine. It is true that when, upon cross-examination, her attention was directed to the contents of these statements, she explained that she could not understand, and perhaps did not read, them; but in that connection it is thought to be significant that when upon her direct examination she was first asked why she called Day up by telephone immediately after coming to Spokane, and why, according to appointment, she went to Wallace two days later, she answered:

"To see Mr. Day and ask him for the statements. Since Mr. Cardoner died he never sent us any more statements, and I went up to ask him for the statements."

It is difficult to avoid the belief that she was measurably familiar with these monthly statements, and was able to interpret them in their main features. Plainly she is not without some aptitude for, and experience in, business matters. She seems to have been careful and methodical, and even exacting, in respect to other transactions brought into evidence. She was quick to discover apparent discrepancies and inconsistencies in the administrator's accounts, and proceeded in an intelligent way to procure explanation and rectification. She kept a diary with unusual care, required receipts for disbursements, and

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altogether made inquiries and gave directions, not in the language of an unsophisticated woman, but in terms signifying that she was not a stranger to business transactions. It is not a case where the principal is at a distance and wholly dependent upon the information furnished him by his agent or associate, or is a stranger with no one to whom to turn for assistance or advice. The company's mill was within a few moments' walk from the offices at Wallace, and the mine a few moments' ride upon the train or by automobile. They were at all times accessible and open to the plaintiff, and so were the books and records of the company. Of this there is no question. She had agents at Wallace, and she had acquaintances and friends. If she did not understand an item in one of the monthly statements, she could as readily and as reasonably have asked Allen for assistance as in the case of the administrator's account, or she was abundantly able to employ service of that character. She had engaged counsel, who was not only qualified to care for her interests in their legal aspects, but was also exceptionally familiar with the history and operation of the Hercules as well as other mines in the district. At intervals she was a guest at the house of the presiding judge of the state district court, at one time her attorney, who also was familiar with the history of the district, and in a general way with the various properties therein.

For Day to have repeatedly denied her information about the Hercules would have been a flagrant violation of his duty, both as manager and as administrator, on account of which the plaintiff might very reasonably, and I think would, have been deeply offended. Yet, so far as appears, she made no complaint to her friends or to her attorney, nor did she suggest criticism of him as manager to her associate owners, Paulsen and Hutton. Instead, she seems to have continued to hold him in high esteem, and to entertain for him a friendly feeling until, after going to New Mexico in December, she was advised by her attorney from the East (acting in perfect good faith, I doubt not) that upon inquiry he believed that the price she had received was inadequate. Furthermore, if we credit her story, we must also believe that, without suspicion or resentment against him, notwithstanding the ill treatment which she now charges at his hands, upon five days' consideration she sold to Day the very property concerning which he had persistently denied her information, and upon representations chiefly made by Allen, whom she looked upon as Day's agent. However tenderly we may regard her rights by reason of her sex and widowhood, we cannot give credence to the incredible. From the whole record I am convinced that from the beginning she was aware of the smelting enterprise, and was concerned about it. The mine had been shut down for some length of time in 1915, because of the smelter controversy. Her husband had not looked with favor on the company going into the smelting business, and upon his death she would be likely to succeed to his views. Not unnaturally, therefore, at her first interview with Day she would raise the question, and quite as naturally, as manager, he would defend the new enterprise and explain the reasons which induced him and the other

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owners to undertake it. Such explanation and defense would almost of necessity lead to a comprehensive account of the mining operations, the condition of the mine, and the future plans and prospects of the company, and, in giving it, Day's natural inclination would be to paint a bright, rather than a gloomy, outlook for the property.

Such, I say, are the probabilities, and such, in substance, I believe to be the facts. It may very well be that, not being fully satisfied touching the smelter enterprise, or her fears being revived by the passing of dividends, or by suggestions in the press or from friends of the peril of a local company fighting what was popularly referred to as the smelting trust, she renewed her questionings from time to time as she talked with Day, until, becoming impatient, he declined again to review the situation in detail, and put to her the inquiry whether she desired to sell her interest; and it is this phase of his treatment of her that, in her resentment, upon being advised that she had been overreached, she has perhaps unconsciously put in the foreground of her recollection until it has obscured all else. In some respects I am satisfied she has unwittingly lost the true perspective. By her testimony she gives the impression that Allen and Judge Woods and his wife made misrepresentations from which it would follow that the property, if not practically worked out, had only a speculative value, and yet for such a property Day, its manager, was admittedly making an offer based upon a value of $5,000,000, a price in excess of anything ever paid or offered for any interest in the mine before. If, as apparently she would now have us believe, she became panic-stricken, and by Allen and her other friends was induced to believe the property was practically worthless, did she think that in receiving at the rate of $5,000,000 from Day she was overreaching or getting the best of him? It was probably suggested to her that the price of lead, then abnormally high, might drop back to a lower level at any time; but surely that was a legitimate consideration. It probably was not said that when she went away Day would send her no more dividends, but upon the other hand it probably was said that at times, as had been the case in the last two years, she might get no dividends; whereas, if she sold her property, and the proceeds thereof were put out at interest, she would be sure of regular interest returns—again a legitimate consideration. It was probably not represented that the Days were speculating upon the lead market, in the sense that they were illegitimately using the company's funds for that purpose, and that they would be smashed by the Guggenheims, and that the plaintiff would thus lose all; but it may very well have been stated that in going into the smelting business the company would have to market its own product, and that in doing so it would come into competition with the Guggenheims, or the so-called smelting trust, and that therefore there was danger of disaster or loss. There probably was no representation that the property had been mined out; but I have no doubt that by different persons she was informed that above the No. 5 or Hummingbird tunnel, which was the lowest possible tunnel level, the ore was almost exhausted, and that the lower shafts and works were still incomplete,

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leaving the lower ore bodies not fully developed or disclosed, and as to their extent there was some doubt and uncertainty. And such appear to have been the facts. Paulsen, whose intelligence and good faith there is no reason to question, testifies that when she called upon him, a few days before the sale, he told her that "there was a good deal of guesswork connected with fixing the price of the mine in the state of development that the mine was in at that time"; that they were behind with their developments, their shaft from the Hummingbird tunnel was not started early enough, and that the ore reserve above the tunnel level was getting pretty low, and that at that time they "did not have such an awful lot of ore exposed or developed." Indeed no one described the physicial condition of the property more conservatively, or gave more prominence to the uncertainties involved in making an estimate of the value of the mine, than Paulsen, and yet at the same time he told the plaintiff that his interest was not for sale, thereby intending to convey the meaning that he regarded the mine as a good property; and the plaintiff admits that she understood him to advise her to hold on to her interest.

Doubtless in the course of the discussions which took place her attention was drawn to the fact that some of the other mines in the district had been worked out at a certain depth, and the inference was drawn that the ore shoots in the Hercules would probably terminate at about the same depth. But the record abundantly shows that such a view was not unreasonable. True, the plaintiff may have attached undue importance to some of these considerations, and may not have given due weight to Paulsen's advice to hold her interest; she was suffering somewhat from the asthma, and was probably anxious to get into a different climate, and may have acted hastily. But in the light which she had, or which was then available, did she act in a panic or unreasonably? If we strike from the record the expert testimony of the two engineers, which, of course, was not available to her or any one else at the time, and put out of mind the fact that our country is now at war, and the conditions bearing upon the net value of the product of this mine, which did not arise or were not disclosed until after October, 1916, in the light of the other facts and circumstances of record, can it be confidently said that from the standpoint of an intelligent, independent owner, the plaintiff made a bad bargain?

Suppose we look at the situation for a moment from her standpoint. She knew that a little more than a year before her interest had been valued by the appraisers of the estate at $250,000; that there had in the meantime been paid to the administrator, for her credit, by way of dividends, over $100,000, so that, if the appraisement was originally correct, the residual value of her interest could not at the time of the sale have exceeded $175,000; and for this she was considering an offer of $350,000. Through her husband she probably knew that in 1905, when, of course, the mine was in fact of much greater value than in 1916, he and the other owners gave an option to purchase the entire property for $4,000,000; and again in 1906 an option to purchase at $6,000,000; and in each case the optionee

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declined to purchase, in the latter case suffering a forfeiture of $20,000. She may very well have known that two or three years later a one-sixteenth interest—the Reeves interest—had been sold for $250,000. She had the very recent opinion of Hutton, one of the owners, whom she doubtless thought to be intelligent and disinterested, that the property as a whole was then worth about $4,000,000. Paulsen, another intelligent owner, who she had the right to think would advise her fairly, declined to make an estimate of the value, because it involved too much guess work, discouraged the idea of selling, and yet suggested that in either case, she would doubtless have all she needed. She knew that current profits were enormous, but she also knew that the price of lead was abnormally high, owing to conditions which might pass at any time, and that the cost of production was also upon the increase. There were elements of uncertainty about the extent and value of the remaining ore bodies, which had been but meagerly explored. The smelting enterprise was giving her concern. It might be safe, but her husband had disapproved, and there were questionings touching its wisdom; it was a new field, with unknown possibilities. For reasons of health she did not desire to reside in this section of the country. She had other property holdings in the Cœur d'Alenes which were likely to give her some annoyance, and Day was agreeing to take them over as a part of the transaction, at a price apparently in excess of what he thought they were really worth. In case of sale she would have, besides her interest in the estate in Spain, approximately a half million dollars in money, and this, if conservatively invested in high-class securities, would, without substantial risk, yield a regular income abundantly sufficient for her wants, and she would be relieved of all responsibility and concern. Besides—and I think this consideration had much weight with her, regardless of its merit or want of merit in point of law—she was not without fear that the legatees named in her husband's will would seek to assert rights thereunder, and she reasoned that such a contingency was much less likely to happen, or to turn out adversely to her, if she disposed of all her interest in the specific property of the estate. Upon the whole, I do not think it can be held that under the known conditions her decision to make a sale was precipitous or improvident.

When we come to consider what in fact was the actual value of the property, we are met with difficulties which both courts and legislators have recognized as well-nigh insurmountable. Because of these difficulties, in this state, as in some other jurisdictions, no attempt is made to estimate the value of mines for taxation purposes. But it does not follow, because the value is difficult accurately to estimate, that an agent or part owner cannot legitimately purchase from his principal or associate owner.

The ultimate question with which we are here concerned, of course, is not how much ore there was in the mine, but what the property was reasonably worth upon the market in cash—what it should have reasonably sold for under the circumstances. The plaintiff had the right to sell her interest. She was not bound to keep it indefinitely and exploit it. So the ultimate question is, not what she might have

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made out of it if she had chosen to retain it, but what it was worth—what it could have been sold for outright. The value of a dairy cow is what she will presently sell for upon the market, and not what she will ultimately yield in profit, if kept indefinitely in the dairy. Nor, of course, does the inquiry here relate to the amount of ore that subsequent developments may disclose to have actually been in the mine. The mineral content of the mine is a material inquiry only because it is a matter to which both the owner and the prospective purchaser would give consideration. They would undertake to estimate the amount of the ore, and the estimates would have some bearing upon the price which an owner would take and the price which an investor would pay. Hence the question is, not what the mine actually contained, but what, under the light then available, was a reasonable estimate of its content. Such estimate, of course, is only one of the important factors, and when we consider all of them we find that the margin of uncertainty is so great that any opinion of the value must be measurably speculative.

The truth of this observation is strikingly illustrated in the evidence given by the two experts who testified, one for the defendants and the other for the plaintiff. Even with a mine so far developed and so fully equipped, there is a wide range of uncertainty as to the extent and quality of the ore bodies. There is next the question of the cost of extracting, treating, and marketing the ores—a process which must extend over a period of years, with uncertainty touching wages, rates of transportation, and other expenses. Then the uncertainty as to the price at which the product can be sold; and still the further question, in estimating the present worth of ores in the earth, of how long it will be before they can be marketed and turned into cash, thus releasing the invested capital, which, until so released, is, of course, unproductive. Furthermore, at the time of the sale it was wholly uncertain whether this country would or would not be drawn into the world war. Should we enter the war, how soon would it end, and what effect would its termination have upon the mining industry? If our country declared war, what effect would such declaration have upon the cost of production and the price of the product? Would the prices be fixed by governmental agency, and what burdens would be levied upon such properties by way of taxation? One contemplating the possible purchase of a sixteenth interest in the mine would further consider the question of labor, the tendency to increase of wages, the possibility of strikes, and, I think, would very seriously consider the question of management. Apparently the management had been conservative and intelligent. What would be the effect on the market value of a sixteenth interest, if, for example, the Days and Paulsen should combine and sell out their controlling interest to an unknown and inexperienced investor, whose policies were unknown, and who might unwisely manage the property, or entangle it with speculative and more perilous enterprises?

In view of these admitted uncertainties and the wide variance between the estimates of the experts, manifestly no safe conclusion as to the reasonable value of the property in October, 1916, can be predi-

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cated upon their testimony alone, and therefore I refrain from setting forth an analysis of it. It is of value and weight in connection with the other evidence upon the subject, and I give it consideration in that connection. What, in the main, is the other evidence? Day, though not an expert geologist or mining engineer, and perhaps without experience in marketing mines, was an intelligent, practical operator, with intimate knowledge of the general conditions in and about this property. His judgment is entitled to some weight, and I am satisfied that he would not have given more for the plaintiff's interest. Some point is made that he bargained with her and sought to secure the property for a much lower figure. But it is not material to the present inquiry to determine whether or not he had the right to deal with her as an equal, if it be assumed that she had all the information that he possessed. It might very well be held that, if she knew as much about the mine as he, he had the right to buy her interest at such price as she was willing to take. But, be that as it may, whether we condemn or justify his conduct in seeking to get the property for less than he finally paid for it, the fact is that he added to his first offers until he reached the sum of $312,500, exclusive of the cash on hand, or a price upon the basis of $5,000,000 for the assets, exclusive of the cash on hand, and there he declined to go further. Through Allen the plaintiff sought to get him to increase his bid; but Day definitely declined, and I think was unwilling to pay more. His testimony now as to what he considers the property worth, as well as that of his brothers, Harry L. Day and Jerome J. Day, is in the nature of expert testimony, and, coming from an interested source, is, of course, to be considered in the light of such interest. But if, for that reason, we put aside entirely their opinion testimony, and impute to that of the opposing engineers equal weight, what have we? We have Day's decision at the time not to pay more. We have the testimony of the two disinterested witnesses, Paulsen and Hutton, the one that the property was worth no more than was paid, and the other that it was worth less. We have no instance where a larger price was ever paid or offered for any interest in the property. We have the sale of the Reeves one-sixteenth interest, seven or eight years before, when undoubtedly the actual value was greater than in 1916, for $250,000. We have the unaccepted offers of the owners to sell the whole property in 1905 for $4,000,000, and in 1906 for $6,000,000. If it be said that to Day the interest had a special value, because it gave "the Days" control of the mine, the obvious reply is that to an independent investor, generally speaking, so small an interest would be less salable, and that therefore its market value, when offered alone, could hardly be said to be equal to one-sixteenth of the market value of the property as a whole.

Upon consideration of the entire matter, my conclusion is that, not only was the plaintiff informed of the known conditions and facts bearing upon the value of the property, but that the price paid approximated the reasonable market value of her interest, and was probably as much as she could have obtained from any other source, and, in any view of the bearing of the question of value upon the issue here, an approximation of the true value is all that is required. Brooks v. Martin, 69 U.

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S. (2 Wall.) 70, 17 L. Ed. 732; Patrick v. Bowman, 149 U. S. 411, 13 Sup. Ct. 866, 37 L. Ed. 790.

From these considerations, it follows that the bill must be dismissed; and such will be the decree.

UNITED STATES v. FABATA et al.

(District Court, N. D. New York. October 26, 1918.)

1. BAIL ⟸79(1)—BREACH OF CONDITION—RELIEF FROM LIABILITY.
Under Rev. St. § 1020 (Comp. St. 1916, § 1684), providing that a court may in its discretion remit the whole or a part of the penalty of a forfeited criminal recognizance, whenever it appears "that there has been no willful default of the party," etc., the court can exercise such discretion only when the failure of defendant to appear was not willful.

2. BAIL ⟸79(1)—RELIEF FROM LIABILITY—"WILLFUL" DEFAULT.
That the failure of defendant in a criminal case to appear at the time required by his recognizance was by advice of his attorney does not make his default other than "willful."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful.]

Action by the United States against Antonio Fabata and the National Surety Company. On application by the Surety Company for remission of penalty of bail bond. Denied.

This is an application by the National Surety Company for the remission of the whole or a part of the penalty of a bond in a criminal case executed by Antonio Fabata, as principal, and the National Surety Company, as surety, for the appearance of said Fabata to stand trial on an indictment found against him and which bond has been reduced to a judgment.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y.

Wm. J. Griffin, of New York City, for defendant National Surety Co.

RAY, District Judge. The defendant Antonio Fabata was duly indicted in this court, and with the National Surety Company, as surety, executed a bond for his appearance in this court at a designated term held at Auburn, N. Y., to answer to such indictment and abide the orders and judgment of the court. On the day and at the term of court designated the defendant Fabata was called, but failed to appear or answer, and the surety was duly called and required to produce its principal, which it failed at that time to do, whereupon the court made an order forfeiting such bond and directing its prosecution and collection. Thereafter this action was brought and judgment recovered against both defendants for the sum of $2,060.40, and now defendant the National Surety Company moves under section 1020, U. S. R. S. (U. S. Comp. St. 1901, p. 719; U. S. Comp. St. 1916, § 1684), for an order remitting the whole or a part of such judgment, on the ground it appears on petitioner's showing that there has been and was no

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willful default of the party, and that a trial could, notwithstanding, be had in the case, and that public justice does not require the penalty of the bond to be enforced.

[1] The section of the Revised Statutes referred to provides as follows:

"When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced."

In United States v. Robinson et al., 158 Fed. 410, 85 C. C. A. 520, the Circuit Court of Appeals (Fourth Circuit) said, and accordingly held:

"Among other things, the foregoing section provides that the court may, in its discretion, remit the whole or a part of the penalty, whenever it appears that there has 'been no willful default of the party,' etc. While in a case like the one at bar a surety may suffer a hardship, owing to the provisions of this statute, nevertheless its terms are plain and unmistakable. It clearly defines the circumstances under which the court may exercise its discretion, and remit the whole or a part of the penalty, to wit, when there has been no willful default; and inasmuch as the court in this case found as a fact that the default was willful, it necessarily follows that it was not within the discretion of the court to vacate or modify the judgment in question."

I think this the true construction of the statute, and that, to authorize a remission of any part of the penalty of the bond, it must appear there "was no willful default of the party"—that is, of the defendant in the indictment, who failed to appear.

In this case the claim of the Surety Company is that Fabata, the principal, went with his attorney to the United States courthouse, but outside of same, in the city of Auburn, N. Y., at the time and place and term of court where required by the bond to appear, but that Fabata, by direction of his counsel, remained outside the courthouse; that it was arranged and agreed between them that Fabata was to remain outside, while his attorney went inside, and remain in a position where he could observe a preconcerted signal from his attorney, the attorney telling Fabata "that in the event of his considering it advisable for him, the said Fabata, to appear before the court a certain unmistakable signal would be given, and in the event that his attendance was deemed unadvisable at the time that another signal, which could in no event be mistaken for the other, would be given, in which latter case the said Fabata should immediately go to the railroad station and return to New York on the first possible train"; that after waiting quite a while the said attorney, a New York City lawyer, appeared at the entrance to the courthouse and gave the agreed signal last above referred to, the one on receipt of which Fabata was to return to New York; and that Fabata, "relying on and in compliance with the advice of his counsel, then and thereupon left Auburn on the first train and returned to New York." The affiadvit that this took place, as claimed, is not made by the attorney of Fabata, or by

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Fabata, but by the attorney for the Surety Company, who simply says that Fabata has so informed him. This falls short of proof that such an occurrence took place. It is the merest hearsay.

[2] But, even if such an arrangement was made and carried out between Fabata and his attorney from New York City, it falls far short of showing that there was no willful default on Fabata's part. On the other hand, it shows there was a willful default. Fabata and the Surety Company knew that Fabata's duty and obligation under the bond was then and there, at Auburn, to appear and answer, and abide the order of the court. Fabata did not appear, nor did the surety produce him. He was duly called and failed to respond in person, but his attorney did appear and requested a delay or postponement, which was refused, as there had been several adjournments of the case. In open court at said time and place, as this court well remembers, and as Mr. D. B. Lucey, the United States attorney, who was present, makes affidavit, the said attorney for Fabata, when Fabata and the surety were called as set forth, stated in open court "that on the preceding day he had made an engagement with the said Fabata to meet him the next morning, to wit, November 16, 1917, at the Grand Central Terminal to take a train from there to Auburn for the purpose of appearing in court (court then being in session at said place); that when O'Neill (the said attorney) arrived at the station in New York he looked around for the said Fabata, and he was unable to see or find him; and that he had no knowledge of where he then was." Fabata was not in court, and this is not disputed. The surety did not produce him, when called and required so to do, and this is not disputed. That he was not in Auburn, remaining outside the courthouse, is shown by what occurred in the courtroom at the time. Plainly, in either event, it was a willful default and failure to appear on Fabata's part, and a failure to produce the defendant on the part of the surety. Such practice, even if it occurred as now claimed, cannot be encouraged or approved, or held to be other than a willful default.

The motion to remit the whole or any part of the penalty of the bond or judgment, or reduce such judgment, must be and is denied.

The incorrect order, headed as of the Syracuse term commencing April 2, 1918, when the motion was first presented, and which was inadvertently and prematurely signed, and which the clerk was directed not to enter, and which has not been filed or entered, is canceled, annulled, vacated, and set aside.

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CASEY et al. v. CITY OF CANTON.

(District Court, N. D. Ohio, E. D. February 28, 1918.)

1. CONTRACTS ⟸284(4)—DECISION OF ENGINEER OR ARCHITECT—EFFECT.
Where construction contract provided that work should be done under the supervision of an engineer, who was empowered to determine classification and allow estimates, his decision can be impeached only for fraud and gross mistake, implying bad faith.

2. MUNICIPAL CORPORATIONS ⟸374(1)—CONTRACTS—CONSTRUCTION.
Where city enters into a contract with a contractor to build a building or lay a sewer, it warrants, just the same as a private owner would warrant, delivery of the site upon which the work is to be constructed, and in event of failure is responsible to the contractor for damages resulting.

3. MUNICIPAL CORPORATIONS ⟸370—CONTRACTS—LIABILITY.
Where municipality, which contracted for the laying of a sewer, did not have title to the site selected, and the contractor was by that reason delayed and injured, *held* that, the municipality being liable for such damages, payment could properly be made without any supplemental contract.

4. MUNICIPAL CORPORATIONS ⟸370—CONTRACTS—LIABILITY.
Where a municipality, which contracted for the laying of a sewer, did not own the site selected, and the contractor was damaged, *held* that, having paid such damages, the municipality could not recover the same, nor set them off in an action by the contractor, though the procedure for payment was irregular.

At Law. Action by John F. Casey and others against the City of Canton. On motion of plaintiff to direct a verdict. Motion granted.

Squire, Sanders & Dempsey and Wm. L. Day, both of Cleveland, Ohio, for plaintiffs.

Clarence A. Fisher, City Sol., and Walter S. Ruff, both of Canton, Ohio, for defendant.

WESTENHAVER, District Judge. [1] The attitude of counsel for the defendant as to the larger item of the counterclaim renders unnecessary any discussion of that. I need only repeat, so far as that is concerned, what counsel have said, that whether or not that foundation embankment should be classified and paid for under item 29 of the specifications was a matter to be determined by the engineer. He was agreed upon by the city of Canton, or the proper authorities of the city of Canton, on the one part, and the John F. Casey Company, upon the other, as the person under whose supervision and direction the work should be done, and who was empowered to determine the question of classification, and to make estimates and allow them. He made his determination, and there is nothing here to impeach the good faith or honesty of his determination.

The law is perfectly well settled in this jurisdiction, although it seems to be a little confused in the state courts, that the decision of an engineer or an architect in that situation is binding upon both parties, and can be impeached only for fraud or such gross mistake as implies bad faith.

Therefore, as to the larger item of 2,961 cubic yards of foundation embankment, I concur entirely in the judgment of the representatives

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of the city of Canton in saying that there is no basis upon which to seek to recover any part of it back, and there is no ground upon which to defend against an action by the Casey Company to recover the amount of the final estimate, which was approved.

Now, let us pass to the other item, the $2,000 item, which is the item embodied in the so-called supplementary contract of August 24, 1915. The testimony here shows that, at the time the contract was let and the work of construction begun, the city of Canton had not provided the right of way over which the sewer was to be laid.

[2] When the city enters into a contract with a contractor to build a building, or to lay a sewer, or to do any other work of that kind, it warrants, just the same as a private owner would warrant, the delivery of the site upon which the work is to be constructed. In other words, if the city of Canton makes a contract with the Casey Company to build a sewer between station 1 and station 50 of a certain type and dimensions, it guarantees absolutely the delivery to the contractor of that site, and it is responsible in damages to the contractor, just as a private owner would be responsible for damages to the contractor, and if the city or owner, from whatever cause, whether blamelessly or wrongfully, is unable to deliver the site upon which the contractor is to construct the sewer or other improvement, they would be responsible in damages to the same extent and in the same degree for the interruption of his work.

Now, in point of fact, the city of Canton did not have the entire right of way for the sewer. The sewer ran through the property of a gentleman by the name of Mr. Barber, according to the original plan, and he refused to permit them to cross, and thereupon the work of constructing the sewer by the plaintiff company was interrupted, and, while it does not appear, it may be safely inferred from this testimony, that when they did get the right of way and the right to cross over the property of Mr. Barber, they had to cross somewhere else, and the sewer had to be constructed under different conditions and to a certain extent of different materials, that is, as to the foundation item, and by that action, as testified to here by the engineer, and as the court would imply if the engineer had not testified to it, certain damage resulted to the contractor.

[3] I have carefully examined the contract, and it seems to me that the engineer was entirely right in his position that items of damage due to an interruption of the work, such as added expense due to disorganization of his force and the shifting of his material to other positions, were items of damage and expense which the contractor had the right to make demand for under article 17 within a certain number of days, and which it was the duty of the engineer and the authorities to estimate and to allow.

It would have been entirely proper for the city authorities to have made the payment, without requiring any supplementary contract in order to warrant the payment. It does not require a separate appropriation of any kind from the council of the municipality, but it is an expense that was included within the original authority conferred upon the service director by the resolution of the council and was

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properly chargeable to the fund then appropriated and set apart for the construction of the sewer.

In view of the action of the engineer, and in view of these facts and the subsequent conduct of the city authorities, there can be no question here before this jury but that the contractor was entitled to his money. The city has gotten the benefit of it, the contractor having been afflicted with a loss. If there was damage resulting, it was damage which was due to the conduct of the city, and not to the conduct of the contractor, and, if the city had refused to pay it, the contractor would not have been without remedy.

For that reason alone it would seem to me that irregularities in the method of making the payment would not warrant the city, after it had made it, in recovering back that which the engineer allowed, and which should have been allowed and included in the first instance, and which, in my opinion, he would have been entirely justified and ought to have allowed in his final estimate, instead of handling it in the way in which it was done.

[4] That being so, irregularities in the method of making payments, of these added precautions, due perhaps to a mistaken opinion on the part of some one that it should not be done that way, but ought to be done through a supplementary contract, or that a supplementary contract ought to have been entered into in the first instance, will not justify an action by the city to recover back money paid under those circumstances.

Now, the law as to irregularity in the making of contracts of this kind works very differently when a plaintiff sues upon a contract made in violation of law, and when the city sues to recover back money rightfully paid or paid upon a contract which has been made in violation of law, but which has been performed. The latter situation was involved in the Fronizer Case, 77 Ohio St. 7, 82 N. E. 518.

In the case of Buchanan Bridge Co. v. Campbell, 60 Ohio St. 406, 54 N. E. 372, it was held, where the county authorities refused to pay for a bridge which they had gotten from the contractor under a contract entered into in violation of the statutes on the subject, that the contractor could not recover when he sued on the contract for the price of the bridge; the court holding that it would leave the parties to such unlawful transaction in the situation in which they had placed themselves. In other words, the contract having been entered into without conformity to the legal requirements, the contractor could not, when he came into court, prove the legality of the contract that he had acted under, and could not, therefore, maintain the burden of proof.

However, in the case of State v. Fronizer, 77 Ohio St. 7, 82 N. E. 518, the reverse of that situation was presented. There the county authorities had gotten the bridge, and when the estimates were presented they paid for it, and thereafter the county undertook to get that money back, claiming the contract illegal because of the lack, through inadvertence, of a certificate of the county auditor that the money is in the treasury to the credit of the fund, or had been levied and was in process of collection. There the Supreme Court said that the money

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so paid could not be recovered back, there being no claim of unfairness or fraud in the making, or fraud or extortion in the execution of the contract for such work, nor any claim of effort to put the contractor in statu quo by the return of the bridge or otherwise; the same having been accepted by the board of commissioners and incorporated as part of the public highway.

The court in that case in effect said:

"The plaintiff here is not suing on an illegal contract to get his money back. He is holding onto money which he got, it is true, by virtue of a contract made in violation of law; but, inasmuch as the public got the property for that money, we will not permit the public's representatives to recover it back. He who comes in and seeks redress of that kind will not be heard to urge the illegality of the contract, in order to recover back that which had been paid, at least in good morals, in dealing with the other party."

That, I think, is the law, and that would be the law that would apply here, if a supplementary contract under section 4331 had been necessary back in May, 1915.

Perhaps, if a supplementary contract had been necessary, and the Casey Company had not been able to get an estimate, or had not been able to get the money and had to sue, they would fail to sustain the burden of proof; in other words, they would not be able, perhaps, to show or to prove a contract binding legally upon the city authorities to pay them that money. But if the city authorities, recognizing their normal obligation to pay for that which was morally due and ought to have been covered by the contract originally, issued a proper voucher and paid it, certainly the city authorities afterwards have no standing in court when they undertake to recover that money back, and it does not take from the strength of the position of the person who has received the money that he has thereafter, and at a date so late that on its face it looks as if it were a superfluity, or almost a subterfuge, gotten that contract under the circumstances shown in evidence in this case.

So that it seems to me that, viewing the counterclaim in any angle and from any aspect, the city is not entitled to recover from the Casey Company on either one of these items. The money has been paid to them, and they are entitled to the payment.

That leaves nothing, gentlemen of the jury, here for your consideration, except that which results from the admitted and conceded facts. It is admitted here, both in the answer and verbally before you, that the city of Canton, which is the defendant, is retaining three sums of money as a reserved percentage of 2 per cent. of the price to be paid to the plaintiff for constructing the sewers. The aggregate amount of these three items is $3,891.45; $1,190.99 bears interest from October 16, 1916, $1,190.81 bears interest from July 15, 1916, and $1,509.55 bears interest from August 20, 1916. The interest should be computed until the first day of this term of court, February 5, 1918, and you should return a verdict for the aggregate amount thus ascertained in favor of the plaintiff.

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OLIVIER et al. v. MT. UNION TANNING & EXTRACT CO.

(District Court, M. D. Pennsylvania. November 16, 1918.)

No. 962.

1. REPLEVIN ⇐8(5)—WHO MAY MAINTAIN—JOINT OWNERS.
Where at most an assignment could only make plaintiff a joint owner of property held by defendant as joint owner, replevin cannot be maintained; for, being a possessory action, replevin cannot be maintained, unless plaintiff is entitled to immediate exclusive possession.

2. CARRIERS ⇐58—TRANSFER OF BILL OF LADING—EFFECT ON TITLE—BULKY ARTICLES.
The transfer to plaintiff of bills of lading for a shipment of logwood consigned by the owner to defendant, together with an assignment, etc., *held*, in view of the bulky character of the property to vest plaintiff with title thereto.

3. SALES ⇐233(3)—RIGHTS AS AGAINST THIRD PERSONS—NOTICE—EVIDENCE—SUFFICIENCY.
Defendant *held* to have had notice, etc., of the transfer to plaintiff of logwood consigned to defendant, before the logwood was manufactured into extract.

4. REPLEVIN ⇐108—ACTIONS—RECOVERY OF DAMAGES.
Replevin is a mixed action, being both a demand for a thing and damages for withholding; and in replevin for property that defendant knew belonged to plaintiff, *held*, that plaintiff could recover damages for that eloigned.

At Law. Action of replevin by Marcel Olivier, Maurice Rosier, and Daniel Brun, copartners doing business as Olivier & Co., against the Mt. Union Tanning & Extract Company. Judgment for plaintiffs.

Fox & Geyer, of Harrisburg, Pa., for plaintiffs.

James S. Woods and H. H. Waite, both of Huntingdon, Pa., for defendant.

WITMER, District Judge. This is an action of replevin brought by the plaintiffs, Marcel Olivier, Maurice Rosier, and Daniel Brun, copartners doing business under the firm name of Olivier & Co., against the Mt. Union Tanning & Extract Company, for the recovery of 1,576 tons of logwood in the yards and possession of the defendant at Mt. Union, Pa.

The case came on for trial, a jury having been called and sworn, and after proceeding with the trial and taking the testimony of witnesses for plaintiff and some for defendant, upon agreement of counsel, the jury was dismissed, and the case proceeded agreeably to the provisions of the act of April 22, 1874 (P. L. 109).

The plaintiff has alleged that in the month of June, 1916, in the city of New York, the Bothamley Chemical, Color & Extract Company, having arranged to acquire certain logwood then being imported, borrowed from it, the plaintiff, certain sums of money, giving its collateral note promising to repay such sum, and at the same time pledged a lot of logwood, described in certain invoices and weigh notes; that it also by writing assigned said logwood to plaintiff, at-

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taching to such instrument bills of lading of the carrier company. It is stated that there were seven individual and like transactions. The plaintiff further alleges that the logwood thereafter came into the possession of the defendant; that when the notes fell due they were not paid, and the plaintiff became entitled to the possession of the logwood. Demand having been made for it, the defendant wrongfully refused to deliver the same to plaintiff.

The plaintiff having filed the required bond, the writ was served by the marshal, and, on failure of defendant to provide a bond for detention, delivery was made to the plaintiff.

The defendant denies the title and right of possession of the plaintiff as alleged, averring generally that such was and always belonged to it, for that in May, 1916, the defendant entered into a contract with the Bothamley Chemical, Color & Extract Company, by which it was agreed that the Bothamley Company would secure logwood to be manufactured by the defendant, the manufactured product to be turned over to the Bothamley Company and sold, the money deposited in a special account, and first used for the payment of the cost of the logwood and freight, and after an allowance of three cents per pound for manufacture, the remaining or net profit to be divided between the two. The defendant further alleges that it had no notice of the plaintiff's claim to the wood until October, 1916; that it had manufactured all or nearly all of the wood into extract and was willing and ready to manufacture the balance as undertaken and agreed with the Bothamley Company; that under its contract with the latter it had received the logwood into its yards, and a certain portion of it was at once taken from the cars and manufactured into extract; that of the 1,576 tons claimed, 984 tons were not stored, but manufactured at once, yielding 787 barrels of extract, of which 700 were delivered to the Bothamley Company, which in turn delivered 400 barrels of it to the plaintiff, of the value of $60,000, which the plaintiff neglected to credit to the Bothamley Company. The defendant also denies the authority of the Bothamley Company to transfer and assign the logwood purchased from H. Mann & Co., being 815 tons of the amount embraced in the total shipment of 1,576 tons, claiming that such purchase was the joint purchase of the defendant and the Bothamley Company. It is further contended that the wood was so commingled in plaintiff's yards that it was not possible to determine how much, if any, of the wood in question was remaining, and, further, that if there was any there defendant had a lien upon it for any balance due from the Bothamley Company on final settlement of their account.

The issue here presented is one of ownership and right of possession of the property in dispute. The plaintiff's claim of title is clearly and fully set forth in its declaration, with an averment of wrongful dispossession, and this it is bound to sustain by the fair weight or preponderance of the evidence in order to maintain its action. Has it done so?

The matter can be best understood and more readily disposed of by considering individually the logwood purchased from H. Mann

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& Co., as distinguished from the wood obtained through other sources from the Bothamley Company. Now, as to the former, the court is readily satisfied, and so finds, that the purchase was made by the defendant jointly with the Bothamley Company, and that the defendant obtained delivery and full possession of the same without any knowledge of the assignment or attempted assignment of it by the Bothamley Company to the plaintiff. Were a discussion of the proof here required in support of this conclusion, it could be readily supplied; suffice to say that plaintiff well knew, judging from the notes and agreements in evidence, that it was supplying only half of the money to pay for these shipments. Had plaintiff made diligent inquiry, as it was in duty bound, it could readily have ascertained that the defendant had obligated itself for the other half, for which it ultimately made payment, and thus ascertained the real and complete ownership of the property to which it sought title.

[1] Though the Bothamley Company did assign to the plaintiff this wood, it nevertheless remains that defendant was not affected thereby since such assignment could only in effect operate to substitute the assignee for the assignor as the joint owner of the defendant; assuming now that these assignments, of which more will hereafter be said, were sufficient to convey ownership of the property recited. It follows, therefore, that the most favorable position that can be allowed plaintiff is to concede to him, jointly with defendant, ownership of the purchases and shipments from H. Mann & Co., which admittedly will defeat its right to recovery to this extent. The action of replevin, being a possessory action, cannot be maintained unless the plaintiff established property and the exclusive right of immediate possession. Lake Shore & Michigan Ry. Co. v. Ellsey, 85 Pa. 283; Strong et al. v. Dinniny, 175 Pa. 586, 34 Atl. 919; McFarland Meade Co. v. Doak, 63 Pa. Super. Ct. 31.

Having decided in Reinheimer v. Hemingway, 35 Pa. 432, that one tenant in common of a chattel cannot maintain replevin for it, without joining his cotenants, Justice Strong, in delivering the opinion of the court, said:

"An action of * * * replevin * * * operates specifically upon the chattel. If it can be brought by one of three tenants in common, it may be by each of the others. And if the writs be in the sheriff's hands at the same time, how is the property to be replevied? In Hart v. Fitzgerald, 2 Mass. 511 [3 Am. Dec. 75], it was ruled that a part owner of a chattel cannot maintain replevin for his undivided part, and if it appear in the writ, the court will arrest the judgment. Part ownership in another is therefore pleadable in bar, and not exclusively in abatement. So in Rogers v. Arnold, 12 Wend. [N. Y.] 30, it was held that, if the plaintiff in replevin fail to establish an exclusive right in himself to possess and control the property, the defendant is entitled to a verdict."

[2, 3] Taking up the remaining shipments, aggregating 761 tons, purchased by the Bothamley Company from the Fruit Dispatch Company and the American Products Exchange, it may be noted that each and every of them was secured to the plaintiff for the purchase money, advanced by check payable to the vendor for the logwood purchased by the Bothamley Company giving its note to plaintiff,

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collateral in form, promising to repay the amount in three months, and an instrument assigning and transferring unto the plaintiff the respective shipments of logwood. Accompanying the collateral note was the original invoice for this wood, together with the weigh notes further describing it. Subsequently the Bothamley Company delivered to the plaintiff the bills of lading of the Pennsylvania Railroad Company, consigning the shipment to the defendant. Accompanying the bills of lading was the written assignment mentioned, transferring and assigning to the plaintiff all of its right, title, and interest in and to the logwood, which assignment was in terms supplemental to the assignment contained in the collateral note, and subject to all the terms thereof.

This arrangement between the parties is undoubtedly binding, and vested the title to the property in the plaintiff. The bulky character of the property rendering it difficult of actual physical delivery, the transfer of such is as a general custom usually made by symbolic delivery; that is, by the transfer of bills of lading, warehouse receipts, or other documents, describing the property and showing the location and possession of it. That the title to property of such character under the circumstances may be shifted by the delivery of such evidences of ownership, and without actual physical delivery, has been held in the well-recognized case of Century Throwing Co. v. Muller, 197 Fed. 252, 116 C. C. A. 614, where the court took judicial notice of the special custom concerning such transactions. Whether such transfer of title without actual physical delivery is, however, binding upon third parties generally without notice, need not be here decided; it being established that the defendant had knowledge of the transfer of title by the Bothamley Company to the plaintiff before the same passed out of its possession, either in its raw state or as manufactured into extract. It is not difficult to find that the defendant was without notice of the plaintiff's claim of title until October, 1916. The written agreement between the Bothamley Company and defendant bore the date of May 24, 1916. Delivery was made during the month of June following. Defendant contends that a portion, if not the greater portion, of the deliveries or shipments, were used up from aboard cars and manufactured into extract as delivered in its yards by the railroad company without storing, and that the product thereof was immediately turned over to the Bothamley Company without knowledge of the plaintiff's claim, and that the remaining portion, which was stored, was so commingled with its own wood that it was impossible to distinguish it or to determine the amount so stored. That the latter contention is true can hardly be doubted, and whether such commingling was due to the negligence of the defendant, or resulting necessarily from the method or means usually employed in the course of manufacturing liquid extract at defendant's plant, is not deemed important in the face of defendant's admissions.

In reply to a letter of October 2, 1916, written to defendant by plaintiff's attorneys, advising it of its claim on the logwood purchased and shipped at the instance of the Bothamley Company, transmitting

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therewith a list of shipments in detail, and furthermore requesting advice as to the location of each carload lot, defendant promised in return a few days later to write fully after investigation and checking of figures submitted. The matter was then no doubt turned over to defendant's attorney, who opened a correspondence with plaintiff's attorneys regarding the assignment and the location of the wood, lasting until the latter part of February, 1917. It may not be important, but it does not appear that it was at any time hinted that the wood or any portion of it was no longer in defendant's yards at Mt. Union. In fact, the correspondence proceeds on the assumption that it was all there. However, during the beginning of January, 1917, plaintiff's agent, E. H. Peck, visited Mt. Union, and states that he was there informed by Mr. Green, president of the defendant company, that the wood was piled in the yard with other wood belonging to the Mt. Union Company and the Bothamley Company.

Referring to Mr. Peck's visit and his report of what he heard and saw, the plaintiff on January 23, 1917, wrote to defendant, amongst other things, inquiring about insurance on the wood. Several days thereafter, the defendant replied by wire: "Letter received and have no insurance on wood." The same day, January 26th, the defendant company confirmed by letter the telegram and added:

"In regard to shipping hematine in your name, would advise that there is no danger of shipping any extract from your wood, as we think there is considerable quantity here yet in addition to yours. We will be careful about this."

The insurance was perfected and the correspondence continued; defendant again, in letter dated January 29th, addressed to plaintiff, stated:

"We will take up with Bothamley the matter you propose about shipment, although we have not yet reached any of your wood. No doubt they are very anxious to get it cleaned up."

March 8th, the plaintiff reimbursed defendant by check $6,016.57 for freight advanced by it on these shipments of the Bothamley Company, according to conference between Mr. Green and Mr. Peck upon the latter's visit to Mt. Union.

Considerable correspondence passed between the parties in the plaintiff's effort to have the wood turned into extract and shipped to plaintiff, without result. Finally on November 24, 1917, after Mr. Peck visited the yards of defendant with a prospective purchaser for the wood, the plaintiff wrote a letter to defendant, advising it that the wood had been sold to the man who visited the yards with Mr. Peck, and directed shipment of it to Marietta, Ohio. To this the defendant replied:

"This wood was sent to us without any notice whatever of any claim being upon it until after it had been in our yards, mixed up with a lot of other wood. It came to our yard in the usual course of business, and no notice was received by us that anybody had any claim upon this wood until long after it had been received. Some of it has been used and manufactured, and some of it may be still in the yard; it may all have been manufactured."

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Finally, on account of the conflicting claims of other parties to the wood, the defendant stated, it was obliged to refuse permission to remove it.

No other conclusion can be fairly deduced from the evidence referring to the admission of the defendant preceding the payment of the freight charges by the plaintiff than that it retained possession of the wood now in dispute. That the president, being in charge of the business, could be so wide of the mark and so badly mistaken as is now argued by his counsel would be attributing to him a want of business grasp and attention, and such lacking of care in the use of assertions in letter writing, of which the court would hesitate to convict him. Surely it must be accepted that the wood was in defendant's yard, and all of it, when the defendant gave plaintiff the assurance that there was considerable there yet in addition to its wood, promising to be careful about the matter, and then afterwards repeating that none of defendant's wood had yet been reached. If, subsequently, this wood was used, or in any shape, as extract or wood, it was removed from the yard, the defendant cannot be heard to complain that it was indistinguishable from its own, having been responsible for its disposition. It follows, and the court so finds, that 515 tons delivered by the marshal to the plaintiff was wood belonging to the plaintiff. This was the weight of a quantity of wood after storing and drying in defendant's yard for a period of a year and over. What portion of the 761 tons, weighed when green and unseasoned, does this represent? The loss by seasoning has been variously estimated. The defendant and one of his witnesses have testified to an experiment made to ascertain this by weighing a number of sticks when green, or on receipt of same in the yard, and then again after thorough drying, resulting in loss of 30 per cent. Common experience teaches that this result is more reliable than the estimate of 6 per cent. loss as testified by plaintiff's witness as the basis for the calculation. Applying this to the tonnage in dry wood seized (515) produces approximately 670 tons, and being accepted on a calculation the 515 tons of seasoned wood represents approximately 670 tons of the 761 tons of wood in the green state, thus leaving 91 tons eloigned.

[4] Replevin is a mixed action, being both the demand for a thing and damages for the taking and detention. It is not only a proceeding in rem, but also a proceeding against the defendant in the writ personally with a summons to appear. This was so previous to the act of July 9, 1901 (P. L. 614), which recognizes merely the previous decisions of our courts, holding to this principle. Wetherill v. Gallagher, 211 Pa. 311, 60 Atl. 905, 107 Am. St. Rep. 575; Hoyt v. Carson, 60 Pa. Super. Ct. 175; Baldwin v. Cash, 7 Watts & S. (Pa.) 425; Bower v. Tallman, 5 Watts & S. (Pa.) 556. In the latter case, Justice Kennedy, speaking for the court, said:

"Thus it has been held, even in England, where the maintenance of the action of replevin is much more restricted than in Pennsylvania, the plaintiff may recover damages from the defendant equal to the value of the property, when taken by the latter tortiously or without authority, where he has put it out of the power of the sheriff or proper officer to execute the writ by replevy-

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ing and delivering the property up to the plaintiff, or where, from other causes, it may have become impracticable for the officer to do so. As, for instance, where the cattle are eloigned by the defendant, the plaintiff may, instead of proceeding to obtain a writ of withernam, for the purpose of taking other cattle in lieu of those eloigned, proceed in the cause, if the cattle be withheld by the defendant, and recover damages to the full value of them, as well as damages for the detention."

The plaintiff, having fixed the price of wood at $29.50 per ton, cannot complain if this is accepted in estimating the damages at $2,684.50 for the wood eloigned and interest upon this amount from January 29, 1917, date of marshal's demand, for detention.

The court therefore finds in favor of plaintiff and against the defendant as and for damages in the sum of $2,810.72.

THE HOWARD.

(District Court, D. Maryland. June 10, 1916.)

1. COLLISION ⇐61—STEAMER AND BARGE—FAULT OF OVERTAKING VESSEL.
An overtaking steamer, which, several miles off Point Judith, on a clear night, ran into a barge, with lights set, in tow of tug, *held* at fault; her navigator's attention having been fixed on another vessel, till too late to avoid the collision, and she having shortly before changed her course.

2. COLLISION ⇐61—FAULT OF TUG WITH LONG HAWSER—EXERCISE OF JUDGMENT.
The rules allowing use, from Race Rock to Gay Head, of a hawser longer than 75 fathoms, when in the judgment of the tug's master, in view of wind and weather conditions, safety requires, he should not be held in fault, in an honest exercise of that judgment, relative to collision of steamer with one of barges in tow of tug.

3. COLLISION ⇐58—TUG WITH LONG HAWSER—CARE REQUIRED.
Use by tug, with barges in tow, of hawsers longer than generally permitted by the rules, requires exercise by it of extreme care in navigation to avoid collision.

4. COLLISION ⇐16, 61—VESSEL AT FAULT—OFFICER WITHOUT AUTHORITY.
No vessel, and least of all, one which, with tows, occupies half a mile of sea room, should be left in charge of an officer who is not allowed to exercise what skill and competency he has, and for such fault, if possibly contributing to a collision, she must be held in part responsible.

5. COLLISION ⇐76—DUTY TO WARN—OVERTAKEN VESSEL.
A tug, with barges in tow, seeing that an overtaking steamer is likely to run into one of the barges, is not without duty to sound danger signals, merely because the steamer has not sounded passing signals.

6. COLLISION ⇐58—DUTY OF OVERTAKEN TUG—PRESERVING COURSE AND SPEED.
The captain of a tug, with two barges in tow, the first of which was struck by an overtaking steamer, though supposing the steamer was likely to pass between the barges, was under the duty of the privileged vessel of preserving course and speed, and was in fault in slowing engines to let hawsers sink.

7. COLLISION ⇐108—FAULT—EMERGENCY.
Act of captain of overtaken tug in slowing engines will not be excused, on ground of emergency, because he had just come from below, but will be judged as if he, or some one free to exercise a free and independent judgment, had been in charge of navigation when danger first appeared.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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In Admiralty. Suits for collision by the Consolidation Coastwise Company and the Consolidation Coal Company against the steamship Howard, and by the Merchants' & Miners' Transportation Company against the Consolidation Coastwise Company. Damages divided.

Keech, Wright & Lord, J. Walter Lord, and Robert R. Carman, all of Baltimore, Md., for Consolidation Coastwise Co. and Consolidation Coal Co.

Daniel H. Hayne, of Baltimore, Md., for The Howard and Merchants' & Miners' Transp. Co.

ROSE, District Judge. A very few minutes after 4 o'clock on the morning of the 4th of February last the steamship Howard, when some 3½ miles southeast of Point Judith, was in collision with a barge known as No. 12. The barge sank almost immediately. It and its cargo of 1,447 tons of coal were lost. Of its crew of five, three were drowned.

[1] The Howard was one of the steamers of the Merchants' & Miners' Transportation Company, and at the time of the disaster was on one of its regular trips from Baltimore to Providence. The barge, together with another, No. 17, was in tow of the steamship Charles F. Mayer, and was bound from Hampton Roads to Boston and Portsmouth. The Mayer and both the barges belonged to the Consolidation Coastwise Company. All three were loaded with coal, which was the property of the Consolidation Coal Company. The barges were arranged in tandem fashion. The one which was sunk followed next after the Mayer, and barge No. 17 brought up the rear. Each barge had from 165 to 185 fathoms of hawser out. The Mayer was some 236 feet long; each of the barges, a trifle over 200 feet. There was therefore about half a mile between the stem of the Mayer and the stern of barge 17. The wind was from the northwest, the night was clear, and the required lights were burning on all the vessels concerned.

It is true that the Howard says that the white lights of the rear barge were not as bright as the law requires. The witness Hamilton was the first officer of the steamship Dimmick. It was west bound and passed the Mayer and her tow on an almost parallel course a few minutes before the collision. He says he remembers looking for the white lights of the rear barge, and that he did not see them until his steamer reached or passed barge 12. He thinks the Dimmick came within a few hundred feet of barge 17, but he frankly adds that it is hard to judge distances accurately, especially at night. If the Dimmick passed as close to the Point Judith gas buoy as he says she did, she could not have come within half a mile of the barge.

Another apparently disinterested witness was navigating the tug Western. It was following some three or four miles behind the Mayer and her barges. He had no difficulty in keeping the white lights of barge 17 steadily in view. There is no sufficient reason to believe that the lights on that barge were any less bright than they should have been.

At the time of the collision the Howard was the overtaking, and therefore the burdened, vessel, and, moreover, she changed her course

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not very long before she struck the barge. With one possible exception, no one on the Howard saw before the collision any of the lights on any of the three vessels of the Mayer fleet. Indeed, until a collision had become inevitable, nobody on the Howard knew that the Mayer or the barges were anywhere in the neighborhood. It is impossible to believe that all the lights that should have been visible on the Mayer and its barges were obscured by sails. The only reason to suppose that any of them were is that perhaps no one on the Howard saw them.

The story told by witnesses for the latter deprives that circumstance of all probative force. Her watch changed at 4 o'clock. The collision, according to the clock in her pilot house, took place at 5 minutes after 4. The officer in charge came on duty a minute or so before 4. Quartermasters were changed somewhat later, the witnesses say, only a minute or so before the collision. It was after the new quartermaster had received the course from his predecessor that the navigating officer first noticed the lights of the Dimmick, which were never reported by the Howard's lookout, if indeed they were ever seen by him, although either her lights or those of the Mayer were noticed by the quartermaster who went off duty just before the collision. It is evident from the testimony of the Howard's officer that, when he first caught sight of the Dimmick's red light, he was startled by what appeared to him to be her dangerous proximity. He gave the order "hard aport," and watched her until he saw he was going to clear her safely. It was not until then that he saw the sails of the barge. He at once gave the order to slow engines, and instantly followed it by another order to put them at full speed astern. It was too late. The stem of the Howard cut into the barge from her forerigging to her boiler hatch.

It is not necessary to assume the precise accuracy of the estimates of time made by those in the pilot house of the Howard. It appears probable that the Howard was not quite as close to the Dimmick as the former's navigator thought, but it is quite clear that he was alarmed by the appearance of the Dimmick, and that he kept his attention riveted on her until it was too late to avoid striking the barge. The fault of the Howard is clear, and need not be further elaborated. It may be explained, but not justified, by the fact that the change of watch had just been made.

[2] Is the Mayer also to blame? The rules require that ordinarily there shall not be more than 75 fathoms of hawser out, but it is expressly provided that from Race Rock to Gay Head longer hawsers may be used, when in the judgment of the master, in view of the wind and weather conditions, safety requires. A great deal of testimony had been taken as to what those conditions were at the time of the collision and immediately preceding it. The weather records show that at Block Island the wind was then blowing from 26 to 27 miles an hour. The witnesses differ widely as to how strong the wind was in the neighborhood of the place of the collision. There are disinterested witnesses on both sides, and they differ as widely as do those more nearly involved in the controversy. Such as testify for the libelants vary from 20 to 35 miles an hour in their estimates of the wind's ve-

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locity. The respondent's witnesses testify it did not exceed 15. The latter say that the sea was smooth.

There is no question that after the collision the Howard's lifeboats were lowered without difficulty and without bumping against the sides of the vessel. They found it both safe and easy to row about in search of the crew of the sunken barge. On the other hand, the libelants put on the stand a number of tugboat captains not in their employ. They all unite in testifying that weather conditions were such that it would not have been safe to tow on a short hawser. The rules impose upon the captain of a tug the duty of deciding whether weather conditions in this locality require at any particular time the use of a hawser exceeding 75 fathoms in length. That judgment must be exercised in good faith, but I see no reason to doubt that the captain of the Mayer did believe that under the weather conditions as he conceived them to be, a long hawser was required.

Now, it is true that tugboat captains assume that in these waters it is never safe to use a short hawser. It may be that that judgment is largely influenced by the fact that the use of a long hawser makes their work easier. Nevertheless, the rules leave to the determination of the captain of the tug the length of the hawser which safety requires. It is obviously unfair to hold him in fault for an honest exercise of that judgment. Moreover, in this case the length of the hawser is of little or no importance. If it had been 20 or 30 fathoms longer than it was, there would have been no collision. If it had been 40 or 50 fathoms shorter, the boats would equally have escaped coming together. Had it been half as long as it was, the Howard would have collided with barge 17, and not with barge 12. After all, that is merely another way of saying that, if the barge had not been precisely where it was when the Howard struck it, it would not have been hit.

[3] I do not for a moment wish to minimize the importance of strict adherence to the rules requiring the use of short hawsers. As already stated, there was half a mile between the bow of the Mayer and the stern of barge 17. Tows of such length are doubly dangerous. They close for the time being a great stretch of water to other vessels, and it is exceedingly difficult for a tug with such a tow so to maneuver as to do its part in escaping from dangerous situations, or from situations which may easily become dangerous. The exercise of extreme care is, under such circumstances, incumbent upon it. The Admiral Schley, 131 Fed. 433, 65 C. C. A. 417.

[4] It is charged that the navigation of the Mayer was not in competent hands. None of her officers, other than her master, were licensed pilots for the waters in which she was. All of them were apparently competent navigators, quite capable of handling the ship under any circumstances in which an accurate knowledge of local conditions was not required. It is equally true that such conditions had nothing to do with this collision. It was in another way that their lack of pilot qualifications embarrassed the navigation of the ship. Because their captain knew they were without pilot licenses, he prescribed the ship's course, and gave them instructions to call him if it became necessary

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to change it, or to do anything at all out of the ordinary. Then he went to his room, largely undressed, went to bed, and perhaps to sleep. The third officer came on duty in the pilot house at the change of watch about 4 a. m. He noticed the alteration in the course of the Howard, and became fearful that she would collide with barge 17. He sounded no danger or other signals. Indeed, it is one of the peculiarities of this case that until after the collision no signals were sounded by any of the craft concerned. He did nothing but call the captain, telling him that a steamship was about to run into the stern barge. The captain emerged in his underclothing and saw the Howard showing a green light. He thought she was to the starboard of the stern barge and about abeam of her, and that she was swinging under her port helm. He put his own helm to starboard, so he could get off at an angle and better see what was going on behind him. It looked to him as if the Howard was about to pass between the two barges. He ordered his engines slowed, so that the hawser might sink and the Howard pass over it without parting it. It was not until after the Howard showed her red light, and appeared to be going off to the southward and eastward of his course, that he blew any signal, and that was not intended for the Howard, but was a direction to his own barges to pay attention and follow the lead of the Mayer. In point of fact the collision must have occurred before he saw the Howard's red light. That could not have been visible from the Mayer until the Howard, after striking barge 12, drew off from it.

It goes without saying that no vessel, and least of all none which with her tows occupies half a mile of sea room, should be left in charge of an officer who is not allowed to exercise whatever skill and competency he has. In this the Mayer was in fault, and, if it is possible that such fault contributed to the collision, she must be held in part responsible for it.

[5, 6] The Howard insists that the Mayer should have blown danger signals so soon as it appeared to those in the pilot house of the Mayer that there was any chance of a collision. The Mayer replies that the obligation to sound danger signals is by the rules imposed on the overtaken vessel only where the overtaking vessel has first sounded passing signals, and the overtaken vessel believes that the maneuver indicated will be dangerous. The Howard answers that the Mayer was expressly required not to ignore any precaution which might be required by the ordinary practice of the seamen, or by the special circumstances of the case. It says that it has always been the ordinary practice of seamen, and for that matter of everybody else, to do all in their power to warn one who appears about to run into them. The Mayer answers that at the earliest moment at which there was any reason to sound such signal it would have been too late to have prevented the collision. That may be true, and if the statements of those in the pilot house of the Howard as to the shortness of the time which elapsed between its helm being put hard aport, and the collision, are correct, it is true. On the other hand, according to the testimony from the Mayer's pilot house, the officer in charge saw the Howard getting into a dangerous position with reference to the rear barge. He

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called the captain, who came out of his stateroom, looked back, formed an idea, correct or incorrect, as to the situation, threw the head of his vessel to port, and slowed down his engines, all before the collision took place.

Under these circumstances it is impossible to be certain that the prompt sounding by the officer in the pilot house of the Mayer of a danger signal might not have attracted the attention of the Howard in time to have prevented the collision. It was the obvious and natural thing to do, and doubtless would have been done, had not the third officer of the Mayer had his mind on calling his captain. But, if there could be any doubt as to whether the Mayer should be held liable for this act of omission, there would seem to be none that she is blameworthy for doing what the captain did. If, as he supposed, the Howard was likely to pass between the two barges, he took a great risk in slowing down. His was the privileged vessel, but it was under the corresponding duty of preserving its course and speed. It was far better to have a hawser cut than to have a barge sunk. As an experienced navigator he must have known that it was almost impossible for him, from his position, to determine accurately the relative positions and speed of the Howard and the barge. Instead of saving the hawser, what he did may have resulted in losing a barge, its contents, and three lives besides. It is true, as argued by the Mayer, that it may be the collision would have happened, had not the Mayer's engines been slowed down, but on such a question it is impossible to be certain.

[7] The captain of the Mayer did what he should not have done, and what he did may have contributed to the collision, and he must be held liable. It is said that, if he made a mistake, it was in extremis. He was attempting to escape from a danger which was not of his making. Had he, or some one else free to exercise a competent and independent judgment, been in charge of the navigation of the Mayer when danger first manifested itself, there would have been more time to think and to act wisely. He must be held responsible for what he did, precisely as if he had been in the pilot house all the time. If slowing the engines was ever a wise thing to do, it should have been done when it looked like the Howard was about to run into the rear barge; but in point of fact, under all the circumstances of this case, the obligation of the Mayer to maintain her speed was more than usually imperative. The Mayer must therefore be held also in fault. I am not prepared to hold, as the Howard asks, that the sunken barge was also blameworthy.

It follows that the damage done by the collision must be divided between the Howard and the Mayer. If the parties cannot agree as to the amounts, a reference will be ordered.

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In re TRI-STATE COAL & COKE CO. et al.

(District Court, W. D. Pennsylvania. March Term, 1918.)

No. 35.

1. SEARCHES AND SEIZURES ⇐7—CONSTITUTION—SCOPE OF PROTECTION.
Const. Amend. 4, guaranteeing against unreasonable searches and seizures, etc., embraces all persons, even those accused of crime, etc., although limitations on the scope of the protection, such as the right to search the person of an accused when legally arrested, etc., is also recognized.

2. SEARCHES AND SEIZURES ⇐3—AFFIDAVITS—SUFFICIENCY.
Affidavits for search warrants under Act June 15, 1917, c. 30, to seize books, etc., on the ground they were used to commit a felony, *held* insufficient, both under act and Const. Amend. 4, constituting mere conclusions as to the offense committed, and not sufficiently designating the books, etc., sought.

3. SEARCHES AND SEIZURES ⇐7—ACQUIESCENCE—ACT OF AGENT.
That an agent of petitioners, whose property had been seized under search warrants illegally issued, consented to execution of the warrants, *held* not an acquiescence which would deprive petitioners of their constitutional rights.

At Law. In the matter of the petition of the Tri-State Coal & Coke Company and others to have returned to them certain books, papers, and writings. Search warrants quashed, and books, etc., ordered restored.

E. Lowry Humes, U. S. Atty., of Pittsburgh, Pa., for the United States.

Nash Rockwood, of New York City, and Diamond & Zacharias, of Pittsburgh, Pa., for defendants.

THOMSON, District Judge. Three several petitions are presented to the court, one by the Tri-State Coal & Coke Company, one by the Pennsylvania Central Coal Company, and one by T. F. Barrett, praying for an order directing that all books, papers, writings, and other property of the several petitioners, alleged to have been illegally seized and taken by the United States marshal, be returned.

The property was seized on search warrants dated February 21, 1918, issued by the United States commissioner for this district, supported by affidavits of Edgar B. Spear, special agent of the Department of Justice. The deputy marshal serving the warrants made return in each case on February 23, 1918, setting forth in connection therewith a general schedule of the property seized on each writ.

A little later petitions were presented to Roger Knox, United States commissioner, who had issued the warrants alleging the illegality of the search warrants, and that the property was unlawfully seized, and praying that the property and papers be returned to the petitioners. A hearing was had before the commissioner, in which testimony on behalf of the petitioners and on behalf of the government was taken. Certain of the papers seized were returned and others were retained, and on hearing the commissioner refused the prayer of the petition.

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The search warrants authorized the entry upon the premises in question "to search for, seize, and take away certain property, to wit, contracts, books of account, minute books, ledgers, journals, cash books, day books, memoranda, and order books, check books, receipt books, and other documents, which other documents were more particularly enumerated, described, and indexed by words, letters, and figures, as follows, to wit." But following this there is no description or designation whatever.

[1] The protection of the people of the United States against unreasonable searches and seizures has been guaranteed by the Fourth Amendment of the Constitution of the United States, in these words:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized."

The protecting scope of this constitutional provision, as well as its limitations, have been considered and enunciated in various decisions of the Supreme Court, among which may be cited Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877, Bram v. United States, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and many others.

These cases all recognize, not only the binding force of this constitutional provision, but its high necessity to protect the sanctity of the home and the privacies of life; that this protection is so broad and ample that it embraces all persons, even those accused of crime; and that the duty of giving it full effect rests upon all intrusted under our federal system with the enforcement of the laws.

In Weeks v. United States, the following limitations are distinctly recognized: The right to search the person of the accused when legally arrested, to discover and seize the proofs of his crime; the right to seize the tools of the burglar, or other proofs of guilt found upon his arrest within the control of the accused; the right to offer during the course of a trial papers, though unlawfully seized, unless reasonable application for their return has been made to the court.

[2] The act of Congress of June 15, 1917 (40 Stat. 217, c. 30), under which the search warrants in this case were issued, very carefully guarded against any invasion of the constitutional provision. It clearly sets forth the three grounds upon which alone a search warrant may issue:

(1) When the property was stolen or embezzled, in violation of a law of the United States.

(2) When the property was used as a means of committing a felony.

(3) When the property, or any paper, is possessed, controlled, or used in violation of section 22 of this act.

By section 3, title 11, a search warrant cannot be issued but upon probable cause, supported by affidavit naming or describing the per-

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son and particularly describing the property and the place to be searched.

Under section 5, title 11, the affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

The opinion in the very recent case of Veeder v. United States, 252 Fed. 414, —— C. C. A. ——, wherein the search warrant was quashed by the Circuit Court of Appeals of the Seventh Circuit, covers this case completely. There the affidavits and depositions in support of the warrant were much fuller and more specific than in the case at bar. The court held there that no search warrant shall issue unless the judge shall first be furnished with facts—not beliefs, or surmises, but facts—which, when the law is properly applied to them, shall tend to establish the necessary legal conclusions, or tend to establish probable cause for believing that the legal conclusion is right, and that the finding of a legal conclusion or a probable cause from the exhibited facts is a judicial function, and cannot be delegated by the judge to the accuser.

The search warrants here issued were totally and fatally defective. All that the affidavit sets forth is that the property referred to—

"has been used as the means of committing certain unlawful felonies; that is to say, the felony of knowingly and willfully, with knowledge that the price of bituminous coal has heretofore been fixed at $2.45 per ton, f. o. b. mines, in accordance with the regulations prescribed under and by virtue of the Food and Fuel Act of Congress approved August 10, 1917, to ask, demand and receive higher prices per ton for bituminous coal at the mine than the price theretofore prescribed by the said regulations under the said act of Congress, and the further felony of combining, conspiring, agreeing, and arranging with other persons to exact excessive prices for bituminous coal, said prices being higher prices per ton at the mine than the prices theretofore prescribed by the regulations prescribed under and by virtue of the Food and Fuel Act of Congress approved August 10, 1917, and the further felony of aiding and abetting the felony of making, demanding, and receiving higher prices per ton for bituminous coal at the mine than the price theretofore prescribed by the said regulations under the act of Congress of August 10, 1917."

These averments are mere conclusions, not facts. As said in the Veeder Case:

"There is nothing but the affiant's application of his own undisclosed notion of the law to an undisclosed state of facts; and under our system of government the accuser is not permitted to be also the judge."

The affidavit does not even set forth the person who committed the alleged felonies, does not sufficiently designate and describe the property to be seized, does not set forth how the books and papers were used as the means of committing a felony, and is otherwise defective.

The issuance of the search warrants, and the seizure of the petitioners' books, papers, and property thereunder, was a palpable and flagrant violation of their rights guaranteed by the Constitution. I have read carefully the testimony offered before the commissioner, and fail to find any such agreement as would make valid and justify the detention of the papers and property thus unlawfully seized and retained.

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[3] Any acquiescence by some agent as to the seizure and detention of the books and papers was simply a choice of evils, when confronted by an officer of the United States armed with a warrant which he was determined to execute. By virtue of no such means can the high constitutional rights of a citizen be invaded or taken away.

I am authorized to state that the views expressed in this opinion are concurred in by Judge ORR.

PER CURIAM. And now, to wit, March 21, 1918, the search warrants in question are quashed, and it is ordered and directed that all books, papers, writings, and other property of the said several petitioners, so as aforesaid illegally taken, and now in the custody and control of the United States attorney for the Western district of Pennsylvania, or in the custody and control of the said Edgar B. Spear, special agent of the Department of Justice, be restored and returned to the respective petitioners from whom the same were taken, together with all copies, photographs, or memoranda thereof made since the same were taken.

At the request of the United States attorney, an exception is noted to the foregoing order of the court, and at his request a bill is sealed.

In the matter of the return of papers ordered by the court in connection with the search warrants issued against the Tri-State Coal Company, the Pennsylvania Central Coal Company, and T. F. Barrett, I now hand to the court the papers ordered returned, the defendants having declined to give us a receipt, in order that the court may have a record of the compliance with the order of court.

[Signed] E. Lowry Humes, United States Attorney.

THOMSON, District Judge. And now, this 21st day of March, A. D. 1918, the United States attorney having turned over to the clerk, in the presence of the court, the papers directed by order this day to be delivered to the respective parties from whom they were taken by virtue of the search warrants designated in the opinion this day filed, the same are directed by the court to be delivered to the counsel who are now present in court of the parties, respectively, to whom the said papers belong.

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COLLINS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 28, 1918.)

No. 3156.

1. INDICTMENT AND INFORMATION ⟸121(1, 5)—BILL OF PARTICULARS—NATURE.
A bill of particulars can in no way aid an indictment fundamentally bad; the office of the bill, which is addressed to the discretion of the court, being to render the defendant more particular information as to matters essential to his defense.

2. INDICTMENT AND INFORMATION ⟸110(3)—SUFFICIENCY—WORDS OF STATUTE.
An indictment charging, in the words of the Espionage Act, that defendant did make and convey false reports, etc., with intent to interfere with military and naval operations, etc., *held* insufficient to charge any offense.

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

William M. Collins was convicted of violating the Espionage Act, and he brings error. Reversed and remanded.

This cause is here on writ of error at the instance of William M. Collins, defendant below, who was charged with a violation of the Espionage Act of Congress (Act June 15, 1917, c. 30, 40 Stat. 217). The indictment contains two counts. Count 1 charges that Collins, on or about December 16, 1917, at Montesano, Wash., "when the United States was at war with Germany, did willfully, knowingly, unlawfully, and feloniously make and convey false reports and false statements, with intent to interfere with the operation and success of the military forces of the United States, and to promote the success of its enemies." The second count is of like tenor, except that the charge is based upon the declaration of the act for causing and attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States.

The indictment was returned January 9, 1918. The defendant was arraigned and entered a plea of not guilty January 14, and the cause was set for trial January 29, 1918. On January 28th, apparently without withdrawing his plea of not guilty, the defendant filed a demurrer to the indictment, assigning as reasons therefor that neither of the counts charged an offense against the laws of the United States, nor did they state facts sufficient to constitute a crime. After argument, the demurrer was overruled, and the court thereupon required the prosecuting attorney to file forthwith a bill of particulars of the offenses charged, which was done.

When the cause came on for trial before a jury duly impaneled, defendant's counsel objected to the court's receiving any evidence in support of the allegations of the indictment, and at the same time moved the court for an instructed verdict acquitting the defendant, upon the ground that the indictment does not state facts sufficient to constitute a crime. The objection was overruled, and the motion denied, and an exception was saved and allowed. The trial resulted in a conviction under count 1 and an acquittal under count 2. There was a motion at the conclusion of the testimony offered by the government for a directed verdict acquitting the defendant, but none at the close of the entire testimony. The motion was denied.

H. E. Foster, of Seattle, Wash., for plaintiff in error.

Clarence L. Reames, Sp. Asst. Atty. Gen., and Robert C. Saunders, U. S. Atty., of Seattle, Wash., for the United States.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

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WOLVERTON, District Judge (after stating the facts as above). Waiving any irregularity in filing and presenting the demurrer for consideration, the question presented for decision is whether the indictment is sufficient to support any evidence designed to secure a conviction.

[1] It should be premised that a bill of particulars can in no way aid or render sufficient an indictment fundamentally bad. The office of a bill of particulars, where the indictment is good, is to render the defendant more particular information as to matters essential to his defense. It is directed to the discretion of the court, and before compelling the defendant to go to trial. United States v. Bayaud (C. C.) 16 Fed. 376, 382; United States v. Tubbs (D. C.) 94 Fed. 356, 360; Rinker v. United States, 151 Fed. 755, 759, 81 C. C. A. 379; United States v. Rintelen (D. C.) 233 Fed. 793, 799. In the Rinker Case the court says:

"When an indictment sets forth the facts constituting the essential elements of the offense with such certainty that it cannot be pronounced ill upon motion to quash or demurrer, and yet is couched in such language that the accused is liable to be surprised by the production of evidence for which he is unprepared, he should, in advance of the trial, apply for a bill of the particulars; otherwise it may properly be assumed as against him that he is fully informed of the precise case which he must meet upon the trial."

The bill of particulars, therefore, filed by the prosecuting attorney, can in no way aid the sufficiency of the indictment.

[2] Now, as to the sufficiency of the indictment: Where a statute declares that certain or specific acts, or the doing of certain things, shall constitute an offense, it is always necessary to state what the accused did whereby he transgressed the law, in order that he may be advised of the specific charge made against him, to enable him to concert his defense, and to avail himself of his conviction or acquittal against further prosecution of the same cause, and, further, to advise the court of the facts relied on for conviction, so that it may determine whether they are sufficient in law to support the charge. It is not sufficient in such a case to state the supposed offense in the language of the statute. As an apt illustration, by the Criminal Code (Act March 4, 1909, c. 321, § 125, 35 Stat. 1111 [Comp. St. 1916, § 10295]), it is declared that:

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, * * * shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury."

It can scarcely be contended that an indictment charging perjury simply in the language of the statute would be sufficient, without stating what the oath was that was taken, its falsity, the defendant's belief that it was false, before whom taken, and the other facts and circumstances, as to time, place, and subject-matter, sufficiently to apprise the accused of the specific charge made against him, and to inform the court of the substantive facts relied upon for conviction.

The Supreme Court has spoken on the subject in no uncertain language. In United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135,

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the defendant was indicted charged with uttering and substituting a falsely made, forged, counterfeited, and altered obligation and security of the United States, in the language of the statute, the obligation being set forth according to its tenor; but it was not alleged that the defendant knew the instrument to be false, forged, counterfeited, and altered. On a motion in arrest of judgment, after verdict of conviction, the question was certified to the Supreme Court whether the indictment was sufficient to sustain the verdict. The Supreme Court declared that it was not, and that the omission was matter of substance, and not a defect or imperfection in matter of form only. The court, speaking through Mr. Justice Gray, has this to say:

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the Legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588, is a leading case. The statute under which the indictment was drawn made it an offense to conspire—

"to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States." Act May 31, 1870, c. 114, § 6, 16 Stat. 141.

The counts in the indictment to which exceptions were taken charged an intent to hinder and prevent the free exercise and enjoyment of "every, each, all, and singular" the rights granted by the Constitution and laws of the United States. There was no specification of any particular right or privilege the free exercise and enjoyment of which was hindered or prevented. The sufficiency of the indictment was challenged on motion in arrest of judgment after verdict. The especial objection was that the indictment did not specify any particular right out of the several or numerous constitutional or legal rights to which the citizens whose rights were claimed to have been infringed were entitled. The question as entertained by the court was not whether it was enough in general to describe a statutory offense in the language of the statute, but whether the offense had been described at all. The court, in the course of the discussion, laid down this declaration:

"The object of the indictment is: First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

The court concludes as follows:

"Therefore the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appear

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from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offense alleged."

The subject was further elaborated in United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, and a like conclusion reached. This latter case bears marked analogy on its facts to the one here presented. See, also, United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819; Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; Batchelor v. United States, 156 U. S. 426, 15 Sup. Ct. 446, 39 L. Ed. 478; Cochran and Sayre v. United States, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704.

The question is pertinent here, as it was in the Cruikshank Case, to inquire whether the offense has been described at all. The indictment charges that the defendant did willfully make and convey false reports and false statements, with intent to interfere with the operation and success of the military forces of the United States. But neither the defendant nor the court is advised as to what the reports and statements were, and the allegation is the sheerest conclusion. How was the defendant expected to prepare for his defense, when he was left wholly in the dark as to what reports, or what statements, if any, he had made that the government relied upon for conviction? He may have made many reports and statements, some or all of which may have been consistent with truth, and without any intent to impinge upon the statute, depending on the particular circumstances under which they were made, and yet he is wholly deprived of the opportunity of concerting his defense until he is confronted with them at the trial. It would be as consistent to charge a man with larceny and attempt to convict him of stealing specific property, when none is described or alluded to in the indictment. The information afforded for advising him of the direct charge would not be more specific in the one case than in the other. On the other hand, the court is without any information whatever whereby it is enabled to say that a crime has been charged. So to say to defendant simply, "You have made false reports and statements with intent to interfere with the success of the military forces of the United States," is wholly insufficient to describe the offense sought to be charged as denounced by the statute.

It was error, therefore, not to have rejected the testimony offered in support of the indictment, which was in itself insufficient to support a verdict.

Reversed and remanded.

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McILHENNY CO. v. GAIDRY.

GAIDRY v. McILHENNY CO.

(Circuit Court of Appeals, Fifth Circuit. July 29, 1918. Rehearing Denied October 7, 1918.)

No. 3157.

1. TRADE-MARKS AND TRADE-NAMES ⟸96—PRIOR DECISIONS—PERSONS CONCLUDED—MUTUALITY OF ESTOPPEL.
Judgments that defendant had no exclusive right to use the word "Tabasco" in connection with a pepper sauce were not conclusive against it in favor of plaintiff, who was not a party to the suits, nor in privity with either party thereto, and so not concluded thereby.

2. COURTS ⟸96(1), 372(1)—PRECEDENTS—FEDERAL AND STATE COURTS.
As precedents, judgments, one by a federal District Court, and the other by a state Supreme Court, that defendant had no exclusive right to use the word "Tabasco" in connection with pepper sauce, are not controlling in the federal Circuit Court of Appeals.

3. TRADE-MARKS AND TRADE-NAMES ⟸11—EXPIRATION OF PATENT—RIGHT TO USE NAME.
Ruling that, on expiration of patent, public may with patented article use name by which it was known, furnishes no support for proposition that on expiration of patent for process for making pepper sauce, and for sauce so made, public may, with a pepper sauce other than that patented, use the name which the patentee, abandoning the patented process, and otherwise making a sauce, gave to his product.

4. TRADE-MARKS AND TRADE-NAMES ⟸45½, New, vol. 6A Key-No. Series—REGISTRATION—EFFECT OF CANCELLATION.
A trade-mark, with its exclusive rights, if existing, existing independently of registration under Trade-Mark Act Feb. 20, 1905 (Comp. St. 1916, § 9485 et seq.), cancellation of registration does not extinguish a right which registration did not confer.

5. JUDGMENT ⟸675(2)—PRIOR DECISIONS—PERSONS CONCLUDED—FURNISHING PLEADING.
A person named as a defendant, but not served, and who did not appear in person or by attorney, is not bound by decree of exclusive right in complainant, merely because an attorney employed by him prepared and furnished an answer, which was filed by the attorney of the defendant served.

6. TRADE-MARKS AND TRADE-NAMES ⟸9—GEOGRAPHICAL NAMES.
Though, at the time of the first manufacture of a pepper sauce under the name "Tabasco," the word was the name of a state of Mexico, the maker was not precluded from acquiring a trade-mark therein, his manufactory being in Louisiana, where he raised the peppers, they not having that name before he used them; and there being no evidence that the first peppers obtained and planted by him came from a locality having that name.

7. LIBEL AND SLANDER ⟸131—SLANDER OF TITLE—MISTAKEN BELIEF.
One who, believing he has an exclusive right to use a word as a designation of his goods, in good faith warns dealers against invasion of his supposed right, though mistaken as to validity of his claim, is not liable for resulting interference with the products of another.

In Error and Cross-Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by Lowell R. Gaidry against the McIlhenny Company. Judg-

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ment for plaintiff, and each party brings error. Reversed, and rendered for defendant.

Philip H. Mentz, Louis H. Burns, and John C. Hollingsworth, all of New Orleans, La., for plaintiff.

Chas. Payne Fenner, of New Orleans, La., and Jos. Clark, of Philadelphia, Pa. (Edward S. Rogers, of Chicago, Ill., on the brief), for defendant.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge. This was an action by Lowell R. Gaidry, a citizen of Louisiana and a manufacturer of a sauce called "Tabasco Pepper Sauce," against McIlhenny Company, a corporation organized under the laws of the state of Maine, to recover damages for alleged wrongful conduct of the defendant in interfering with the plaintiff's business, by falsely and in bad faith representing, by papers, circulars, and letters, to dealers throughout the country, including those who have handled the plaintiff's product, that the defendant has an exclusive trade-mark right in the name "Tabasco," and threatening legal proceedings, including injunctions, and demands for accounting for profits, against those who handle any sauce called "Tabasco" unless made by the defendant. The parties will be referred to as they were designated in the trial court. A jury was waived, and the court made special findings of fact, upon which was predicated its judgment in favor of the plaintiff, assessing damages at the sum of $1,000. Each of the parties sued out a writ of error to obtain a review of that judgment.

The plaintiff claims that he has the right to use the word "Tabasco" in the name of the sauce he produces and puts on the market, and that the defendant falsely and in bad faith pretends to believe that it has the exclusive right to use that word as the name of a sauce, and holds itself out to the trade as the owner of a trade-mark in that word as a name for a pepper sauce; the defendant well knowing that its claim that it has an exclusive right to use the name "Tabasco" as applied to a sauce is false and fraudulent, such claim being made solely to injure its competitors in business, and particularly the plaintiff. The claim of the defendant is that it has the exclusive right to use the word "Tabasco" in connection with pepper sauce, and that the plaintiff is not legally justified in complaining of the conduct of the defendant in asserting that right, claimed in good faith, and in undertaking to maintain it.

The plaintiff contends that certain incidents in the history of the defendant and of its predecessors in the sauce-making business have the effect of conclusively establishing the falsity of the defendant's claim that it has an exclusive right to the use of the name "Tabasco" in connection with a sauce, and of showing that the defendant's continued assertion of that claim is fraudulent and in bad faith, and is made solely for the wrongful purpose of injuring its competitors in business, including the plaintiff. The defendant, on the other hand, sets up the claim that the plaintiff was so connected with a suit brought by the defendant in the District Court of the United States for the

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Southern District of New York as to be bound and concluded by the decree rendered in that suit, which adjudged that the defendant in this suit has the exclusive right to use the word "Tabasco" in connection with pepper sauce, though the plaintiff was not served with process in that suit and did not formally appear therein.

The incidents relied upon by the plaintiff to sustain its last-mentioned contention are: (1) The judgments rendered in certain suits between the defendant and third parties, with whom the plaintiff is not in privity, in which suits the defendant unsuccessfully asserted the claim that it had the exclusive right to use the word "Tabasco" in connection with pepper sauce; (2) the expiration of a United States patent, issued in 1870 to Edmund McIlhenny, through whom the defendant claims, for a method or process of making or compounding a sauce; and (3) the cancellation of a registration in the United States Patent Office, on the application of the defendant's predecessor, of the name "Tabasco" as a trade-mark.

[1, 2] As the plaintiff was not a party to either of the suits in which judgments adverse to the claim of the defendant were rendered, and was not in privity with either of the parties in whose favor such judgments were rendered, he was not bound thereby. To hold that those judgments were conclusive against the defendant in favor of the plaintiff, who was unaffected thereby, would be giving to them the effect of creating an estoppel which is not mutual. After the rendition of those judgments the successful parties thereto relinquished in favor of the defendant all rights conferred thereby upon the former. Such relinquishments conferred no right upon the defendant as against the plaintiff, who was a stranger to such judgments, for the same reason that the judgments themselves conferred no right upon the plaintiff as against the defendant. The rendition of those judgments did not have the effect of creating a legal obstacle to the assertion by the defendant against the plaintiff of the former's claim that it has the exclusive right to use the name "Tabasco" in connection with a pepper sauce. As precedents those judgments—one of which was rendered by the District Court of the United States for the Southern District of Texas and the other by the Supreme Court of Louisiana—are not controlling in this court.

[3] As above stated, the patent issued in 1870 to a predecessor of the defendant was for a method or process of making or compounding a pepper sauce. The following were the claims of the patent:

"1. The pepper sauce prepared of the ingredients herein set forth, substantially in the manner specified.

"2. The herein described process of preparing pepper sauce from the ingredients, in about the proportions set forth."

The following was a finding of the court:

"The process thus patented was abandoned by Edmund McIlhenny shortly after the patent was issued, and has not been used since by him, or his successors in title, and is not used by the plaintiff."

What was patented was the described process of preparing pepper sauce and the pepper sauce prepared in accordance with the patent-

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ed process. There was no finding to the effect that during the life of the patent the word "Tabasco" came to be the identifying name of the thing patented, distinguishing it from other things, and the evidence was not such as to justify such a finding. On the contrary, the evidence without conflict showed that from the time of the abandonment by the patentee of the patented process the word "Tabasco" was continuously used by the patentee in the name of a sauce not made by the patented process. There was no finding that the patented process was used by any one after it was abandoned by the patentee, shortly after the patent was issued, and there was an absence of evidence to prove that after such abandonment the word "Tabasco" was in actual use to describe either the patented process or the sauce made according to that process.

The ruling in the case of Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, was to the effect that on the expiration of a patent the public has the right to make the patented article and to use the identifying name of it which, with the consent or acquiescence of the patentee, it came to be known by while the patent was in force and had at the time of the expiration of the patent. That ruling furnishes no support for the proposition that the expiration of a patent gives the public the right to use in the name of a thing other than the patented one a word which, during the life of the patent, came to be the identifying name of a product of the patentee which never had, and for which he never claimed, the protection of the patent. If Edmund McIlhenny, prior to the expiration of the patent to him, had acquired the exclusive right to use the word "Tabasco" with reference to a sauce not made by the patented process, that right was not extinguished by the expiration of the patent, as the patent had nothing to do with the acquisition of it. The expiration of the patent did not have the effect of conferring on the public, or the plaintiff as a part of it, any right with reference to the name of a thing which was not a subject of the patent. From the fact that the defendant has no exclusive right to use the patented process, it does not follow that it has not the exclusive right, the assertion of which by it is complained of by the plaintiff.

[4] The cancellation, on the opposition of a competitor, of the registration by the defendant's predecessor of the word Tabasco as a trademark under the federal Trade-Mark Act of February 20, 1905 (33 Stat. 724, c. 592 [9 U. S. Comp. Stat. Ann. 1916, § 9485 et seq.]), does not stand in the way of the assertion by the defendant that it has the exclusive right which it claims in this suit. That act, which made provision for the registration of trade-marks "used in commerce with foreign nations, or among the several states, or with Indian tribes," and which conferred certain benefits upon registrants thereunder, did not purport to make registration under it the prerequisite to the acquisition or continued existence of an exclusive right to use a word or symbol as a trade-mark. If the defendant's predecessor had the exclusive right which the defendant asserts in this suit, that right was not extinguished by the cancellation of the registration mentioned. If the trade-mark exists, it exists independently of the reg-

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istration. The cancellation of a registration does not extinguish a right which the registration did not confer. Edison v. Thomas A. Edison, Jr., Chemical Co. (C. C.) 128 Fed. 1013; Capewell Horse Nail Co. v. Mooney, 172 Fed. 826, 97 C. C. A. 248. Neither of the incidents relied upon by the plaintiff is inconsistent with the assertion in good faith by the defendant that it has the exclusive right to use the word "Tabasco" in connection with pepper sauce.

[5] By a plea or exception the defendant set up as an adjudication binding on the plaintiff a decree rendered by the District Court of the United States for the Southern District of New York, enjoining Edward L. White "from using or offering to customers or otherwise dealing in or with a pepper sauce labeled 'Tabasco Pepper Sauce' manufactured by the defendant Lowell R. Gaidry, or any other pepper sauce in the name of which or in connection with which the word 'Tabasco' is used, excepting only the pepper sauce manufactured by the complainant." The defendant in the pending suit was the plaintiff in the suit in which the decree mentioned was rendered, and its bill of complaint in that suit named as defendants Edward L. White and Lowell R. Gaidry, the plaintiff in the pending suit; but the latter was not served with process in that suit and did not in person or by attorney appear therein. White was represented in that case by Theodore F. Kuper, a New York lawyer. Mr. Kuper was not employed by Gaidry, or authorized to act for him; but Gaidry did employ other attorneys in New York, who prepared an answer for White, which the latter's attorney filed in the suit. There were some negotiations looking to Gaidry paying Mr. Kuper a fee for making a defense for White in the suit, and also to arranging for Gaidry's attorneys appearing in the suit for White and defending it in his name; but these negotiations did not result either in Gaidry paying a fee to White's attorneys or in Gaidry's attorneys appearing in the case for either White or Gaidry. The decree rendered was the result of an agreement entered into between the attorney for the plaintiff in the case and White's attorney, after it had become apparent that Gaidry would not pay a fee to White's attorney and that his own attorneys would not appear in the case or participate in the conduct of it in court.

The preparation by Gaidry's attorneys of an answer for White, which was filed by the latter's attorney, and the negotiations with the result, or lack of result, above indicated, were not enough to make the decree rendered in the case binding upon the plaintiff in the pending case. One having an interest in defeating the relief sought in a suit may, by openly taking charge of and conducting the defense therein, become bound by the result of the suit, though he was not a party thereto on the record. But one who was not a party on the record, and who did not, in person or by an authorized representative, either appear in the case or participate in the control or conduct of it in court, is not bound by the result of it in consequence of an attorney employed by him preparing a pleading in the case and furnishing it to the attorney for a party on the record. Such defense as was made in the case in which the decree mentioned was rendered

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was not conducted or participated in by Gaidry, or by any one appearing in court who was authorized to represent or act for him. Neither he nor his authorized representative openly took charge of the defense or participated in the conduct of it in court. He never became a party to the suit, either nominally or by participating in person or by attorney in the conduct of it in court. He had no such connection with the case as would have the effect of making him bound by the decree rendered in it. Bigelow v. Old Dominion Copper Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. Ed. 1009, Ann. Cas. 1913E. 875; Rumford Chemical Works v. Hygienic Chemical Co., 215 U. S. 156, 30 Sup. Ct. 45, 54 L. Ed. 137; Hauke v. Cooper, 108 Fed. 922, 48 C. C. A. 144. The exception of res judicata was properly overruled. We do not think that it was made to appear that anything had happened that is entitled to be given the effect of estopping or precluding the parties, or either of them, in favor of his or its adversary, from making the opposing claims respectively relied on.

[6] There was uncontroverted evidence to the following effect:

Several years prior to 1868 a man who at the time had recently come from Mexico gave to Edmund McIlhenny some peppers having a peculiar and agreeable flavor and aroma, all or a part of which were planted by Mr. McIlhenny on his place on Avery Island, near New Iberia, La., and thereafter he continued to grow them there; he being the first person to grow those peppers in the United States. In 1868 he began the manufacture and sale of a table sauce made from that pepper, marketing it in a distinctive bottle bearing a distinctive label, conspicuous words on which were "Tabasco * * Pepper Sauce"; the word "Tabasco" being separated from the other two words by stars. The business so started was continuously conducted by its founder until his death in 1890, and thereafter by a firm composed of his widow and children, until the defendant corporation, controlled by the same family, was formed and succeeded to the business, which it still carries on. There was no name by which the kind of pepper mentioned was known when Mr. McIlhenny began to grow it, or when he started the manufacture and sale of the sauce made from it. Afterwards it came to be known as "Tabasco pepper," though it was and is also called "bird pepper." In the application made by Mr. McIlhenny in 1870 for the patent issued to him in that year it was referred to as "the pepper known in the market as Tabasco pepper." In 1887 it was listed as Tabasco pepper in the catalogue of a New Orleans seed dealer. In 1888 it was described by a botanist of Geneva, N. Y., as a new variety, and he named it "Tabasco pepper." This was the first time it was recognized botanically and under that name.

Edmund McIlhenny and the immediate successors to his business were the exclusive manufacturers of a sauce for the market made from that pepper, and in the name of which the word "Tabasco" was used, from 1868 until 1896. In the latter year a rival in Texas commenced the manufacture and sale of a sauce labeled "Tabasco Pepper Sauce." Thereafter others in different parts of the country did likewise. The defendant and its immediate predecessor, acting on the advice of reputable counsel who were fully apprised of the facts,

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continuously and actively, by suits and otherwise, asserted the exclusive right to use the word "Tabasco" in connection with a pepper sauce. Some of its competitors desisted when informed of the defendant's claim and of the facts relied on to support it. Others, including the plaintiff, who first put his sauce on the market in 1911, persisted, denying the validity of the defendant's claim of exclusive right. The word "Tabasco" became so identified with the sauce made and sold by Edmund McIlhenny and his successors that, after as well as before other similar sauces were offered for sale by others, orders for Tabasco given to dealers in sauces were generally understood by both buyer and seller to call for the McIlhenny product, unless another make was specified, and in places where food is served—hotels, restaurants, or private residences—one desiring the hot sauce identified by the McIlhenny bottle and label usually could make the fact known by asking for "Tabasco" or "Tabasco sauce," without otherwise indicating what was wanted. It is quite obvious that hot pepper sauces, other than the defendant's, which are successfully marketed under the name "Tabasco," share in the benefits of the good will in part at least acquired by the defendant's product before there was any competition in the business.

The court made findings of fact which, with an exception to be stated, were such as the above stated evidence called for. Among the findings was the following:

"The defendant and its predecessors in title in good faith have claimed a common-law trade-mark in the word 'Tabasco,' and until the year 1896 had the exclusive use of the trade-mark, but since that time other manufacturers of pepper sauce have used the word 'Tabasco' in connection with their manufactured product. That the word 'Tabasco,' as applied to pepper sauce, is generic, and indicates quality, ingredients, and place of origin of the pepper from which it is made."

The court overruled motions made by the defendant that the concluding sentence of the above-quoted finding be canceled and eliminated, and that the following be incorporated among the court's findings of fact:

"That the word 'Tabasco,' as applied to pepper sauce, indicates origin of manufacture; that is to say, that the sauce to which the term is applied is the sauce made by E. McIlhenny of New Iberia, La., and his successors in title."

The rulings mentioned are duly presented for review. The ground urged in support of the motion to cancel and eliminate was that the finding at which that motion was aimed was unsupported by evidence. In support of the motion to incorporate the proposed finding above set out it was contended that the uncontroverted evidence justified such a finding. Another finding made by the court was the following:

"The plaintiff has suffered damage by the publication of the circulars and letters of defendant amounting to the sum of $1,000."

Before Edmund McIlhenny began the manufacture and sale of his sauce, the word "Tabasco" had an established meaning. It was and is the name of one of the states of Mexico. In a suit quite similar to the pending one, brought by a rival pepper sauce manufacturer against

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the defendant's immediate predecessor in business, the Supreme Court of Louisiana decided that the plaintiff in that suit was entitled to recover damages resulting from conduct of the defendant's predecessor in claiming, by letters and circulars addressed to dealers in pepper sauce, that it had the exclusive right to use the word "Tabasco" as a designation of its product, and threatening with suits for infringement all persons who might buy, sell, or use the product manufactured by the plaintiff in the suit, with the object and purpose of frightening dealers and users of the product of the plaintiff in the suit from buying, selling, or using that product. That court, in deciding that case, following a ruling made by the Court of Appeals of the District of Columbia in the case involving the cancellation of the registration by the defendant's predecessor of the word "Tabasco" as a trade-mark, ruled that that word was not subject to exclusive appropriation, because it had a geographical meaning. New Iberia Extract Co. v. McIlhenny's Son, 132 La. 149, 61 South. 131.

We understand it to be a contention of the counsel for the plaintiff in the pending suit that the previous rendition of such decisions in litigated cases to which the defendant's predecessor was a party had the effect of conclusively showing that the defendant was lacking in good faith in persisting in the assertion of an exclusive right which had been so explicitly ruled against in the only cases in which the question had been contested on its merits to a final conclusion. Such conclusive effect in favor of the plaintiff cannot be accorded to decisions rendered in favor of parties with whom he is not in privity, especially when those decisions are not reconcilable with later rulings which are authoritative and controlling. In the case of Baglin v. Cusenier Co., 221 U. S. 580, 31 Sup. Ct. 669, 55 L. Ed. 863, it was decided that the fact that the primary meaning of the word "Chartreuse" was geographical, being the name of a locality and of a monastery in France, did not prevent the acquisition of the exclusive right to use it as the designation of a liqueur made by the monks of the monastery of La Grande Chartreuse. Speaking of the use of the word by the monks as a designation of their product, the court said:

"If it be assumed that the monks took their name from the region in France in which they settled in the eleventh century, it still remains true that it became peculiarly their designation; and the word 'Chartreuse,' as applied to the liqueur which for generations they made and sold, cannot be regarded in a proper sense as a geographical name. It had exclusive reference to the fact that it was the liqueur made by the Carthusian monks at their monastery. So far as it embraced the notion of place, the description was not of a district, but of the monastery of the order—the abode of the monks—and the term in its entirety pointed to production by the monks."

In the case of Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629, the right of a manufacturer to use the words "The American Girl" as a trade-mark for shoes made by it was sustained. It was said in the opinion rendered in that case:

"We do not regard the word 'The American Girl,' adopted and employed by complainant in connection with shoes of its manufacture, as being a geographical or descriptive term. It does not signify that the shoes are

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manufactured in America, or intended to be sold or used in America, nor does it indicate the quality or characteristics of the shoes. Indeed, it does not, in its primary signification, indicate shoes at all. It is a fanciful designation, arbitrarily selected by complainant's predecessors to designate shoes of their manufacture. We are convinced that it was subject to appropriation for that purpose, and it abundantly appears to have been appropriated and used by complainant and those under whom it claims."

The rulings just referred to establish the proposition that the fact that a word or expression has a geographical meaning does not prevent its appropriation as a trade-mark, or as the designation of a manufacturer's or dealer's product, when it is so used as not to have a geographical or descriptive signification, nor make legally impossible the assertion in good faith of a claim of exclusive right to use such word or expression for a nongeographical and nondescriptive purpose, even though such use may result or have resulted in its acquiring a new meaning, or new meanings separate and distinct from the one it had before. Uncontradicted evidence in the pending case was to the effect that, when Edmund McIlhenny adopted the word "Tabasco" in the designation of the pepper sauce manufactured and sold by him, he did not use it as a geographical or descriptive term. It is obvious that it did not indicate the place of manufacture. It did not indicate the kind of pepper which was the principal ingredient of the sauce, as that pepper was not then known by that name; it having afterwards acquired the name of Tabasco pepper, apparently because it was the pepper from which Tabasco sauce was made.

Much testimony was adduced to prove that the kind of pepper used in making the defendant's sauce was, at the time the testimony was given and for many years before, known and dealt in as "Tabasco pepper." This was not controverted. But there was no evidence tending to prove that, when the defendant's first predecessor in business adopted the word "Tabasco" as the designation of his sauce, that pepper had ceased to be an unnamed variety. Nor was there any evidence to support the conclusion that the word indicated the place of origin of the pepper from which the sauce was made. There was no evidence tending to prove that the first of such peppers, which were obtained and planted by Edmund McIlhenny, came from the state of Tabasco or from a locality having that name. The word as it theretofore had been used was not indicative of the quality, characteristics, or ingredients of the sauce in connection with which the defendant's predecessor first made use of it. We think the uncontroverted evidence was such as to call for favorable action on the motions made by the defendant to the effect that an above-quoted finding by the court be canceled and eliminated, and that the following be incorporated among the court's findings of fact:

"That the word 'Tabasco,' as applied to pepper sauce, indicates origin of manufacture; that is to say, that the sauce to which the term is applied is the sauce made by E. McIlhenny, of New Iberia, La., and his successors in title."

It is not to be denied that the decisions in the two cases last cited constitute such authoritative recognition of the legal propositions relied on to support the claim of an exclusive right to use the word

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"Tabasco" in connection with a pepper sauce, continuously and persistently made, in the circumstances disclosed by the evidence, by the defendant and its predecessors for many years, as to negative the absence of good faith on the defendant's part in its assertions of that claim which occasioned the institution of this suit.

[7] The findings of fact, including the one which it has been held the defendant was entitled to have made, did not constitute a proper predicate for the judgment rendered. The gist of the action was the alleged assertion in bad faith by the defendant of a claim of exclusive right to the use of the word "Tabasco" in connection with a pepper sauce. One of the court's findings was to the effect that the claim of the defendant and its predecessors was made in good faith, and there was evidence to support that finding. Where one, believing himself to have an exclusive right to use a word as a designation of his goods, in good faith warns dealers against invasion of his supposed right, a mistake on his part as to the validity of his claim does not render him liable to an action by another, the sale of whose products was interfered with by the giving of such notice and warning. John W. Lovell Co. v. Houghton, 116 N. Y. 520, 22 N. E. 1066, 6 L. R. A. 363; Hovey v. Rubber Tip Pencil Co., 57 N. Y. 119, 15 Am. Rep. 470; 25 Cyc. 562. It may be assumed, without being decided, that there was evidence to support the finding that—

"The plaintiff has suffered damage by the publication of the circulars and letters of the defendant amounting to the sum of $1,000."

That finding by itself is not enough to support the legal conclusion that the defendant was liable for the pecuniary loss sustained by the plaintiff. Findings of fact which were made negative the conclusion that the defendant was guilty of the alleged conduct which was made the basis of the plaintiff's demand. It follows that the judgment presented for review cannot be sustained. It is reversed, and a judgment in favor of the defendant will be here entered.

Reversed.

PEDERSON et al. v. UNITED STATES, for the Use of WASHINGTON IRON WORKS, et al.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1918.)

No. 3164.

1. APPEAL AND ERROR ⟸209(1)—REVIEW—ACTION TRIED TO COURT.
In an action tried to the court without a jury by stipulation, where the court is not asked to rule that there is no substantial evidence to justify judgment, the findings of fact must be accepted by the appellate court, and only rulings on matters of law, duly excepted to, are reviewable.

2. UNITED STATES ⟸67(2)—ACTION ON CONTRACTOR'S BOND—INTEREST.
Where the penalty of a government contractor's bond is sufficient to pay all the claims against the contractor, a claimant is entitled to recover interest from the time his demand became due.

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3. UNITED STATES ⇐67(3)—CONTRACTOR'S BOND—ACTIONS BY SUBCONTRACTORS —LIMITATION.

Under Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. 1916, § 6923), permitting any person furnishing material to a government contractor to bring suit on his bond within one year after performance and final settlement of the contract, and permitting any other similar creditor to intervene "within one year from the completion of the work under said contract and not later," the time limit is the same in case of the original plaintiff and an intervener.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by the United States, for the use and benefit of the Washington Iron Works against Hans Pederson, Marie Pederson, his wife, and the National Surety Company, with the Western Electric Company as intervener. Judgment for plaintiff and intervener, and defendants bring error. Affirmed.

See, also, 243 Fed. 260.

Pederson, to be called defendant, made a contract, dated September 8, 1914, with the United States through an engineer officer of the army to furnish and install valve and electrical equipment for the operation of locks of the canal at Ballard, Wash. The National Surety Company, also a defendant below, became bondsman for Pederson to secure payment by Pederson to those who supplied labor or material; the bond being such as is required by Act of Congress (Act Aug. 13, 1894, c. 280, 28 Stat. 278, and as amended by Act Feb. 24, 1905, 33 Stat. 811 [Comp. St. 1916, § 6923]), "An act for the protection of persons furnishing material and labor for the construction of public works," etc. After the making of the contract just referred to, Pederson sublet to the Washington Iron Works, also a plaintiff below, that part of the contract which provided for the furnishing of the valves and machinery, and to the Western Electric Company, a defendant below, the portion for furnishing the electrical equipment. Upon a settlement between the United States and Pederson, found by the District Court to have been on or after July 14, 1916, $5,411 was withheld from Pederson because of delay in completing the contract and on account of certain inspection charges.

In January, 1917, the Iron Works filed a suit in equity in the United States District Court in Washington against Pederson, contractor, and the National Surety Company, for $11,281.53 for material furnished under the contract with Pederson and for extras and interest. The defendants admitted furnishing valves and valve machinery, but denied that $11,281.53 was due. Pederson also pleaded the withholding of $5,411 for pumping and inspecting charges due to delay by the Iron Works, which sum he had held out from payments to the Iron Works, and he also claimed damages for negligence and delay and for moneys spent in correcting defects in work rejected by the United States engineer.

In July, 1917, the Western Electric Company (a defendant in error herein) intervened and sought to recover against Pederson for cer-

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tain extras and balances alleged to have been left unpaid. Pederson and the Surety Company answered, denying the right of the Electric Company, upon the grounds that the complaint in intervention was not filed within one year after complete performance and settlement, denying that interest was recoverable, and pleading that for the extras no recovery could be had. It came about that before the action was brought to trial the Supreme Court, in Illinois Surety Co. v. Peeler, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609, decided that an action under the act of Congress as amended, as hereinbefore cited, was not to be determined in equity, but is one at law, and the bill of exceptions herein shows that, when trial of the action was called, a jury was waived and the case was tried by the court, with the result that the Iron Works recovered a judgment against Pederson for $9,597.48 and against the Surety Company for $9,556.63, and the Western Electric Company recovered judgment for $1,934.80 against Pederson and for $1,724.71 against the Surety Company.

Writ of error was thereafter sued out by Pederson and wife and the Surety Company. The assignments are to the effect that the trial court erred: (1) In holding that there was a balance of $9,462.69 unpaid on the contract between Pederson and the Iron Works; (2) in denying the motion to dismiss the complaint of the Western Electric Company in intervention: (3) in holding that final payment was made by the United States to Pederson on July 14, 1916; (4) in sustaining claims of the Iron Works for extras; (5) in allowing interest; (6) in not holding the Iron Works liable to Pederson for $5,411.83, the sum deducted by the United States for inspection and pumping, and for damages.

Roberts, Wilson & Skeel and Lee Johnston, all of Seattle, Wash., for plaintiffs in error.

C. B. White, of Seattle, Wash., and H. W. Henderson, of New York City, for plaintiff in error National Surety Co.

R. A. Ballinger, Alfred Battle, R. A. Hulbert and Bruce C. Shorts, all of Seattle, Wash., for defendant in error Washington Iron Works.

Wright, Kelleher & Allen and George E. Wright, all of Seattle, Wash., for defendant in error Western Electric Co.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

HUNT, Circuit Judge (after stating the facts as above). The findings were made with great care and detailed reference to the evidence. In them reference is made to specific items in the specifications attached to the contract between Pederson and the Iron Works, and to the manner of payment by installments, as well as to the amounts payable under the contract. Various aggregate sums are set forth, and the balance on the contract unpaid by Pederson is found to be $9,462.69, together with $234.85 due for extras furnished. The court disallowed Pederson's claim of $5,411.83, offset, except in certain items, and found that Pederson broke his contract with respect to certain items. The court fixed July 14, 1916, or afterwards, as the time of the full completion of the work and final settlement therefor,

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and found that no suit upon the contract was commenced by the United States, that action by defendant in error was begun within one year from the completion of the work and final settlement therefor, and that the intervener filed its complaint in due time as required by the act of Congress heretofore cited.

The claim of the intervener Electric Company was also carefully examined and included in the findings, and the court, after referring to the provisions of the contract between the company and Pederson, found that the company fully performed, and that under the contract interest from August 25, 1914, became due upon the purchase price of the materials furnished, and that certain extra material was furnished under an agreement that the purchase price therefor should bear interest from 30 days after the date of shipment.

[1, 2] From the foregoing history of the case it is apparent that, trial of the issues having been to the court without a jury, and no request having been made of the trial court for a ruling that there was no substantial evidence to justify judgment, the findings upon questions of fact should be accepted by this court, and therefore the only rulings for review are those made upon matters of law properly presented by bill of exceptions. Maryland Casualty Co. v. Orchard Land & Timber Co., 240 Fed. 364, 153 C. C. A. 290; Turner v. Schaeffer, 249 Fed. 654, — C. C. A. —. The evidence tends to support the ultimate findings and it is clear that the judgment was warranted by the findings. Interest was allowed as on a liability to pay money from the time the demand accrues, the amount being ascertainable by computation. Dickinson Fire, etc., v. Crowe & Co., 63 Wash. 550, 115 Pac. 1087; Fidelity & Deposit Co. v. United States, 229 Fed. 127, 143 C. C. A. 403.

Plaintiffs in error argue that under the specifications attached to the contract between Pederson and the United States the weights of certain material as made by the United States engineers should control, in instances where there was a variance in weight between the Iron Works and Pederson. But as the items furnished to Pederson by the Iron Works were weighed at the plant of the Iron Works, and the weights were certified to by a government inspector, the explanation concerning discrepancies (which amounted to $162.73) was found by the court to be in the likelihood that the weights of material delivered for which defendants would be liable might exceed the weight of material installed for which the government had agreed to pay. Testimony of who was responsible for delay and defects was considered by the District Court as matter of fact, and it does not appear that resolution in favor of defendant in error was erroneous. Fisher v. Edgefield & Nashville Mfg. Co. (Tenn. Ch. App.) 62 S. W. 27; Murphy v. No. 1 Wall Street Corp., 142 App. Div. 835, 127 N. Y. Supp. 735.

[3] Plaintiffs in error question the jurisdiction of the court to entertain the claim of the Western Electric Company upon the ground that the company failed to file its complaint within the one year allowed by law. The statute authorizes any person or corporation who has furnished labor or material used, and payment for which has not

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been made, "to intervene and be made a party," and to have their rights and claims adjudicated in such action. If no suit is brought by the United States within six months "from the completion and final settlement" of the contract, suit may be brought in the name of the United States against the contractor and his sureties, provided—

"that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract, and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract and not later: and provided further that where suit is so instituted by a creditor or creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later."

In our opinion the intent of the statute is that in the case of an intervener the time limit shall be the same as it is in the case of an original party complainant. In Bryant Co. v. N. Y. Steam Fitting Co., 235 U. S. 327, 35 Sup. Ct. 108, 59 L. Ed. 253, the court observed that an intervening creditor, as well as the instituting creditor, must file his claim within a year. Vermont Marble Co. v. National Surety Co., 213 Fed. 429, 130 C. C. A. 65. By the language of the statute the year begins to run against the instituting creditor from the time of complete performance of the contract and final settlement thereof, and although the final words of limitation with respect to a creditor who comes in as a party require that he file his claim within one year "from the completion of the work" under the contract, and not later, the intent of the whole statute, as analyzed by the Supreme Court, is to put original and intervening claimants upon an equality in the matter of time.

We therefore inquire what was the date from which the period of one year commenced to run. Here again we have an explicit finding of the court, fully sustained by evidence, respecting articles furnished to the contractor that the contract was not completely performed until within a year before the time when the complaint in intervention was filed. The final payment was July 14, 1916, and there is ample evidence that the War Department of the government treated that as the date of final settlement. In Am. Bonding Co. v. United States, 233 Fed. 364, 147 C. C. A. 300, the Court of Appeals of the Third Circuit took the very reasonable view that the date given by the department of the government which has to do with the work might ordinarily be safely accepted as fixing the time of final settlement.

Illinois Surety Co. v. Peeler, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609, is cited by plaintiffs in error as authority for holding that the time from which the year shall run is the time of the final determination of the amount due, irrespective of the date of final payment. In reliance upon the application of this rule the plaintiffs in error lay stress upon an indorsement upon a carbon copy of a voucher for $21,541.96, dated June 28, 1916. The indorsement is a form of certificate whereby the officer certifies that the contract had been completed in accordance with the specifications, except as to time, and that material and work were accepted as satisfactory—

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"In behalf of the United States. Lieut. Col. Corps Engineers, U. S. A. Authority for extension of time filed with voucher No. 178, December, 1914."

At the bottom of the voucher is a statement of payment for $19,541.96, signed by Colonel Cavanaugh, the contracting engineer officer. The certificate itself, however, was not dated, nor was it signed by Col. Cavanaugh in the space left vacant for signature above the words, "Lieut. Col. Corps of Engineers, U. S. A." The testimony was that the custom was to forward the original to Washington, D. C. However that may be, the original was not produced at the trial, and we cannot now hold that the District Court was in error in declining to treat the voucher as a certificate of acceptance and completion and as a determination of the amount due. The District Judge in his written opinion comments upon the absence of an original or certified copy of a certificate signed by Col. Cavanaugh, and points out that on July 6, 1916, Col. Cavanaugh called on Pederson for material yet to be furnished under the contract, and also that on July 11th Col. Cavanaugh made a payment to Pederson of $1,916.67 out of $2,000 retained to insure complete performance. Furthermore, there appear to have been offsets to be deducted, and prior to July 14, 1916, there was no determination of the amount which the government was finally bound to pay. The final settlement was had on that day, and it was so understood by the War Department.

Allowance of interest upon the claim of the intervener under the original contract and for extras furnished was proper. Upon the original contract matters interest became due by provision that payments provided for should bear interest, while as to moneys due for extras furnished the invoices provided they should bear interest.

We think that the principal points made by plaintiffs in error are sufficiently covered by what we have said. Upon the whole case the conclusions reached by the District Court appear to be right and to call for an affirmance of the judgment.

Affirmed.

THE HOQUIAM.

BOWES et al. v. BAUMERT.

(Circuit Court of Appeals, Ninth Circuit. October 28, 1918.)

No. 3155.

SEAMEN ⟸29(3)—INJURY—FELLOW SERVANTS—LONGSHOREMAN—STATUTE—"THOSE."

Grammatically, as well as because the whole act relates to merchant seamen, "those," in Act March 4, 1915, § 20 (Comp. St. 1916, § 8337a), providing that, in any suit to recover for injury sustained on board a vessel, seamen having a command shall not be deemed to be fellow servants with "those" under their authority, refers, not to person injured, and so not to a longshoreman, employed by ship in loading, but to seamen.

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

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Libel by W. M. Baumert against the steamship Hoquiam; E. C. Bowes and another, claimants. Judgment for libelant, and claimants appeal. Reversed.

Huffer & Hayden, W. H. Hayden, and F. A. Huffer, all of Tacoma, Wash., Percy P. Brush, of Kelso, Wash., and Ira A. Campbell and McCutchen, Olney & Willard, all of San Francisco, Cal., for appellants.

Govnor Teats, Leo Teats, Ralph Teats, and Teats, Teats & Teats, all of Tacoma, Wash., for appellee.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

HUNT, Circuit Judge. Libel against the steamer Hoquiam to recover for injuries sustained while appellee, a longshoreman, was working in the hold of the ship, loading railroad ties, at Hoquiam, Wash. The District Court found that the injury occurred by reason of the negligence of the hatch tender, who was the second officer of the ship, and who was in authority over the appellee, who was employed by the ship and working in its service. From a decree against claimants, appeal was taken.

The findings having settled disputed questions of fact, the sole question presented and argued is whether or not the hatch tender, a seaman employed by the ship, and the longshoreman, employed from the land by the hour by the ship to assist in loading, were fellow servants.

It is assumed that, since the law was settled by the case of The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, a seaman is limited in his right of recovery to his cure and wages, where his injury is not the result of failure to care properly for the seaman or to provide a seaworthy ship. But the District Court held herein that a change was wrought by section 20 of the act of March 4, 1915 (38 Stat. 1185, c. 153 [Comp. St. 1916, § 8337a]), which reads as follows:

"That in any suit to recover damages for any injury sustained on board vessel, or in its service, seamen having command shall not be held to be fellow servants with those under their authority."

The view expressed was that, by using the words "in any suit" to recover for any injury, Congress meant to include more than seamen, and that the words "seamen having command," followed by "those," mean "those injured," and not those seamen. If this is a true construction, of course the judgment should be affirmed.

We find ourselves unable to agree with such a construction. The word "injured" is not in the section. It is a suit for damages for an "injury" sustained that the whole provision deals with. The two personal nouns which appear are "seamen" and "fellow servants," and by rules of ordinary construction the relative words are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to or including others more remote, unless such extension is required by a consideration of the entire act. Cushing et al. v. Worrick, 9 Gray (Mass.) 382.

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There are, however, broader rules which have greatly influenced us. We think that the context of the whole statute indicates that the lawmakers had in mind a particular class of persons for whose interests they were legislating. The act of which section 20 is a part is entitled one—

"to promote the welfare of American seamen in the merchant marine of the United States, to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto, and to promote safety at sea."

Section 1 amends section 4516 of the Revised Statutes (Comp. St. 1916, § 8306), under the title "Merchant Seamen—Shipment"; and section 4516 of the Revised Statute is found in the act of June 7, 1872, which is entitled:

"An act to authorize the appointment of shipping commissioners by the several Circuit Courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for further protection of seamen." 17 Stat. 262, c. 322.

Section 2 refers to the division of crews, to fire drills, and to the fixing of holidays. Section 3 amends section 4529 of the Revised Statutes (Comp. St. 1916, § 8320), under the title "Seamen—Wages and Effects." Section 4 amends section 4530 of the Revised Statutes (Comp. St. 1916, § 8322), under the title "Merchant Seamen—Wages and Effects." Section 5 amends section 4559 of the Revised Statutes (section 8348), under title of "Merchant Seamen—Protection and Relief." Section 6 amends section 2 of an act entitled "An act to amend laws relating to navigation," approved March 3, 1897. 29 Stat. 688, c. 389 (Comp. St. 1916, § 7734). Sections 7 and 8 amend sections 4596 and 4600, respectively, of the Revised Statutes (sections 8380, 8382), under title of "Merchant Seamen—Offenses and Punishments." Section 9 amends section 4611 of the Revised Statutes (section 8391), under Title of "Merchant Seamen—Offenses and Punishments." Sections 10 and 11 (sections 8392a, 8323) are amendatory of an act entitled "An act to amend the laws relating to American seamen, for the protection of such seamen and to promote commerce, approved December 21, 1898." Section 16 (section 8382a) abrogates treaties in so far as they provide for imprisonment and arrest of officers and seamen deserting, or charged with desertion from, merchant vessels of United States in foreign countries, and of seamen of foreign vessels in the United States. Section 19 (section 8372) amends section 16 of the act of December 21, 1898 (30 Stat. 759, c. 28) entitled "An act to amend the laws relating to American seamen and for the protection of such seamen and to promote commerce."

These several sections show that Congress was legislating with relation to American seamen. Longshoremen are not classified as seamen in the merchant marine. Treaties do not affect them, and legislation in relation to flogging or to safety at sea has no relation to them.

We are cited to Atlantic Transport Co. v. Imbrovek, 234 U. S. 61, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157, and Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L.

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Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, as holding that a longshoreman working on a ship is of a class as clearly identified with maritime affairs as are the mariners. Conceding that there is such identity, and that a longshoreman is within the jurisdiction of the admiralty, it still does not answer the argument that the statute heretofore quoted, by the several rules of construction, includes only those persons mentioned in the act, seamen. In The Baron Napier, 249 Fed. 127, — C. C. A. —, a muleteer, hired by the master of the ship to care for mules, was injured while acting as a watchman at night, and in libel against the ship it was held that the seaman should have been furnished with a lantern, that section 20 abolished the fellow-servant doctrine, and that recovery was proper for personal injuries by reason of the negligence of the ship and failure to take proper care to furnish medical attention and to take steps to effect a cure. It is at least doubtful whether the court meant to announce more than the established rule that the ship was liable for no more than the furnishing of proper medical attention.

In Chelentis v. Luckenbach S. S. Co., 243 Fed. 536, 156 C. C. A. 234, the Supreme Court, 247 U. S. 372, 38 Sup. Ct. 502, 62 L. Ed. 1171, affirmed the view taken by the Court of Appeals of the Second Circuit, holding that section 20, supra, has not altered the situation in this respect; that whether or not the master and seamen are fellow servants is quite immaterial in a suit for injuries resulting from an improvident order of the master; that a seaman may not recover in a common-law action according to the full indemnity rule of the common law for personal injuries received in the performance of his duties at sea through such an order; and that the measure of his recovery is that of the maritime law—wages, maintenance, and cure. The Supreme Court said that the commands of section 20 should be given full effect whenever the relationship between "such parties" as the statute refers to becomes important, but that the maritime law imposes upon a shipowner liability to a member of the crew injured at sea by reason of another member's negligence, without regard to their relationship; hence that section 20 was irrelevant. Said the court:

> "The language of the section discloses no intention to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employés on shore."

We cite this decision as illustrating the limitations of section 20, and as in harmony with our opinion that, when we consider that the only class of persons mentioned in the section are seamen, it is proper to read and understand the whole section by its ordinary grammatical sense. The great purpose, the special need for protection of seamen, was carried out by the statute; but we find no safe ground for extension of its provisions to others not seamen.

The judgment is reversed.

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LOUISVILLE BRIDGE CO. v. CHICAGO, I. & L. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. August 1, 1918.)

No. 2251.

1. RECEIVERS ⟸160—CLAIMS—PRIORITY—UNSECURED CLAIMS.
Where a contract between a bridge company and a railroad company which used the bridge provided for termination in case of the railroad's default for 30 days in payment, the bridge company is not, as against mortgagees, entitled to priority out of surplus earnings during receivership on claims some of which were more than 6 years old when the receiver was appointed, and all of which arose more than 16 months prior thereto.

2. RECEIVERS ⟸158(4)—CLAIMS—PRIORITY—PURPOSE OF DEBT.
In receivership proceedings a bridge company was not entitled to priority against mortgagees of a railroad company for claims for use of its bridge by the railroad; it appearing that credit was extended upon the strength of the railroad company's general credit and that the debt was not a current income debt.

3. RAILROADS ⟸139—CONTRACT BETWEEN RAILROAD AND BRIDGE COMPANY.
A contract whereby a railroad company agreed to make certain payments to a bridge company for the use of a bridge, the payments being computed on the bridge company's capital and expenses, etc., *held* not to create any trust in favor of the bridge company in event of nonpayment by the railroad company, on the theory that the bridge company was entitled to share in the freight and passenger receipts of the railroad company, etc.

4. RECEIVERS ⟸158(4)—CLAIMS—PRIORITY—NET EARNINGS.
Where the claim of a bridge company against a railroad company for use of bridge was not entitled to priority, the bridge company is not entitled to net profits during receivership as against a mortgagee whose lien covered, not only the property of the railroad, but the rents and profits derived therefrom.

Appeal from the District Court of the United States for the District of Indiana.

Petition by the Louisville Bridge Company to intervene in a foreclosure suit against the Louisville, New Albany & Chicago Railway Company and have its claim allowed as a prior claim. The petition was opposed by the Chicago, Indianapolis & Louisville Railway Company, and petitioner appeals from a decree denying the petition. Affirmed.

The Louisville, New Albany & Chicago Railway Company, known as the Monon road, predecessor to appellee, executed five mortgages to secure bonds aggregating $14,100,000. The last three, being for $8,500,000, were foreclosed in this suit, although the proceedings leading to the appointment of the receiver were instituted by a judgment creditor, after a nulla bona return of the execution had been filed. The various foreclosure suits were merely consolidated with this judgment creditor proceeding and the receivership continued. The receiver operated the road from August 24, 1896, to June 30, 1897, when it was turned over to appellee, the purchaser on foreclosure suit, pursuant to a sale previously made and then confirmed; the selling price being far less than the face value of the three mortgages.

Appellant timely presented its claim for $187,354.38 and interest, and no question of amount or liability is raised. Appellant asserts and appellee denies priority of this claim over the lien of the mortgages and the rights of the purchaser on the foreclosure sale.

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Appellant owned and maintained a bridge across the Ohio river at Louisville, Ky., which is connected on the north by tracks of the main line of the railway company, and on the south with terminal tracks, freight depot, and yards of such company; the city of Louisville being the southern terminus of the line of the railway company. On June 5, 1872, an agreement was made between appellant and several railroads, which agreement provided for the use of the bridge and the compensation for such use. Another agreement made February 1, 1882, between appellant and appellee's predecessor, extended the terms of the agreement to appellee.

By this contract the railroad companies agreed to pay the bridge company for the use of the bridge a sum sufficient to produce in the aggregate an amount equal to the cost and expense of keeping in repair the said bridge, tracks, and other structures appurtenant thereto, and paying a dividend semi-annually of 4 per cent. on a capital stock of $1,500,000, and the interest upon bonds, as the same matured, and a sinking fund sufficient to pay off bonds to the amount of $800,000 at maturity: all charges were to be the same to all carriers for like service. The accounts for all expenditures, tolls, and charges were to be carefully kept, a statement rendered each month succeeding the date the items accrued and the same were to be paid within 30 days from the date of the rendition of such monthly account. If any difference arose between the parties it was to be submitted to arbitration.

It was expressly provided: "But it is distinctly agreed and understood that if the railroad company shall at any time be in default in the payment of any of the sums of money herein by it stipulated to be paid, or in the performance of any of the obligations herein by it stipulated to be performed, then at the option of the party in respect to whom such default occurs, but not otherwise, and upon 30 days' notice in writing, all the rights and privileges herein conferred upon the third party shall cease and determine, and this agreement cease to be of any force or effect whatever."

It was expressly agreed that the consideration passing to the bridge company for this agreement was the promise on the part of the railroad company to pass all its freight, passengers, mails, express matter and other goods carried by it over the bridge of the appellant to and from Louisville. The railroad company agreed that it would "pay punctually * * * the tolls and charges herein provided for the use by the railroad company of said bridge, etc."

Appellant's claim arose out of the failure of the railway company to pay the various amounts thus provided for by this agreement. The statement of appellant's account is as follows:

April 1, 1895. Due as per agreed statement of account, and Blodgett award, excluding Monon share of contested taxes and its share of L. & N. surplus subsequently recovered by L. & N.		$ 97,358.58
Monon's share of above taxes		25,887.32
Monon's share of above L. & N. surplus for the years 1888, 1889, 1890, 1891	$33,457.91	
For the years 1892, 1893, 1894, 1895	38,325.00	71,782.91
		$195,028.81
Deduct payments made by Monon and its share of surplus April 1, 1895, to August 24, 1896, in excess of amounts payable by it for same period		7,674.43
		$187,354.38

The receiver made a final report, which was duly approved by the court, and which contained the following:

Gross earnings	$2,527,160.12
Operating expenses and taxes	1,728,756.98
Leaving net earnings	$ 798,403.14

This balance of "net earnings" was attacked by appellee as being incorrect, and the master, to whom all issues were referred found: "There was no surplus of earnings during the receivership. * * * There was no diver-

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sion of the earnings during the receivership to the prejudice of the intervener. * * * There is no special equity in the intervener's favor that entitled the intervener to preferential payment out of the proceeds of the foreclosure sale."

The master's report was approved and the petition dismissed. Appellant assigns error for thus dismissing its petition and asserts that its claim was entitled to priority over the claims of mortgagees and those claiming under them in and to the net earnings of the company during receivership; that there was in fact a net profit earned during the receivership, and that such net profit should be devoted to the payment of its claim, or if that be now impossible, that it have a lien for such amount upon the road prior to the equity of the appellee.

Lawrence Maxwell, of Cincinnati, Ohio, for appellant.

Ferdinand Winter and William L. Taylor, both of Indianapolis, Ind., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge (after stating the facts as above). Two questions are presented for our consideration: (a) Was appellant's claim entitled to priority over the lien of the mortgages? (b) Were there any net earnings during the receivership? It is conceded that the appellee stands in no better position than the last three mortgagees, whose mortgages were foreclosed by this suit.

Appellee contends that the indebtedness of the Monon road to appellant was not for "current expenses" and such indebtedness was, therefore, not entitled to priority over the lien of the mortgagees. It further contends that even though the consideration for this claim would otherwise have entitled appellant to priority, such priority must be denied because the claim arose more than 6 months prior to the appointment of the receiver.

Appellant, on the other hand, contends that as the holder of a claim for current expenses it is entitled to priority over the lien of the mortgagees so far as the net profits of the company earned during the receivership in suit are concerned; that the 6 months period fixed in some jurisdictions and in some instances, is not an absolute or arbitrary period but must give way to facts showing reasons for its nonapplicability, that such reasons exist in the present case. Appellant also insists that in the present case the Monon road was a trustee holding amounts collected from passengers and shippers in trust for appellant, the cestui que trust.

Questions of asserted priority of claims such as here considered, over liens of mortgages, have frequently been before the courts for determination. It has been uniformly held that not only must the claim be for "current expenses" but the claims must not be stale. In many jurisdictions a time limit of 6 months next preceding the appointment of a receiver is fixed as the period during which the claim must have arisen to entitle it to consideration. Turner v. Indianapolis, B. & W. Ry., Fed. Cas. No. 14,258, 8 Biss. 315; Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co., 137 Fed. 26, 71 C. C. A. 1; Moore v. Donahoo, 217 Fed. 177, 133 C. C. A. 171; Carbon Fuel Co. v. C., C. & L. R. Co., 202 Fed. 172, 120 C. C. A. 460; C. & A. Ry. v. Mexican Trust Co., 225 Fed. 940, 141 C. C. A. 64; Texas Co. v. International & G. N. R. Co., 237 Fed. 921, 150 C. C. A. 571; Crane Co.

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v. Fidelity Trust Co., 238 Fed. 693, 151 C. C. A. 543; Roebling Sons Co. v. Idaho Ry., L. & P. Co., 243 Fed. 527, 156 C. C. A. 225; Gregg v. Metropolitan Trust Co., 197 U. S. 196, 25 Sup. Ct. 415, 49 L. Ed. 717. Other courts reject the 6 months period as arbitrary and unjustifiable. Northern Pacific Ry. v. Lamont, 69 Fed. 23, 16 C. C. A. 364; Blair v. St. L., H. & K. R. Co. (C. C.) 22 Fed. 471; Wood v. N. Y. & N. E. R. Co. (C. C.) 70 Fed. 741; Hale v. Frost, 99 U. S. 389, 25 L. Ed. 419; Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596; Beach on Receivers, p. 414.

[1] It is not necessary in this case to adopt any hard and fast period of limitation to dispose of the claims here under consideration; for if we adopt the rule announced by the last above cited cases, we are still unable to bring the appellant's claims within such a period as will permit of their allowance in advance of the lien of the mortgages. Some of these claims were 6 years old at the time the receiver was appointed, and all of the claims arose more than 16 months prior to such appointment. The presence of the provision in the agreement which gave to the bridge company at any time the right to terminate the contract upon 30 days' notice for failure of the railroad company to pay the amounts due, affords ample support for this conclusion. As against the mortgagees it would be unjust and inequitable to give petitioner priority of lien when it is apparent that claimant had at all times an effective weapon for the collection of its account.

[2] We are also convinced that upon all the facts and circumstances in this case, appellant does not bring its claim within the rule entitling it to priority over the lien of the mortgages, even though the question of time be waived. The fact that the bridge company reserved the express right to terminate the contract upon failure of the railroad company to promptly pay its indebtedness is equally significant on this phase of the case. Thomas v. Western Car Co., 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663. In that case the court said:

"Such provision shows that the car company was aware of the existence of the outstanding bonds, and protected itself by other methods than relying upon the possible order of a court which might appoint a receiver."

The contract made by the parties in this case was one of mutual benefit. The bridge company owned a bridge, the value of which in part depended upon the extent of the use to which it was put. The carrier was obviously benefited in that it was not required to construct a bridge itself. In order to secure all the business of the railroad company and to make more certain its fixed income, this agreement was made, the duration of which was in part dependent upon the action of appellant. It extended the time of payment from month to month upon the strength of the credit of the railroad company.

The acts and conduct of the parties add strength to this conclusion. The president of the bridge company testified:

"The railroad companies using the bridge simply paid on account from time to time according to their convenience."

As stated in Southern Railway v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458:

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"Whether the debt was contracted upon the personal credit of the company, without any reference to its receipts, is to be determined in each case by the amount of the debt, the time and terms of payment, and all other circumstances attending the transaction."

We conclude the credit was extended upon the strength of the railroad company's general credit and that the debt was not a "current income debt."

[3] Appellant also contends that it should be entitled to priority because the railroad company held the money received by it from passenger or shipper as a trust fund and the amounts thus collected to the extent of this indebtedness in equity belong to the bridge company, citing Terre Haute & Indianapolis Ry. Co. v. Cox, 102 Fed. 825, 42 C. C. A. 654. The facts in that case are distinguishable from those in the present case. In that case the court said:

"The 30 per centum embraced in the order of the court, though mingled with the funds of the Indianapolis Company, never belonged equitably to that company, either in its own right, or in the right of its bondholders. In equity the moneys were always, notwithstanding the intermingling, the moneys of the Peoria Company. In view of these facts, the court clearly had the power, after the appointment of the receivers, to recognize the provisions of the lease, to the extent of restoring these moneys; and, in our opinion, it was the duty of the court to go at least to that extent."

The agreement expressly provided for a division of the earnings. It is clearly distinguishable from a case covering an agreement calling for a payment as rent of a sum equal to a certain per cent. of the earnings.

In the present case, we conclude that the contract was one calling for the payment of rent and that the amount of the rent was measured in a somewhat unusual manner. The agreement did not, however, have the effect of giving to the bridge company a right to any specific money received by its lessee.

[4] In view of this determination of the first question submitted, it becomes unnecessary for us to consider the second question, for unless the appellant's claim was entitled to priority over the lien of the outstanding mortgages, no right to the net profits accrued in its favor, as against a mortgagee whose lien covered not only the property but the rents and profits derived therefrom.

The decree is affirmed.

GREAT LAKES TOWING CO. v. ST. JOSEPH-CHICAGO S. S. CO.

(Circuit Court of Appeals, Seventh Circuit. August 22, 1918. Rehearing Denied October 14, 1918.)

No. 2465.

1. ADMIRALTY ⇐108—APPEAL—FINAL DECREE—WHAT CONSTITUTES.

Where the owner of a vessel, which had capsized and sunk after contracting with appellant to raise the same, filed a petition for limitation of liability, and appellant's petition therein for a preferred lien was denied, *held*, that the decree was final as to appellant, and appealable.

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2. SALVAGE ⇐11—SALVAGE SERVICE—WHAT CONSTITUTES.
The raising of a sunken vessel, which lay at the bottom of a narrow and much-traveled and navigable stream, was a salvage service, entitling the salvor to a prior lien, enforceable in rem, whether it was rendered under contract or not, or the vessel was in danger, etc.

3. SALVAGE ⇐40—LIEN—PRIORITY.
Maritime liens arise from many kinds of acts, and priority is determined by the rank of benefits conferred; so one who raised the sunken vessel is entitled to priority over other claimants and the owner.

4. SALVAGE ⇐11—LIEN—CONTRACTS.
Where a towing company undertook to raise and deliver a sunken steamer for $34,500, "no cure, no pay," and there was no showing of fraud in the contract, or that the personal credit of the owner was relied on, etc., the towing company is entitled to a lien for the contract price.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Libel and petition by the St. Joseph-Chicago Steamship Company for limitation of liability, in which the Great Lakes Towing Company and others file claims. From a decree denying the motion of the Great Lakes Towing Company that its claim be decreed a preferred and first lien, it appeals. Reversed.

Harvey D. Goulder and Thomas H. Garry, both of Cleveland, Ohio, for appellant.

Harry W. Standidge and Charles E. Kremer, both of Chicago, Ill., for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. On July 24, 1915, the steamship Eastland, owned by the St. Joseph-Chicago Steamship Company, of St. Joseph, Mich., and chartered to and operated by the Indiana Transportation Company, capsized and sank in the Chicago river. Many passengers were drowned and others injured.

Three days later the Great Lakes Towing Company, appellant, contracted with the steamship company "to raise and deliver said steamer, righted and pumped out, to a dock in the vicinity of where she now lies, for $34,500; no cure, no pay." Appellant's undertaking was fully performed.

This cause was begun in the District Court by the steamship company's filing of a libel and petition for limitation of liability. A trustee was appointed and took possession of the steamer; an order was entered, restraining the prosecution of claims, except in the limitation proceedings; and a monition was issued, citing all claimants to appear. Appellees, other than the steamship company, are tort and supply claimants.

Appellant filed an answer denying the steamship company's right of limitation, and also a petition asking that appellant's claim for services in raising the steamer be declared and enforced as a "preferred, paramount, and first lien." It was stipulated that there were no other claims of that class.

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Afterwards the court sold the steamer for a sum which would go but a little way toward satisfying all the claims. Thereupon appellant filed a motion that it be first paid out of the proceeds. Tort and supply claimants resisted appellant's petition and motion, and a hearing resulted in a decree:

"That said Great Lakes Towing Company is not entitled to the relief prayed for by it in its said petition and motion to have its said claim decreed a preferred, paramount, and first lien on said steamer or the proceeds thereof, and it is ordered that said prayer of said petition be and the same is hereby denied."

Hence this appeal.

[1] 1. Motion to dismiss: Appellees contend that the decree is merely interlocutory, because appellant's petition was not in terms finally dismissed, and because appellant may hereafter be granted an allowance for its services as an unsecured claim or on an equal footing with appellees. But the only relief sought by appellant's petition was the enforcement of an asserted prior lien. By the limitation proceedings appellant was forbidden to file an independent libel, and was constrained to intervene in this case. The San Pedro, 223 U. S. 365, 32 Sup. Ct. 275, 56 L. Ed. 473. Appellant's intervening petition was in its essence an independent libel to declare and enforce a paramount maritime lien; and though the controversies between the steamship company and the tort and supply claimants were left pending, and though appellant's right to allowance of an unsecured claim, if appellant should care to present such a claim, was not cut off, nevertheless the decree denying the only relief sought by the intervening petition was in its effect upon the asserted lien the same as a formal and final decree dismissing an independent libel. Gumbel v. Pitkin, 113 U. S. 545, 5 Sup. Ct. 616, 28 L. Ed. 1128; Potter v. Beal, 50 Fed. 860, 2 C. C. A. 60; Sanders v. Bluefield Water Works, 106 Fed. 587, 45 C. C. A. 475; The Attualita, 238 Fed. 909, 152 C. C. A. 43. Motion to dismiss is overruled.

[2] 2. Has appellant a paramount lien?

Appellees contend that appellant rendered no salvage service. Confessedly appellant did not go out in a tempest, at great risk to its own vessels and crews, in a voluntary effort to save the Eastland from imminent perils of the sea. What appellant did was to raise and pump out the sunken steamer under a "no cure—no pay" contract with the owner. Work of this character, appellees insist, is not salvage service. From the syllabus of Merritt & Chapman Derrick & Wrecking Co. v. Morris & Cummings Dredging Co., 137 Fed. 780, 70 C. C. A. 356, they quote:

"The raising of a dredge sunk in shallow water, where there is no danger involved, nor any extraordinary means required or employed, is not a salvage service."

And additionally they cite The Paul L. Bleakley (D. C.) 146 Fed. 570; The S. C. Schenk, 158 Fed. 54, 85 C. C. A. 384; The New Haven (D. C.) 159 Fed. 798.

Whether service is rendered voluntarily or under contract does not affect the character of the service. The Elfrida, 172 U. S. 186, 19

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Sup. Ct. 146, 43 L. Ed. 413. That the expression "perils of the sea" must not be taken literally is illustrated in The Jefferson, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907, wherein service in protecting a vessel undergoing repairs in a dry dock from a fire on the shore was held to be salvage. Cases of The Tornado, 109 U. S. 110, 3 Sup. Ct. 78, 27 L. Ed. 874, The Elfrida, supra, The Stanley H. Miner (D. C.) 172 Fed. 486, and Barnett & Record Co. v. Wineman, 202 Fed. 110, 122 C. C. A. 222, indicate that service in raising, pumping out, and restoring to commerce stranded and sunken vessels, in no immediate peril of destruction, and without the employment of means or the incurring of hazards beyond those necessary to the undertaking is salvage; and we think it must necessarily be so. In the present case the Eastland lay at the bottom of a navigable river, narrow and much traveled. She was an obstruction to navigation, a danger to herself and all passing vessels. Our judgment is that appellant's service in raising and restoring her to use was salvage, creating a property right, enforceable by process in rem.

[3] But, after all, it is unnecessary that appellant's service be defined as salvage. Maritime liens arise from many kinds of acts and services, and priority is determined by rank of benefits conferred. The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969. Appellees' liens, if any they have, attached to the Eastland as she lay on the bottom of the river at the end of her voyage. Appellees, as well as the owner, were benefited by appellant's service, and their claims are therefore subordinate.

[4] Nothing in evidence tends to show collusion, fraud, or duress in the execution of the "no cure—no pay" contract, or that appellant accepted the personal credit of the owner in lieu of its right to an interest in the vessel. Though some of the appellees in their pleadings challenged the amount of the consideration, they offered no evidence to prove that it was unfair. Recovery must therefore be for the contract price. The Elfrida, supra.

Since it affirmatively appears that appellant's claim is the only one of the preferred class, there is no reason for delaying payment.

The decree is reversed, with direction to allow appellant's claim, with interest and costs.

CITY OF AMARILLO et al. v. SOUTHWESTERN TELEGRAPH & TELEPHONE CO.

(Circuit Court of Appeals, Fifth Circuit. November 12, 1918. Rehearing Denied December 19, 1918.)

No. 3271.

1. APPEAL AND ERROR ⟸954(1)—TEMPORARY INJUNCTION—DISCRETION OF TRIAL COURT.
Discretion of court in granting temporary injunction pending final hearing will not be reviewed, unless abuse is shown.

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2. INJUNCTION ⟸136(2), 149—TEMPORARY INJUNCTION—PROPRIETY—DEPOSIT IN COURT.

The granting of a temporary injunction restraining a municipality from enforcing against a telephone company an ordinance prohibiting the collection of increased rates until underground installation of wires *held* proper, though company should be required to make deposit instead of giving bond, to secure patrons in case restitution of increase should be ordered.

Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Bill by the Southwestern Telegraph & Telephone Company against the City of Amarillo and others. From an interlocutory order directing the issue of an injunction pendente lite, defendants appeal. Modified, and, as modified, affirmed.

W. H. Kimbrough, R. E. Underwood, and M. J. R. Jackson, all of Amarillo, Tex., for appellants.

S. P. English, of Dallas, Tex., for appellee.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. This is an appeal by the defendant in the District Court (appellant here) from an interlocutory order of that court directing the issue of an injunction pendente lite, restraining the defendant from the enforcement of a municipal ordinance against the plaintiff (appellee) which prohibited the plaintiff from collecting increased rates for service, fixed by it, until it had installed its wires underground within the fire limits of the city of Amarillo. The motion for a temporary injunction was heard upon bill, answer, affidavits, and counter affidavits.

The plaintiff claimed the right to put in and maintain the increased rates by virtue of the ordinance granting its predecessor the franchise to maintain and operate its telephone system in the streets of the city. The defendant contended that the plaintiff was in default of a stipulation in the ordinance that it was to install its wires underground within the city's fire limits, which it was conceded it had not done, and that it could not resort to a court of equity to enforce the ordinance, as a contract, in its favor, while in default of performance of the conditions required of it. The plaintiff also claimed that the rates in force before increased were confiscatory, and that, regardless of the ordinance contract, it could enjoin the inhibitory ordinance upon the ground that it deprived plaintiff of its property without due process. The defendant denied that the old rates were confiscatory, and denied plaintiff's right to resort to equity, while in default under the contract ordinance, though they were confiscatory.

The District Judge did not undertake to determine, on the hearing of the motion, any issue of fact or law, except the default of the plaintiff as to the underground installation; but in view of the serious and doubtful questions presented by the motion, and the impossibility of reaching a proper conclusion on a preliminary hearing, and in view

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of the fact that the subscribers, represented by the defendant, could be amply protected, if the temporary injunction issued, by a deposit in the registry of the court for their reimbursement in the event the increased rates were held to be illegally put into effect on the final hearing, while the plaintiff, if the temporary injunction was denied, would irreparably lose the benefit of the increased rates until final hearing, even if the increased rates were then sustained and the inhibitory ordinance permanently enjoined, decided to grant the motion, conditioned upon the plaintiff depositing in the registry of the court an amount adequate for the reimbursement of the subscribers.

[1] The rule is settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court, and that the granting of a temporary injunction will be reviewed on appeal only if the lower court has abused its discretion or improvidently granted the writ. Texas Traction Co. v. Barron G. Collier, Inc., 195 Fed. 65, 115 C. C. A. 82; Southern Pacific Co. v. Earl, 82 Fed. 690, 27 C. C. A. 185; Kankakee v. American Water Supply Co., 199 Fed. 757, 118 C. C. A. 195. Especially will the granting of the temporary writ be upheld, when the balance of injury as between the parties favors its issuance. Memphis Gas & Light Co. v. Memphis (C. C.) 72 Fed. 952; Southern Railway Co. v. McNeill (C. C.) 155 Fed. 756.

[2] In view of the doubt attending the questions involved, and the difficulty of properly solving them on a preliminary hearing upon affidavits, and the fact that the loss the appellee will suffer from the enforcement of the ordinance pending final hearing will be irreparable, and the possibility of so molding the order as to protect the subscribers if the defendant should succeed upon final hearing, we are not disposed to hold that the District Judge abused his discretion in granting the writ, or ordered its issue improvidently.

The opinion of the District Judge recited the offer by the plaintiff to make a deposit or execute a bond to protect the subscribers, and directed the clerk of the court to ascertain what would be a proper amount to deposit with the court for their protection, and that, upon such deposit being made, the writ should issue. The order of the District Court, however, provides that, upon the filing by plaintiff of a bond in the sum of $30,000, the writ should issue. Upon the hearing in this court, the appellant's counsel complained of the substitution of the bond for the deposit, and counsel for appellee renewed its offer to make the deposit in addition to the bond.

We are of the opinion that the subscribers will be more amply protected by a deposit. The order appealed from should be modified, so as to provide for the continuance in force of the writ, upon the plaintiff's making with the clerk of the District Court a deposit in an amount to be determined by him to be sufficient to repay to those having, or that may hereafter have, contracts with the plaintiff for telephone service in the city of Amarillo, the difference between the charges at the increased rates and at the rates which had theretofore obtained, during the period the writ is in force, within five days after being notified of such determination of the clerk, and such additional

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deposits, if any, as may in the opinion of the District Court become at any time or times hereafter necessary for that purpose and be ordered by it, and stipulating of record to submit itself to the jurisdiction of the District Court in the matter of the determination of the claims of such persons for reimbursement from such deposit or deposits.

The cause is remanded to the District Court for the modification of the order appealed from in conformity with this opinion, and, as so modified, the order will be affirmed.

VON BANK v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5156.

1. ARMY AND NAVY ⇐40—ESPIONAGE ACT—CONSTRUCTION—"WILLFULLY."
In Espionage Act June 15, 1917, tit. 1, § 3, making it an offense to "willfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States," the word "willfully" means "intentionally" or "with the purpose of."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willfully.]

2. ARMY AND NAVY ⇐40—ESPIONAGE ACT—ATTEMPT TO CAUSE INSUBORDINATION, ETC.
A statement by an officer of a school district, that he "would rather see a pair of old trousers hanging over the schoolhouse than the United States flag," *held*, under the circumstances in which it was made, not an offense under the Espionage Act, as a willful attempt to cause insubordination, etc., in the military or naval forces.

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Criminal prosecution by the United States against Henry Von Bank. Judgment of conviction, and defendant brings error. Reversed.

A. W. Fowler, of Fargo, N. D., for plaintiff in error.

Melvin A. Hildreth, U. S. Atty., of Fargo, N. D. (John Carmody, Asst. U. S. Atty., of Fargo, N. D., on the brief), for the United States.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

CARLAND, Circuit Judge. Von Bank was convicted and sentenced for a violation of section 3, title 1, Act of Congress approved June 15, 1917, c. 30, 40 Stat. 217. The charge against him was that on December 15, 1917, at or near Buffalo, in the county of Cass, district of North Dakota, he had willfully caused and attempted to cause, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, the United States then being at war with the Imperial German Government, by refusing as president of the school board of district No. 79, to put the flag of the United States upon the schoolhouse in said district, and stating that he would just as soon see a pair of old trousers hanging over the schoolhouse

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as the United States flag. At the close of all the evidence, counsel for the defendant moved for a directed verdict in his favor, which was denied. This ruling is assigned as error.

There was evidence tending to show that the defendant was a naturalized citizen of the United States, having been born in the Grand Duchy of Luxemburg; that he was a farmer living in the county of Cass, North Dakota, and at the time of the commission of the alleged offense was president of the district school board, and said board had neglected or refused to purchase a flag of the United States and display the same in seasonable weather upon the district schoolhouse or upon a flagstaff upon the school grounds during school hours of each day's session of school as the law provided. At the county teachers' institute it appeared that the schoolhouse of district No. 79 had no flag. Knowledge that there was criticism for the failure to provide a flag came to the defendant, and on the date mentioned in the indictment he visited the schoolhouse while school was in session, and in a conversation had in the entry of the schoolhouse, at which the defendant and the school-teacher were alone present, the defendant stated "he would rather see a pair of old trousers hanging over the schoolhouse than the United States flag." Later, when asked by the county superintendent, Mr. Riley, as to whether he had used this language, he replied, "Yes; I said so, and why not?"

At the time the defendant admitted that he had used the words set forth in the indictment, Mr. W. A. Landblom, assistant superintendent of public instruction, was present and was a member of class 4 of the selective draft. There was no evidence that the defendant spoke the language quoted for the purpose of causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, except the language itself. The law in express terms confines the organizations to be acted upon to the military or naval forces of the United States, and the effect of the acts or declarations of any person upon such organization is termed insubordination, disloyalty, mutiny, or refusal of duty, terms which, with the exception of disloyalty, are applicable to persons subject to the command of superior authority in an organized service.

[1] The word "willfully" has been given different shades of meaning in different statutes. In the law under consideration we think it means "intentionally," or "with the purpose of." The fact that no flag had been displayed upon the schoolhouse can have very little influence in the present controversy, as that condition had existed for years before June 15, 1917, and it was the district board's duty to display the flag, and not particularly that of the defendant. It is contended by counsel for the government that the jury had a right to find or infer from the language used that the defendant intended to cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, upon the well-known principle that every man is presumed to intend the necessary and legitimate consequence of what he knowingly does or says. The jury, however, had no right to find a criminal intent,

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unless such intent was the necessary and legitimate consequence of the words spoken. A jury has no more right to draw an inference from facts that do not necessarily and legitimately authorize such inference than to find any other fact without evidence.

[2] The question now presented is: Would the words spoken, under the circumstances attending their utterance, necessarily and legitimately cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States? Assuming the military or naval forces to be constituted of patriotic citizens, which of course is a legitimate assumption, we think the language used by the defendant with reference to the flag, when heard by them, would cause the flame of patriotism to burn the brighter in indignant protest, rather than cause insubordination, disloyalty, mutiny, or refusal of duty.

It is not the language of the wily agitator or propagandist. The language used by the defendant is unpatriotic and offensive to any one who appreciates what the flag has always and still stands for; but if this be a government of laws, and not of men, the defendant should stand unprejudiced by the passions of the times when charged with the commission of crime. It would seem that Congress passed the law of May 16, 1918 (chapter 75), for the purpose of punishing the use of unpatriotic language, as the passage thereof would not have been necessary if it was the opinion of Congress that the present law included merely scurrilous language with reference to the flag. We are of the opinion, therefore, that there was no evidence from which the jury had the right to find or infer that the defendant used the language quoted above with the intent to cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States. So far as the attack upon the indictment is concerned, we think that, as the words spoken are alleged to have been uttered willfully, the indictment is sufficient; the proof to sustain the fact that the words were spoken willfully for the purpose alleged to be supplied at the trial.

For the error in refusing to direct a verdict, the judgment below is reversed, and a new trial ordered.

RAGANSKY v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. August 13, 1918.)

No. 2605.

1. HOMICIDE ⇐92—THREATS AGAINST LIFE OF PRESIDENT—DEFENSE—JOKE.
It is no defense to prosecution, under Act Feb. 14, 1917 for threatening to take the life of the President, that the language was used as a joke; it not being claimed that those present so understood, or were intended to so understand.

2. HOMICIDE ⇐92—THREATS AGAINST LIFE OF PRESIDENT—"KNOWINGLY"—"WILLFULLY."
Within Act Feb. 14, 1917, denouncing the offense of knowingly and willfully threatening to take the life of the President, a threat is "knowingly"

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made, if the maker comprehends the meaning of the words used, and "willfully" made, if, in addition to comprehending their meaning, he voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution; a bad purpose is not necessary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Knowingly; Willfully.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Walter Ragansky was convicted of threatening the life of the President, and brings error. Affirmed.

Seymour Stedman, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne and Robert T. Neill, both of Chicago, Ill., for the United States.

Before MACK and EVANS, Circuit Judges.

MACK, Circuit Judge. The sole question for consideration on this writ of error to reverse a judgment based upon a verdict of guilty under all three counts of an indictment for knowingly and willfully making threats to take the life of the President of the United States is the construction of the Act of February 14, 1917 (39 Stat. 919, c. 64) copied in the margin.[1]

Concededly, the language charged to have been used by defendant in and of itself constituted such a threat; that specified in the first count was "I can make bombs and I will make bombs and blow up the President"; in the second, "We ought to make the biggest bomb in the world and take it down to the White House and put it on the dome and blow up President Wilson and all the rest of the crooks, and get President Wilson and all of the rest of the crooks and blow it up;" in the third, "I would like to make a bomb big enough to blow up the Capitol and President and all the Senators and everybody in it." The demurrer and motion to quash, not shown in the record, as well as the motion in arrest of judgment, were therefore properly overruled.

[1] While the testimony is not preserved, it appears, from the statement of the judge in overruling a motion for a new trial, that "there was a claim by this defendant and testimony in corroboration of his claim that he was joking, that he was not in earnest, that he did not intend to kill him."

The court instructed the jury that "the claim that the language was used as a joke, in fun," is not a defense. It was not claimed that every one present understood that he was joking, or that he intended them so to understand; the claim appears to have been that defendant

[1] "Any person who knowingly and willfully deposits or causes to be deposited for conveyance in the mail or for delivery from any postoffice or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and willfully otherwise makes any such threat against the President, shall upon conviction be fined not exceeding $1,000 or imprisoned not exceeding five years, or both."

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had no intention to carry out his threat, and that, therefore, it was a joke; the instruction read in the light of the entire charge must be so construed, and in our judgment it was correct.

[2] A threat is knowingly made, if the maker of it comprehends the meaning of the words uttered by him; a foreigner, ignorant of the English language, repeating these same words without knowledge of their meaning, may not knowingly have made a threat.

And a threat is willfully made, if in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution.

Defendant, while conceding that an intention actually to carry out the threat or the President's knowledge of the threat is not essential, contends that the language must be used with an evil or malicious intent to express a sentiment to be impressed upon the minds of persons through which it might create a sentiment of hostility to the security of the President, "that willfully implies an evil purpose—legal malice."

Waiving defendant's failure properly to except to the charges (his exception was general to the court's construction of the act), his present contention cannot be sustained, if by evil purpose or legal malice, more is meant than an intention to give utterance to words which, to defendant's knowledge, were in form and would naturally be understood by the hearers as being a threat; that is, the expression of a determination, whether actual or only pretended, to menace the President's safety.

While under some circumstances, the word "willfully" in penal statutes means not merely voluntarily, but with a bad purpose (Spurr v. United States, 174 U. S. 728, 19 Sup. Ct. 812, 43 L. Ed. 1150; Potter v. United States, 155 U. S. 446, 15 Sup. Ct. 144, 39 L. Ed. 214), nothing in the text, context, or history of this legislation indicates the materiality of the hidden intent or purpose of one who, in the presence of others, voluntarily uses language known by him to be in form such a threat, and who thus, to some extent endangers the President's life (United States v. Stickrath [D. C.] 242 Fed. 151; United States v. Clark, 250 Fed. 449, — C. C. A. — [April 1, 1918, C. C. A. 5th Circuit]).

Judge KOHLSAAT concurred in these conclusions, but died before the opinion was written.

Judgment affirmed.

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DOLL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5089.

ARMY AND NAVY ⟸40—ESPIONAGE ACT—VIOLATION.

Where accused indulged in profane and coarse outburst to forest officers concerning grievance over timber right in forest reservation, and there was nothing said against enlistment, and accused did not know the officers were engaged in recruiting, *held*, under the circumstances, that there was no violation of Espionage Act June 15, 1917, tit. 1, § 3.

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Charles Doll was convicted of willfully obstructing the recruiting service, etc., in violation of Espionage Act June 15, 1917, tit. 1, § 3, and he brings error. Reversed and remanded.

Robert C. Hayes, of Deadwood, S. D. (J. D. Wear, of Omaha, Neb., and John T. Heffron, of Deadwood, S. D., on the brief), for plaintiff in error.

Robert P. Stewart, U. S. Atty., of Deadwood, S. D. (Edmund W. Fiske, Asst. U. S. Atty., of Sioux Falls, S. D., and George Philip, Asst. U. S. Atty., of Rapid City, S. D., on the brief), for defendant in error.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

HOOK, Circuit Judge. Charles Doll was convicted of willfully obstructing the recruiting and enlistment service of the United States, and of willfully causing and attempting to cause disloyalty, insubordination, and mutiny in the military forces of the United States, in violation of section 3, title 1, of the Espionage Act of June 15, 1917 (40 Stat. 219, c. 30).

The crimes were charged to have been committed June 20, 1917, by the use of language which is too profane and obscene to be set forth in this opinion. It was quite clearly shown at the trial that the accused was under the influence of liquor, and had or thought he had a grievance against the government over a right to timber from a forest reservation. The language was used in a conversation with two forest officers, to whom he made his complaints. It appeared that, at the time, the officers were also engaged in recruiting for the engineer military service; but that fact was not told the accused, nor did he know it. The military service was not the subject of the conversation, and he said nothing by way of persuasion, advice, or otherwise against enlistment or the draft. What he said was but a coarse, indecent outburst, because of a fancied grievance in a matter wholly unrelated to those subjects. Where words only are relied on as obstructing the service, or as causing or constituting an attempt to cause disloyalty, etc., contrary to the clauses of the Espionage Act above cited,

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much depends on the circumstances, and they should be closely regarded. We think there was nothing in this case fairly indicating that the accused intended the results which are essential elements of the offenses, or that such results in fact followed, or would naturally follow, what he said. His request for a directed verdict should therefore have been granted. It should be noted that this case arose before Act May 16, 1918, c. 75, which is much broader than the original statute.

The sentence is reversed, and the cause is remanded for a new trial.

OSHKOSH MFG. CO. v. KOEHRING MACH. CO.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1918. Rehearing Denied November 19, 1918.)

No. 2547.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—CONCRETE MIXER.
Patent No. 899,414, for combinations in a concrete mixer, in view of the Mik German patent, No. 36,807, for lime-slacking apparatus, the arts being analogous, *held*, if valid, limited to a machine as specifically described, and not infringed.

2. PATENTS ⟸328—ANTICIPATION—CONCRETE DISTRIBUTOR.
Reissue patent No. 13,617, for concrete distributor, *held* anticipated by machines on sale more than two years before filing of application for original patent.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Bill by the Koehring Machine Company against the Oshkosh Manufacturing Company for infringement of patents. From a decree for plaintiff, defendant appeals. Reversed and remanded, with directions.

Stephen J. Cox, of New York City, and Arthur L. Morsell and Louis O. French, both of Milwaukee, Wis., for appellant.

John F. Robb, of Cleveland, Ohio, for appellee.

Before BAKER and MACK, Circuit Judges.

MACK, Circuit Judge. Two patents are involved in this appeal—the one, No. 899,414, for improvements in concrete mixer; the other, reissue No. 13,617, for improvements in concrete distributors. The machine in controversy is a combined concrete mixing and paving machine, called a paver; the alleged infringements result from the form of appellant's mixer and from the construction of the distributing attachment thereto. The two patents will be considered separately; the questions arising as to each of them are different.

The Concrete Mixer.

[1] The two claims of the patent, both of which were held valid and infringed, are as follows:

1. In a concrete mixer, the combination of a revoluble drum having separate receiving and discharge openings at its respective ends, a stationary hopper

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having its discharge end within one of the openings of said drum, arms connected with the drum supporting frame and projecting into the drum at its discharge end, a reversely inclinable trough pivoted to the inner ends of said arms, and means for manually changing the inclination of said trough upon its pivotal support.

2. In a concrete mixer, the combination of a revoluble drum having separate receiving and discharge openings at its respective ends, a stationary hopper, having its discharge end within one of the openings of said drum, a stationary trough supported from the exterior near the opposite end of said drums, arms connected with the drum supporting frame and projecting into the drum at its discharge end only, and a reversely inclinable trough pivoted to the inner ends of said arms and adapted to contact with said stationary trough.

The following statement from appellee's brief suggests the issue:

"Discharge chutes, operating practically outside of the drum, but adapted to be swung into the drum in order to perform their discharge function, were quite old in the art. At any rate, the patentee of patent No. 899,414 evolved the conception that a simple mounting of the chute further within the drum of a batch mixer type machine and using it in its idle position to shoot or cataract the materials back from the discharge end to (not merely toward) the inlet end, would create an active function for the chute as a mixing element when it was not needed for discharge purposes. In other words, appellee's discharge chute never has an idle position when the mixer is in use. The appellee recognizes that, while the patentee achieved a broadly new result in designing his double functioning chute, such result was derived from what might be characterized as a rather narrow structural change, namely, the shifting inwards of the pivotal support of the chute and reshaping and formation of the latter to accommodate for its new double action. In fact, throughout the procurement of his patent the patentee fully appreciated that, while the structural changes made by him over prior art devices were quite narrow ones, nevertheless, the accomplishment was maintained as wholly novel and an important advance in the art. His chief difficulty was to couch in proper terms claims which avoided many and various prior patents, and yet actually covered the real inventive idea developed by him."

Concededly, defendant's reversibly inclinable trough, though performing both the functions of discharging from and of aiding in the mixing of the materials within the drum, is not pivoted to the inner ends of the arms, and the arms do not project into the drum. Therefore, if the patent claims are to be literally interpreted, there is no infringement.

In view of our conclusions as to the Mik German patent, No. 36,807, we do not pass upon appellant's strong and earnest contention that the successively narrowing amendments of the claims, made to meet the examiner's references to earlier patents, not including, however, Mik, compel such an interpretation; for the conception, if novel, of utilizing the reverse discharge chute in co-operation with the elevating buckets to aid the mixing within the drum, might, nevertheless, justify an interpretation of the claims broad enough to cover defendant's structure. Despite the change in the location of the pivoted support from within the drum to the opening thereof, defendant's reversed discharge chute does function as a mixing element, even though other advantages alleged to result from the location within the drum are thereby lost.

Is, then, this conception novel? In its application to concrete mixers, yes; to other apparatus in a strictly analogous art, no. For, in

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our judgment, Mik in his patent for lime-slaking apparatus clearly shows the same double function of a discharge chute.

It is immaterial that concrete could not be mixed in Mik's machine, or that the primary function of his discharge chute, when in reversed position, is to aid in separating the stony impurities from the lime. This separation is but a step in the more thorough mixing of the quicklime and the water which have been fed into the drum.

Both patents are classified in the Patent Office as mortar mixers; in both machines, thorough agitation of the materials is essential; in both, the mixture is lifted upwards by the buckets or straining basket, and on reaching its highest point is dropped into the reversed chute, whence it is cataracted back. In the concrete mixture, the aim is thoroughly to mix all of the material; none of it runs off after it is mixed; the whole mass is discharged through the chute. In the lime-slaking apparatus, the object is thoroughly to saturate the quicklime, producing slaked lime, which is strained through and flows out of the drum beneath the reversed chute. After these stony substances have been mixed as thoroughly as possible with the liquid into which they drop from the reversed chute, and thereby to a very large extent have cast off the lime surrounding them, they are discharged as waste material through the discharge chute; as some lime, however, still adheres to them, they drop into a receptacle having a straining bottom, so that any lime passing out with the stones may be caught and mixed with the slaked lime. The arts are clearly analogous.

The patent in suit, therefore, if valid, must be limited to a machine as specifically described in the claims; so limited, it is not infringed.

The Concrete Distributor.

[2] As stated in the specifications, the object of the invention was—

"to provide a device to be used in laying walks and street pavements in connection with a concrete mixer for receiving the mixed concrete as it is discharged from the mixing drum and conveying it to the place of deposit in the walk or pavement which is being laid."

Claim 1 reads as follows:

"1. In a device of the described class, the combination of a vertical frame, a boom pivotally supported near one end from said frame, manually actuated means for revolving said boom a partial revolution about its pivotal support, a track carried by the boom, a carriage mounted upon said track, a cable operating along said boom and connected with the carriage, a receptacle suspended from said carriage, means for communicating a forward and backward movement to said carriage, and means carried by the boom for raising and lowering the same."

This claim corrects obvious errors in the corresponding ones of the original patent by substituting "boom" for "crane" and in stating that the "manually actuated means" are to revolve the boom, not the frame.

The other claims in issue, 3 to 6, had no corresponding ones in the original patent; they differ from claim 1 as follows: In each of them, the means for revolving the boom are not limited to those manually actuated; in claims 4 and 6 the means for raising and lowering the boom are not limited by locating them on the boom; in claim 5 this ele-

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ment is omitted altogether; and in claim 6, these means are stated to be operatively connected with the outer end of the boom. Furthermore, in claim 4 the cable is omitted and the shape of the carriage is specifically described; in claim 5 a new element, drums on the upper and lower portions of the frame, is added; in claim 6, in addition to these drums, there is also added pulleys at the inner and outer ends of the boom, to carry the cables.

Plaintiff was no pioneer. Such distributing machines were old in the art. He introduced no new elements. Without discussing the details of the prior art, it is apparent therefrom that plaintiff's claims are to be given no wide range of equivalency. We pass, however, the question of infringement.

We pass, too, appellant's contentions as to the validity of the reissue, as well as to the limitation of the claims to the specific structure, based upon the proceedings in the Patent Office. We note, too, that any defense of prior public use was waived by objection to the relevancy of plaintiff's offer to carry his invention back of such use. But there was no waiver of the separate defense that such machines were on sale more than two years before application for the original patent was filed. Two such actual sales were clearly proven; contemporaneous records substantiate the oral testimony. It is immaterial whether or when these machines were put into actual public use; that they were so used more than two years prior to the original application seems, however, equally clear.

If defendant's machine should be deemed to infringe, then these machines so sold must be held to anticipate.

The decree will be reversed, and the cause remanded, with directions to dismiss the bill.

NOTE.—Judge KOHLSAAT concurred in the decision, but died before the opinion was prepared.

F. W. RAUSKOLB CO. v. ANTHONY MFG. CO.

(Circuit Court of Appeals, First Circuit. November 8, 1918.)

No. 1340.

1. APPEAL AND ERROR ⟸877(1)—REVIEW—QUESTIONS PRESENTED.
Where plaintiff appealed from a decree of noninfringement, and not from the part of the decree sustaining the validity of the patent, *held*, that the question of infringement was the only one presented.

2. PATENTS ⟸174—IMPROVEMENT PATENTS—CONSTRUCTION.
Doubtless an improvement patent may be relieved in a measure from the operation of the rule of limited construction, if the merit of the invention warrants it; but the merit is not ordinarily accepted as sufficient when the invention only slightly advances the art.

3. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The Rauskolb patents, Nos. 1,072,992, and 1,103,222, for a method of gold leaf mounting, *held* limited to the use of pressure, and not infringed by the attachment of metal leaf by adhesive in accordance with the Davis and Schumacher patent, No. 1,124,114.

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Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit by the F. W. Rauskolb Company against the Anthony Manufacturing Company. From a decree for defendant, plaintiff appeals. Affirmed.

Frederick P. Fish, of Boston, Mass. (J. L. Stackpole, of Boston, Mass., on the brief), for appellant.

Odin Roberts, of Boston, Mass., and Hubert Howson, of New York City, for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. The two patents upon which the plaintiff relies are for improvements in the art of metal leaf mountings, and it is apparent that the leading object was to provide improved means for mounting gold leaf upon leather, cloth and other surfaces.

In the court below the defense was noninvention and noninfringement, with the result that that court accepted the patents as valid and, under the rule of limited or narrow construction, found no infringement.

[1] There being no appeal from that part of the decision which gives to the patents the status of invention, there is nothing before us as to their validity. It is true that assignments of error 1 and 2 set out that the court erred in not holding the patents good and valid, but counsel in their brief say that the assignments of error are, in substance, that the court erred in not holding the patents infringed. Under the circumstances; there is no occasion for an examination of any questions other than those which relate to the District Court's interpretation of the claims and the finding of no infringement under their scope as limited by the rules of narrow construction.

[2] Doubtless an improvement patent may be relieved, in a measure, from the operation of the rule of limited or strict construction if the merit of the invention is such as to warrant it (Whitin Machine Works v. Houghton, 178 Fed. 444, 445, 101 C. C. A. 344), but the merit is not ordinarily accepted as sufficient to warrant it when the invention only slightly advances the art, thus carrying the claims only a little into the field of invention. Under such view, and dealing with the question of merit as a question of fact, as we must, no reason can be seen for invoking the theory of liberal construction in order to carry protection to the plaintiff beyond the particular means which he described and relied upon in claiming his invention.

[3] The leading argument which the appellant directs against the reasoning and findings of the District Court is that there was no warrant for the position of that court that the Rauskolb patents contemplated the use of substantial pressure in applying gold leaf, and that the defendant's mounting was made without the use of substantial pressure. This argument cannot be accepted as sound, under the claims of the Rauskolb patents, as explained by their specifications and under the claims and specification of the Davis and Schumacher patent under

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which the defendant's mounting was made. This is so because the leading idea in the Rauskolb patents is to securely attach metal leaf under nonadhesive conditions in respect to the paper on the side to which it is applied, and that such attachment is to be secured through pressure as the only means for uniting the leaf; while the leading idea of Davis and Schumacher was to attach the metal leaf to paper, not under substantial pressure, but through the medium of an adhesive or sticky substance, and the alleged infringing article was made in accordance with that idea.

Rauskolb, in the specification of his article patent, of July 14, 1914, emphasized the idea of pressure by describing his article of manufacture as one "consisting of a sheet of gold leaf with a backing of nonadhesive paper applied thereto by pressure and provided on the opposite face thereof with a fine coating of adhesive sizing."

It would thus seem that pressure was the only means which Rauskolb had in mind for securing the attachment of the gold leaf to the nonadhesive side of the paper. He apparently had no thought of securing such attachment through the medium of adhesive substances. Indeed, there would seem to be ground for suggestion that his idea was to exclude adhesive materials as a means of attachment, because, in the specification of his article patent, he points out objections to sized materials as used in the older art. According to his specifications, Rauskolb apparently relied upon pressure, applied to his three sheets, as the sole agency for causing the delicate sheet, or metal foil, to adhere firmly to the sheet of paper which was to become its backing. The method for arranging the three sheets for his contemplated and necessary pressure was described by Mr. Rauskolb, who testified before Judge Dodge, and the contemplated pressure was described as that of hydraulics, and of the measure in round figures of one hundred tons to the square inch.

On the other hand, as has been already said, the process contemplated by the Davis and Schumacher patent was secured by attachment through the instrumentality of a wax containing a sticky substance. In each of the seven claims of this patent the idea is expressed that the attachment of the metallic leaf ribbon, comprising a carrier strip having a film of gold, shall be secured through the medium of a sticky substance, because, in speaking of the two elements of the combination of the leaf ribbon, the claims say "secured thereto" by a wax containing a sticky substance, sometimes describing the adhesive substance, as that of wax, containing a small amount of sticky substance, and sometimes as a film of yellow beeswax. So far as concerns the security of such attachment, it cannot reasonably be said that pressure was a substantial element of its security, because the word "pressure" does not appear in any of the claims, and because pressure cannot be accepted as an intended substantial element of the proposed attachment.

The slight pressure of the heated die spoken of in the specification of the Davis and Schumacher patent we think was something quite independent of the original and supposed inventive attachment of their metal film, and was something having reference to ornamentations of

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the front surface, at a stage of the process subsequent to the attachment of the film to the carrier strip of which we have been speaking. And the same is true of the Rauskolb patents, whose specifications speak of ornamenting the surface of the metal leaf with suitable characters through the instrumentality of the heat and pressure of the impression portion of a heated die applied to the rear face of the sheet of paraffin paper; but this, we think, is an after feature, and something quite independent of Rauskolb's high pressure attachment of the gold foil to the other face of its backing under nonadhesive material conditions, or in other words, as Rauskolb says in his specifications, under conditions where there is no "necessity of applying sizing to the leather or other material to which the leaf is to be affixed."

In short, we think the method of the process of Rauskolb, and that of Davis and Schumacher, not only differ in detail and in mode of operation, but that they are substantially different in principle.

In view of the prior art and the prominence which the inventor gave to the element of pressure in the Patent Office proceeding, and under the repeated iterations of his specifications as to pressure under nonadhesive conditions, it is difficult to resist the conclusion that the patent was based upon the conception of the supposed inventive idea, and the description of means of uniting metal foil, without the aid of adhesive substance, to a paper backing to be treated with a coating of adhesive sizing on its opposite face; thus, according to Rauskolb's suggestion in his specifications, doing away with the necessary sizing between the layer of metal leaf and the material, of the older methods which, according to Rauskolb's idea, as he points out in his specification, was an objectionable feature, because it disfigured and caused loss of metal leaf, which, when gold, has a considerable value; while Davis and Schumacher hold to a method of adhesive attachment between the foil and the carrier strip, without substantial pressure, thus clearly and at once substantially differentiating their method from the pressure method of Rauskolb, where the idea of pressure and uniting without adhesive material embodies the substantial, if not the whole, merit of the invention. Under such circumstances, we cannot see that the Davis and Schumacher process was in any substantial sense the equivalent of that of Rauskolb. It results, therefore, that the finding of no infringement must be sustained.

Upon the arguments no suggestions were made upon the question of costs raised by the assignment of errors.

The decree of the District Court is affirmed, with costs.

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BUTLER BROS. v. PRATT.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5104.

1. PATENTS ⟸328—VALIDITY—INVENTION.
The Pratt patent, No. 1,166,629, for an improvement in bracelets, consisting of a series of curved links with a slot at each end, adapted so the same could be worn on a flexible band or united by metal connections, *held* invalid as not showing invention, but only a mechanical improvement over the prior art, etc.

2. PATENTS ⟸22—INVENTION—SUBSTITUTION.
It is not invention to substitute for one element in an article of manufacture another which performs the same functions in substantially the same way, and accomplishes substantially the same effect.

3. PATENTS ⟸32, 112(3)—VALIDITY—PRESUMPTIONS.
The presumptions from the issuance of a patent and the commercial success of the patented article cannot sustain the patent, where there was manifest equivalency of functions, and the commercial success was directly attributable to the unique advertising of the article.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by Henry B. Pratt against Butler Bros. From a decree for complainant, defendant appeals. Reversed, with directions to dismiss the bill.

A. C. Paul, of Minneapolis, Minn. (Lancaster, Simpson & Purdy, of Minneapolis, Minn., on the brief), for appellant.

John E. Stryker, of St. Paul, Minn., for appellee.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. This was a suit for infringement of letters patent No. 1,166,629, issued to Henry B. Pratt, January 4, 1916, for improvements in bracelets. The appeal is from a decree sustaining the patent and awarding an accounting.

[1] There are five claims in the patent. The first and fourth claims, which may be regarded as typical, are as follows:

"(1) In a bracelet, a series of oblong metal plates, each plate being formed with a transverse rectilinear slot at each end thereof, and a band passing through all of said slots for uniting said plates."

"(4) In a bracelet, a plurality of oblong metal plates, each plate being curved longitudinally and perforated at its ends, and a flat flexible band passing through said perforations and extending along the inner or concave sides of the plates."

The objects of the patentee are stated in his specifications as follows:

"My invention relates to improvements in bracelets. Its object is to provide an easily assembled and attractive ornament of this kind, having a series of metal links united by a flexible band, which lines said links and overlaps their ends.

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"A further object is to provide in a device of this kind a series of links, each of which is shaped to substantially conform to the curvature of the wrist and provided with a panel adapted to display a monogram, initials, or other ornamentation on the outer or convex side thereof.

"This bracelet is peculiarly fitted for use as a 'friendship' or keepsake bracelet, in which the several links or plates are donated or inscribed by sundry friends and thereafter assembled as a complete bracelet."

The character of the band used to unite the links is referred to in claim numbered 2 as "a flat band" and in claims numbered 3 and 5 as a "flexible band."

The patentee entered into a license agreement with a manufacturing company that did an extensive business in making and selling jewelry and a novel and successful advertising campaign began. An appeal was made by illustrated advertisements in prominent magazines and periodicals, and by circulars, addressed especially to young women and girls, showing the adaptability of the links as gifts, engraved with the name or initials of the donor, and the feasibility of adding links together, thus inscribed, until enough would be gathered to make a complete bracelet. In many cases dealers made presents to prospective customers of a single link, perhaps engraved with the name of the donee, and mounted upon a band of velvet ribbon. There was a very considerable sale of these links; the licensee having sold over 2,000,000 of them up to the time of the trial of this suit. The defendants sold bracelet links that were essentially the same as the plaintiffs. They were not sold with a ribbon or other band to pass through the slots in the links, but they were furnished to dealers for display mounted on portions of advertising cards, which were cut into strips or tabs colored and shaped to resemble a black ribbon, passing through the slots in the links and suggesting the use of them on a flexible band, when used as a bracelet, or as a part of a bracelet. Although the use of metal connections between the links of a completed bracelet was urged, the sale of separate links for temporary use upon a band of ribbon, until enough had been accumulated to form the complete bracelet, was obviously a part of the defendant's purposes.

The joining together in a bracelet of separate links, so as to conform the bracelet to the shape of the wrist, has been the subject of many patents antedating plaintiff's. The use of links having the same mechanical structure as those of plaintiff is conceded to be old. The use of flexible bands to unite the links is also conceded to be old. The claims of plaintiff relate to a combination of links, each of which has a slot or perforation at each end and a band that passes through all of the slots or perforations, uniting the links. In the ordinary practical use of the combination, the band has been a ribbon, usually of velvet, that extends along the inner sides of the links, but passing through the transverse rectilinear slots, so as to leave exposed the outer portion of the links between the slots. The plaintiff concedes that many of the features of construction and design adopted by him are not necessary to the mechanical or functional operation of the bracelet, but are adapted merely to give to it a distinct, characteristic, and unique appearance. He regards as among the nonessen-

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tial features the links' dimensions and the rectangular shapes of the face of the link, the central panel and the slots. The plaintiff does not claim a patent for the design.

Patent No. 149,879, issued to Murphy and Poolman, August 22, 1873, discloses a bracelet composed of separate links, each of which has passing through it longitudinally a rectangular aperture for the reception of a broad elastic band for the purpose of uniting the links. The function of the band in the Murphy and Poolman patent, as in the bracelet of plaintiff, is obviously, and as is stated in the specifications of the former patent, to connect together, by means of the flat band, the separate members of the bracelet, so as to give more strength than is given by the use of round cords, and to hold the links firmly together along the adjacent ends of the separate links. The arrangement of plaintiff's links, so that the band shall pass beneath the greater portion of a link and then be carried through a transverse slot at the end of the link to the adjoining link, and thence downward through a similar slot in the adjoining link, and so on to the end of the bracelet, while a new arrangement, is only a change of form—an equivalent, so far as functions are concerned—of the connecting band shown in the Murphy and Poolman patent.

[2] As settled by many cases, it is not invention to substitute for one element in an article of manufacture another, which performs the same functions in substantially the same way and accomplishes substantially the same effect. Railroad Supply Co. v. Elyria Iron & Steel Co., 244 U. S. 285, 37 Sup. Ct. 502, 61 L. Ed. 1136; Smith v. Nichols, 21 Wall. 112, 22 L. Ed. 566; Reckendorfer v. Faber, 92 U. S. 347, 23 L. Ed. 719; Van Epps v. United Box Board & Paper Co., 143 Fed. 869, 75 C. C. A. 77; Walker on Patents (5th Ed.) § 36.

[3] The presumptions from the issuance of the patent and from the commercial success in the sale of plaintiff's bracelet links are not sufficient to overbear the manifest equivalency of functions between the two patents, and the extent of sales is more directly traceable to the unique advertising the article has received (see Eisenstadt Mfg. Co. v. J. M. Fisher Co., 241 Fed. 241, 154 C. C. A. 161) than to any patentable novelty. This conclusion announced makes unnecessary the determination of other questions presented.

The decree of the lower court will be reversed, with costs, and with directions to dismiss the bill.

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WEBER ELECTRIC CO. v. E. H. FREEMAN ELECTRIC CO.

(District Court, D. New Jersey. November 6, 1918.)

1. PATENTS ⟸328—VALIDITY—INFRINGEMENT—"TELESCOPE."
The Weber patent, No. 743,206, claims 1 and 4, for an incandescent electric lamp socket, consisting of the combination of a pair of members comprising a sleeve, etc., and a cup adapted to telescopically receive the end of the sleeve, etc., *held* valid, and infringed by defendant's device, which provided for rotation; for the word "telescope" means to drive together, so one slides into another like a spyglass, and often rotative movements are necessary to close a spyglass.

2. PATENTS ⟸328—VALIDITY—INFRINGEMENT.
The Weber patent, No. 743,206, claims 2 and 3, for an incandescent electric lamp socket, *held* invalid and anticipated, and hence not infringed.

In Equity. Suit for infringement of patent for improvement in incandescent electric lamp sockets by the Weber Electric Company against the E. H. Freeman Electric Company. Decree for complainant.

Frank C. Curtis, of Troy, N. Y., for complainant.
Robert H. Parkinson, of Chicago, Ill. (David P. Wolhaupter, of Washington, D. C., of counsel), for defendant.

DAVIS, District Judge. [1] This suit was instituted for the infringement of United States patent No. 743,206, issued to August Weber, Sr., November 3, 1903, and by him assigned to the complainant. The patent has five claims, the first four only of which are alleged to have been infringed by the defendant, and are as follows:

"1. In a device of the class described, the combination with a pair of members comprising a sheet-metal sleeve having a slotted end and introverted tongues, and a cap adapted to telescopically receive the slotted end of said sleeve, said members having interengaging parts adapted to automatically interlock with a snap action when telescopically applied to each other, and to be released by compression of said sleeve, of an insulating base for electrical fittings loosely inclosed within said sleeve in engagement with said tongues, substantially as described.

"2. In a device of the class described, the combination with a base of insulating material having a peripheral recess, and an incandescent lamp support mounted thereon, of an inclosing case therefor comprising in part a sheet-metal sleeve having a portion of its wall introverted to occupy said base recess, substantially as described.

"3. In a device of the class described, the combination with a base of insulating material having a peripheral recess, and a screw socket fixedly mounted thereon, of an inclosing case therefor comprising in part a sheet-metal sleeve having a portion of its wall introverted to occupy said base recess, and prevent a relative rotative movement between said sleeve, base, and socket, substantially as described.

"4. In a device of the class described, and in combination a pair of members comprising a sheet-metal sleeve having a slotted end, and a sheet-metal cap adapted to telescopically receive the slotted end of said sleeve, one of said members being provided with a recess, and the other having a correspondingly located transverse slit, and the wall on one side thereof displaced to form a projection beveled or inclined toward said recessed member and terminating abruptly at said slit, whereby said members are adapted to automatically interlock with a snap action when telescopically applied to each

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other, and to be released by manual compression of said slotted sleeve, substantially as described."

As Judge Ray, in the case of Weber Electric Co. v. National Gas & Electric Fixture Co. (D. C.) 204 Fed. 79, said:

"Claim 1 calls for a pair of members comprising (1) a sheet-metal sleeve having a slotted end and introverted tongues and (2) a cap adapted to telescopically receive the slotted end of said sleeve, said members having interengaging parts adapted to automatically interlock with a snap action when telescopically applied to each other, and to be released by compression of said sleeve; also in combination an insulating base for electrical fittings loosely inclosed within said sleeve in engagement with said tongues, all substantially as described.

"Claim 2 calls for (1) a base of insulating material having a peripheral recess; (2) an incandescent lamp support mounted thereon; and (3) an inclosing case therefor comprising, in part, a sheet-metal sleeve having a portion of its wall introverted to occupy said base recess, all substantially as described.

"Claim 3 calls for (1) the same base as claim 1; (2) a screw socket fixedly mounted thereon; and (3) an inclosing case therefor comprising in part a sheet-metal sleeve having a portion of its wall introverted to occupy said peripheral recess of the base and prevent a relative rotative movement between said sleeve, base, and socket, all substantially as described.

"Claim 4 calls for a pair of members comprising a sheet-metal sleeve having a slotted end and a sheet-metal cap to telescopically receive the slotted end of said sleeve, one of said members being provided with a recess, and the other having a correspondingly located transverse slit and the wall on one side thereof displaced to form a projection beveled or inclined toward said recessed member and terminating abruptly at said slit, whereby said members are adapted to automatically interlock with a snap action when telescopically applied to each other and to be released by manual compression of said slotted sleeve, all substantially as described."

The patent in question has been decreed to be valid in the Southern district of New York, in the case of Weber Electric Co. v. National Gas & Electric Fixture Co., supra, and affirmed by the Circuit Court of Appeals of the Second Circuit in 212 Fed. 948, 129 C. C. A. 468; in the district of Massachusetts in the case of Weber Electric Co. v. Wirt Manufacturing Co., 226 Fed. 481; and in the district of New Jersey, in the case of Weber Electric Co. v. Union Electric Co., 226 Fed. 482.

Judge Ray, in the Southern district of New York, fully considered the Fowler patent, the Bray patent, the Oetting patent, the Kenney patents, and the Paiste patent, cited here against the validity of the Weber patent, and found the Weber patent to be valid. Judge Rellstab, of this court, re-examined the said patents, together with the Wirt patent, and reached the same conclusion. In addition to these patents, the defendant here relies upon the Benjamin patent, the Mix and Genest patent, the Knowles patent, the Edison & Swan patent, and the Gover patent. I find myself absolutely in accord with Judges Rellstab, Ray, and Dodge as to the validity of the Weber patent as affected by the prior art in the patents cited and considered by them; and in the patents cited in this case, which were not cited and were not considered in the previous cases, there is nothing, in my opinion, which affects their decision as to the validity of claims 1 and 4.

The essence and genius of the Weber patent consist in certain de-

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vices, interengaging parts, on the case members which automatically interlock with a snap action when the said case members are telescopically assembled. Weber in the specification says:

"The principal object of my invention is to provide a simple and effective automatically locking connection between the sleeve and cap of an incandescent electric lamp socket.

"My invention is applicable to various telescopically connecting members, but is especially adapted for use in the telescopically connecting cap and sleeve members of incandescent electric lamp sockets.

"In carrying out the principal feature of the invention, the inner telescoping member is made compressible, and the telescopically connecting members are provided, in the manner hereinafter described, with interengaging parts adapted to automatically interlock with a snap action when telescopically applied to each other, and to be released by compression of said inner member."

The immediate use and success of the patent embracing these principal objects are evidence of its invention, and of its superiority over anything in the prior art at that time. As Judge Rellstab said:

"Weber's structure did not enter an art already well filled with devices accomplishing like results. His conception carried him well in advance of any competitor in that field at the date of his invention, and the mechanism embodying his conception has largely displaced other makes of electric lamp socket casings."

Judge Ray said in the National Gas Case, supra:

"It cannot, under the evidence in these cases, be successfully disputed that these structures have largely displaced those of the prior art. They present new and novel features in this art, have proved a commercial success, and are less expensive in construction and also safer. They are easier of assembling. Substantially all the sockets now on the market have a snap-shell construction, and the evidence establishes that at least 85 per cent. of such sockets are made by the Webers and their licensees."

Defendant's keyless socket, as does the Weber keyless socket under claim 1, calls for a pair of members comprising (1) a sheet-metal sleeve having a slotted end and introverted tongues and (2) a cap adapted to telescopically receive the slotted end of said sleeve; said members having interengaging parts adapted to automatically interlock with a snap action when applied to each other, and to be released by compression of said sleeve; also in combination an insulating base for electrical fittings loosely inclosed within said sleeve in engagement with said tongues. Defendant's key socket is like the keyless in all respects, except the key renders an introverted tongue unnecessary. There is no doubt that in these respects the sockets of the defendant conform to the requirements of claim 1 of Weber.

The defendant's sockets, both the key and keyless, have a pair of members comprising a sheet-metal sleeve having a slotted end and a sheet-metal cap to telescopically receive the slotted end of said sleeve; one of said members, the sleeve, being provided with recesses, and the other, the cap, with corresponding projections or studs, which are mechanical equivalents of the projections in the Weber, whereby said members are adapted to automatically interlock when applied to each other telescopically with a slight rotative movement, and to be released by manual compression of said slotted sleeve. The bevel is

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not on the projection, as in Weber, but is on the corner, or right angle, formed by the periphery and slot of the sleeve adjacent to the recess or hole adapted to receive one of the studs, its interengaging part, of the cap. The studs are mechanical equivalents of the projections and the hole and slots of the recesses in the Weber patent. There are four studs on the inner side of the cap in the defendant's socket. There are also four recesses into which these projections enter; one of them is the hole already referred to; the other three are open-end slots which receive the corresponding studs upon the cap, and which automatically interlock with a snap action when the two are applied to each other telescopically with a slight rotative movement. It makes no difference, as Judge Ray pointed out, whether these corresponding interengaging parts, projections and recesses, are upon the sleeve member or the cap member of the casing.

Defendant, however, contends that it does not infringe, because claims 1 and 4 of Weber provide that these interengaging parts automatically interlock with a snap action when the case members are telescopically applied to each other, whereas the defendant's sockets require a rotary motion, in addition to the telescopic, in order to interlock. This, it is claimed, distinguishes the operation of the defendant's sockets from the provisions of the Weber patent. This distinction is justified, the defendant contends, by the statement of Judge Rellstab in the Union Electric Co. Case, supra, that:

"In Kenney (U. S.), the shell was provided with open-end slots and slots adjacent thereto. Radial inwardly projecting studs on the cap were adapted to enter these open-end slots in the shell, and then by a rotary movement, after the telescopic application was completed, to spring into the adjacent slots. In combination with these slots and studs, the shell was provided with bayonet slots, intermediate of the others referred to, and the cap was provided with additional radial projections, intermediate of the studs referred to, which entered recesses within the periphery of the socket base or insulator block to lock the same in position. No interlocking of the Kenney members could be effected automatically by telescopic pressure. A rotary movement of the members against each other was absolutely necessary to put the radial projections and the intermediate lugs into position to effect a locking engagement."

Judge Rellstab, in the above quotation, was describing the Kenney patent, and particularly its method of operation. Whether or not under the particular facts of this case this additional rotary movement, or the telescopic movement with a rotary component, would be sufficient to differentiate the patents, so that the defendant may escape the charge of infringement, is another matter, and is not justified as a conclusion from Judge Rellstab's description of the Kenney patent. There were other essential differences distinguishing the Weber patent from the Kenney, one of which was the abruptness of the termination of the projections which make the interlocking firm and secure as compared with the abruptness of Kenney's studs G, and which have no abrupt termination, but which abruptness the interengaging parts on defendant's sockets have. Weber, however, did not specifically confine his claim to a construction the parts of which must be assembled by a straight, direct, telescopic movement. In fact, in his patent No. 743,206, without the guard or guide contained in later patents, it is dif-

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ficult to bring together the case members with such accuracy as to make a slight rotative movement unnecessary before the interlocking takes place. In order to sustain the contention of the defendant, a telescopic application of the case members to each other must be made with such accuracy as to prevent the slightest rotative movement before the interlocking of the interengaging parts. While Weber did not in terms thus limit the movement, yet the defendant contends that the use of the words "telescopically applied to each other" necessarily imposes such limitation and excludes the slightest rotative movement before interlocking is effected. The verb "telescope," according to the Standard Dictionary, means:

"To drive together, so that one slides into another like the sections of a spyglass or small telescope; to crush by driving together into or upon; to move like the sliding portions of a spyglass in closing."

Often slight rotative movements are necessarily employed in bringing together sections of a spyglass. The limitation here contended for, therefore, is not necessarily imposed or implied in the words used by Weber, nor by experience in actually doing the thing, and Weber did not in terms so limit the movement. In any case, the term "telescopically" should not be so limited, for by so doing justice would seem to be defeated.

The defendant has appropriated all the elements of claims 1 and 4 of the Weber patent, enjoyed the fruits thereof, and seeks to escape the consequences of such appropriation by the single studied distinction of a slight rotative movement in bringing together the cap and sleeve. This, in my opinion, cannot be done, and the defendant is guilty of infringement of said two claims.

[2] If claims 2 and 3 are valid, defendant has likewise infringed these claims. Their validity seems to me to depend upon whether or not the introverted portion of the wall of the sheet-metal sleeve is limited to a cut edge tongue as exhibited in *16* of Figure 2 of the Weber patent. If so limited, claims 2 and 3 are valid and are infringed. If not so limited, and if an indentation in the wall portion of the sleeve accomplishes the same thing as the introverted tongue called for by claim 1, preventing the rotation between the insulating base and the sleeve, then such indentations are mechanical equivalents of introverted tongues.

The evident purpose of the introverted tongues mentioned in claim 1 and introverted portions of the wall of the sleeve mentioned in claims 2 and 3 is to prevent rotation between the insulating base and the sleeve. The introverted tongues and the introverted portions of the wall of the sleeve are different things; but they accomplish the same thing in the same way, and are mechanical equivalents. The introverted tongue *16* in Fig. 2 of Weber is the tongue referred to in claim 1. The change of language in claims 2 and 3, from "introverted tongues" to "a portion of its wall introverted," was doubtless made to cover any indentation of the wall of the sleeve adapted to enter the recess in the insulating base to prevent rotation between it and the sleeve. It seems to me, therefore, that the introverted portion of the wall cannot be limited to sharp edge, cut-metal introverted tongues called for by claim 1.

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In the Benjamin patent, No. 575,322, January 19, 1897, we have a base of insulating material having a peripheral recess, etc. In fact, we admittedly have every requirement of claims 2 and 3, except the introverted portions of the wall of the sleeve, and as to these the patent describes them thus:

"Upon the interior of the shell or casing *e* two lugs or projections e^2 e^2 are provided, which engage corresponding recesses a^9 a^9 in the base *a* to prevent rotation of the base relatively to the casing."

In the Benjamin patent, however, the indentations or inward projections are on the cap, and not on the sleeve, as in Weber. It makes no difference on which of the case members the lug or projection is located, for the purpose and effect is identical, whether in one member of the casing or the other. The introversion of the casing into engagement with a recess in the base has no different function, mode of operation, or effect in the Weber socket than in the Benjamin socket and the defendant's sockets.

In the Edison & Swan patent of May 4, 1895:

"The base *A* is grooved along each side, and the casing *C* which holds it has its two opposite sides indented as shown at *H*, so that the base *A* and the parts fixed on it are made to occupy the proper position relatively to the bayonet catch slot *K* by which the lamp base is held in the socket."

These indentations in the casing, which project into recesses in the base *A*, are shown by top view in Fig. 2, where they are marked *H* and accomplish the same thing in the same way as the introverted portions of the wall of the sleeve in the Weber patent.

The Gover patent, 1897, shows and describes indentations in the wall of the casing engaging with corresponding grooves in the periphery of the insulating base, to prevent rotation between it and the casing. "The two sides of the socket are indented so as to form internal protuberances *p*, engaging in the grooves *i* of the insulator to prevent it from turning." This serves the same purpose as the introverted portions of the wall of the casing in the Weber patent.

These patents admittedly conform to claims 2 and 3 of Weber in all essential respects, except the introverted portions of the wall of the casing, and if it is true, as I hold, that that is not limited to a cut-metal edge tongue, they substantially agree in this respect.

I have not considered the Epstein patent, the Mix and Genest patent, the Perkins patent, and the Marshall patents, because they are all subsequent to the date of the invention of Weber, as found by Judge Ray, with whose conclusions I agree.

It follows that claims 2 and 3 are invalid and not infringed, and that claims 1 and 4 of Weber are valid and infringed, and on those two claims, 1 and 4, the plaintiff is entitled to an injunction and damages and profits.

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In re CUNNINGHAM.

(District Court, N. D. New York. October 28, 1918.)

1. BANKRUPTCY ⟸315(1)—CLAIMS—"NEGLIGENCE"—"WILLFUL NEGLIGENCE"—AVERMENT.

A judgment based on a complaint merely alleging "negligence" cannot be construed as one for willful or malicious injuries, for simple negligence is opposed to the idea of malice or willfulness, which presupposes a conscious purpose to injure.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence; Willful Negligence.]

2. BANKRUPTCY ⟸315(1)—"PROVABLE DEBT"—WHAT IS.

Under Bankruptcy Act, § 63 (Comp. St. 1916, § 9647), a judgment against the bankrupt, based on negligent injuries to the judgment creditor's property, is a "provable debt."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Provable Debt.]

3. BANKRUPTCY ⟸424—DISCHARGE—JUDGMENTS DISCHARGED.

The debt evidenced by a judgment against a bankrupt based on negligent injuries to the property of the judgment creditor is dischargeable in bankruptcy, not falling within the exception of Bankruptcy Act, § 17 (Comp. St. 1916, § 9601), because not a liability for willful and malicious injuries to person or property.

4. BANKRUPTCY ⟸217(3)—STAY OF PROCEEDINGS IN STATE COURT ON JUDGMENT—DISCHARGE.

Bankruptcy court will stay further proceedings in state court on judgment against bankrupt based on simple negligence, where such judgment was provable and debt evinced by it would be barred by discharge.

In Bankruptcy. In the matter of the bankruptcy of John R. Cunningham. On order to show cause, granted by the referee, to stay Virgil D. Selleck from taking further proceedings on a judgment obtained against the bankrupt, except to prove same. Injunction granted.

This matter is before me on an order to show cause, granted by a referee in bankruptcy, for the purpose of staying the plaintiff in a judgment for damages for the negligence of said bankrupt, obtained by him against the bankrupt prior to the filing of the petition in bankruptcy, from taking further proceedings on said judgment, except to prove same as a claim against the bankrupt estate. The bankrupt is threatened with arrest on an execution against the person issued at the instance of the plaintiff on such judgment.

Chambers & Finn, of Glens Falls, N. Y., for bankrupt.
H. Prior King, of Glens Falls, N. Y., for judgment creditor.

RAY, District Judge. John R. Cunningham was adjudicated a voluntary bankrupt on the 28th day of September, 1918.

June 17, 1918, Virgil D. Selleck obtained a judgment against the now bankrupt John R. Cunningham for $97.50 damages and $79.40 costs on a cause of action against him for the act of negligence of one Robert Cunningham, son of the now bankrupt, who was driving his automobile truck and acting as chauffeur for the now bankrupt. The pertinent allegations of the complaint on which the judgment was obtained are as follows:

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"That on the 19th day of November, 1917, at about 11 o'clock in the forenoon, he was driving a Saxon automobile, then owned by him and used in conducting his professional business, and was duly licensed to run his said automobile, and was driving the same upon and along Bacon street, in said city of Glens Falls, N. Y., in an easterly direction, and was approaching Glen street in said city, under control and traveling not to exceed five miles per hour, which streets intersect at about right angles. That both Bacon and Glen streets are public streets of said city and much traveled by pedestrians and vehicles of all kinds. That upon approaching Glen street, upon the right-hand side of Bacon street, he sounded his horn and made the turn into Glen street as near to the right-hand curb as practicable, having the right of way of all motor vehicles going south along Glen street.

"That the plaintiff had just completed the turn into Glen street, when his automobile, without warning, was hit from behind and on the left-hand side by an automobile truck owned by the defendant and driven by Robert Cunningham, his chauffeur, who was driving said car without a license, coming in a southerly direction along Glen street, and plaintiff's automobile was pushed and forced over and upon the curb and sidewalk by said auto truck, and the front wheels and gearing were smashed and destroyed, and many other parts of the plaintiff's automobile were injured, damaged, and destroyed.

"That the plaintiff's said automobile was damaged by the collision, and was hit with the defendant's automobile truck, by and through the carelessness and negligence of the driver of said truck, not having a license, and by reason of his not giving to the plaintiff and his automobile the right of way in turning into Glen street, and by running into the plaintiff's automobile without warning.

"That the plaintiff's automobile was so damaged, and so many parts destroyed and broken, that it was totally useless to him, and he was prevented from using the same in his business for a long time thereafter.

"That the plaintiff has been damaged in the sum of $500 for the costs and expenses of procuring parts and repairing the said automobile and by being deprived of the use thereof in his business.

"That the plaintiff was free from contributory or any negligence whatever, and the whole damage to the said automobile was caused wholly by the carelessness and negligence of the defendant's said chauffeur as hereinbefore stated."

It is seen there is no allegation that there was any willfulness or malice, or that defendant's son intentionally or knowingly or willfully ran into or against the plaintiff's automobile. If defendant's son ran into Mr. Selleck's automobile knowingly, when he could have prevented it by due care, and did not exercise such care, or if he intended to do what he did do, there being no compelling necessity, then the act was willful and malicious within the meaning of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 545). But this was not alleged, and we may assume was not proved, as it was unnecessary to a cause of action for negligence. There is no claim that proof of such acts was given on the trial. We may assume that defendant's son was driving this automobile truck; that he was driving it negligently, and negligently allowed it to run into or against the plaintiff's automobile, not—

"giving to the plaintiff and his automobile the right of way on turning into Glen street, and by running into the plaintiff's automobile without warning."

It seems that the defendant's son was driving the auto truck south along Glen street; that plaintiff, coming along Bacon street, which intersects that street at right angles, sounded his horn and turned into

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Glen street ahead of defendant's truck, and kept his car in the proper position as near the right-hand side of Glen street as he could, and proceeded southerly; and that defendant's son carelessly and negligently allowed the truck he was driving to run into the plaintiff's car from the rear. It *might* have been done purposely and it *may* have been done purposely, and, if so, maliciously; but there is no allegation of purpose so to do, or of malice in so doing. There is no allegation defendant's son *believed* he would run into the plaintiff's car, or had reason to think he would. He was running the truck too rapidly, surely, for he overtook the plaintiff's automobile and ran into and damaged it. Careless driving, without malice and purpose or intent to do injury, or run into another car, would accomplish all this. Wanton and reckless conduct—that is, acts done with an utter disregard of the rights and safety of another or of his property—may constitute willful and malicious injury to the person or property of another. But we have no such allegation here, and no facts are stated in the complaint showing such conduct.

[1] 1. Negligent acts may do injury to the person or property of another. There are different degrees of negligence, and at least two kinds of negligence—mere negligence, for the consequence of which the negligent person is responsible, and for the consequence of which he must respond in damages; and "willful neglect," or "willful negligence," for the consequences of which the guilty person is responsible, and for the consequences of which he must respond in damages. But a charge of negligence merely does not imply or impart malice, or willfulness, or conscious *purpose* to do injury, or that there was "willful neglect," as defined in the law. A charge of willfulness is not maintained by proof of mere negligence. Girard Coal Co. v. Wiggins, 52 Ill. App. 69, 74. A person doing an affirmative act is usually conscious of the fact that he is doing the act, and if he omits to do an act which it is his duty to perform he is usually conscious of the omission; but this is far from showing knowledge that the act done or act omitted would result in damages or injury to another, and is far from showing conscious purpose or intent to do injury to the person or property of another. In 40 Cyc. 947, 948, the law is thus stated, citing numerous cases:

"Willfulness and negligence are, it has been said, the opposites of each other; the one signifying the presence of purpose, the other its absence. Nevertheless the term 'willful negligence,' or 'neglect,' has come to have a settled signification in the law, and has been defined as that degree of neglect arising where there is a reckless indifference to the safety of human life, or an intentional failure to perform a manifest duty to the public, in the performance of which the public and the party injured had an interest. To constitute a willful injury, the act which produced it must have been intentional, or must have been done under such circumstances as to evince a reckless disregard for the safety of others, and a willingness to inflict the injury complained of."

In 40 Cyc. 947, "willfulness," in its application to negligence, is defined as:

"An entire absence of care for the life, the person, or the property of others, such as exhibits a *conscious* indifference to consequences."

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Numerous cases are cited.

[2] 2. This judgment against Cunningham, the bankrupt, was a provable debt. Section 63 of Bankruptcy Act (Comp. St. 1916, § 9647), says:

"Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him."

This was a fixed liability, and evidenced by the judgment referred to, and was absolutely owing at the time the petition was filed.

[3, 4] 3. The bankrupt will be released from this debt evidenced by this judgment, if he is discharged in bankruptcy, as it is not within the exception of section 17 of the Bankruptcy Act (Comp. St. 1916, § 9601), not being a liability "for willful and malicious injuries to the person or property of another," viz. Selleck, and therefore this court may enjoin the judgment creditor from enforcing it against the bankrupt or his estate, except in the usual way, by proving and filing his claim; that is, may enjoin the plaintiff in that judgment and the sheriff from enforcing a body execution until the question of discharge is determined. We have already discussed the nature and character of the judgment and of the claim on which founded, and have arrived at the conclusion that the claim or liability was for simple negligence, and not "willful negligence," and not a liability for willful and malicious injuries to the property or person of Mr. Selleck, the judgment creditor.

This conclusion is also sustained by the following authorities:

In Matter of Grout, 33 Am. Bankr. Rep. 789, 88 Vt. 318, 92 Atl. 646, Ann. Cas. 1917A, 210, judgment by default was entered on a complaint charging that the defendant assaulted the plaintiff's wife by recklessly, carelessly, and negligently running into her and knocking her down; but there was no allegation that the act was intentional, willful, or malicious, and it was held that the claim on the judgment was barred by the discharge in bankruptcy. The allegation of the complaint was that, while the plaintiff's wife—

"was walking with due care and prudence on a sidewalk in a public street, the defendant recklessly, carelessly, and negligently ran into the said Lilla M. Nason and knocked her down."

The court said:

"These declarations allege that the defendant recklessly, carelessly and negligently ran into the plaintiff wife and knocked her down. There is no allegation that this was done intentionally, willfully, or maliciously. There is nothing in the nature of the violence alleged that indicates intention or malice. There is no allegation of accompanying language characterizing the act as malicious. The addition of the word 'recklessly' to the terms more commonly used does not change the nature of the allegation. The characterization of the defendant's acts is doubtless intensified, but it still remains a charge of negligence. In suffering a default, the defendant conceded nothing beyond this, and nothing more can be implied from the judgment.

"One can be liable in a civil action for direct violence to the person of another, without there having been malice, or intention to injure, or an intention to do the act which caused the injury. Judd v. Ballard, 66 Vt. 668, 30 Atl. 96."

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In Matter of Madigan, 41 Am. Bankr. Rep. 770, 254 Fed. 221, it is held:

"A judgment of a state court for negligence due to the reckless driving of an automobile is a debt dischargeable in bankruptcy."

In Jefferson Transfer Co. v. Hull, 40 Am. Bankr. Rep. 844, 847, 166 Wis. 438, 442, 166 N. W. 1, 2, a judgment was obtained for damages—

"upon a cause of action for [defendant's] negligently running his automobile on the highway, so that it collided with and seriously injured a taxicab belonging to the plaintiff."

The defendant was subsequently discharged in bankruptcy, and it was held by the Supreme Court of the state of Wisconsin that the claim on the judgment was dischargeable and discharged. The court said:

"The plaintiff's claim, having been reduced to judgment prior to the commencement of the bankruptcy proceedings, was a provable debt under section 63 of the Bankruptcy Act, although it was a judgment for a tort; it is a fixed liability, evidenced by a judgment absolutely owing at the time of the filing of the petition, and hence answers the calls of the first subdivision of the section last cited. 1 Remington on Bankruptcy, § 680, and cases cited; 7 C. J. p. 299, § 480.

"IV. Being a provable debt, it is dischargeable unless it comes within the exceptions named in section 17 of the Bankruptcy Act, subd. 2, which excepts from the operation of a discharge liabilities for obtaining money under false pretenses or false representations, or willful and malicious injuries to the persons or property of another. The judgment in question was simply a judgment for damages resulting from a negligent act. It is not claimed or shown that the act was willful or malicious; hence the debt will be discharged if the bankrupt be granted a discharge. 7 C. J. p. 398, § 708; 3 Remington on Bankruptcy, § 2740, and cases cited."

So far as the Supreme Court of the United States has spoken on the subject, it leads to the conclusion that the act must be one which necessarily causes injury, and must be done intentionally, and done with a willful disregard of what the person doing the act knows to be his duty. Thus in Tinker v. Colwell, 193 U. S. 473, 487, 24 Sup. Ct. 505, 509 (48 L. Ed. 754), the court said:

"In United States v. Reed [C. C.], 86 Fed. Rep. 308, it was held that malice consisted in the willful doing of an act which the person doing it knows is liable to injure another, regardless of the consequences; and a malignant spirit or a specific intention to hurt a particular person is not an essential element. Upon that principle, we think a willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the exception."

This was quoted and approved by the Supreme Court in McIntyre v. Kavanaugh, 242 U. S. 138, 141, 37 Sup. Ct. 38, 61 L. Ed. 205. The one case was dealing with criminal conversation with another man's wife, and the other with conversion of property. In Tinker v. Colwell, 193 U. S. at page 489, 24 Sup. Ct. 510 (48 L. Ed. 754), the court, speaking of negligent acts, said:

"It is not necessary, in the construction we give to the language of the exception in the statute, to hold that every willful act which is wrong implies

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malice. One who negligently drives through a crowded thoroughfare, and negligently runs over an individual, would not, as we suppose, be within the exception. True, he drives negligently, and that is a wrongful act; but he does not intentionally drive over the individual. If he intentionally did drive over him, it would certainly be malicious."

This language plainly indicates the opinion of the Supreme Court on a state of facts such as we have here. In the instant case the defendant's son drove the auto truck negligently; but there is nothing to show that he drove it into Mr. Selleck's car intentionally, or that he purposed or intended to strike it at all, or was conscious in advance that he would run into it. This cannot be presumed, and there is nothing in the complaint in that action or in this record which would justify the inference, or a holding that the son of this bankrupt, in driving the car negligently, drove it against Mr. Selleck's car intentionally, or was conscious in advance of hitting it that the truck would collide therewith.

I think it clear that the judgment of Mr. Selleck against the bankrupt is a provable claim, and one from which a discharge in bankruptcy will be a release. Therefore the plaintiff should be enjoined from issuing or enforcing an execution against the person or property of the bankrupt pending his application for a discharge and until the determination of that question. If a discharge is applied for and granted, and Mr. Selleck is made a party to the bankruptcy proceedings, that is, if his judgment is duly scheduled by the bankrupt, whether Mr. Selleck proves his claim or not, and he is duly notified of all proceedings, and thereafter attempts to enforce his said judgment, the discharge can be set up and pleaded as a bar. It should be added that the allegation that Cunningham's son was driving the truck without a license was not an issue on the trial of the case, as it was withdrawn from the consideration of the jury, and a written stipulation to that effect has been filed in this court.

There will be an order for an injunction accordingly.

In re GRAFTON GAS & ELECTRIC LIGHT CO. In re GRAFTON TRACTION CO. In re GRAFTON LIGHT & POWER CO.

(District Court, N. D. West Virginia. November 16, 1918.)

No. 594.

1. BANKRUPTCY ⟸43—VOLUNTARY BANKRUPTS—ELECTRIC COMPANIES.

A corporation operating a plant to generate and sell electricity is not within the exception to Bankruptcy Act, § 4a (Comp. St. 1916, § 9588), declaring any person, excepting certain corporations, entitled to the benefits of the act as a voluntary bankrupt.

2. BANKRUPTCY ⟸43—VOLUNTARY BANKRUPTS—STREET RAILWAYS—"RAILROAD."

Ordinarily at least an electric street railway is not a "railroad," within Bankruptcy Act, § 4a (Comp. St. 1916, § 9588), excepting railroad corporations from those which may become voluntary bankrupts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Railroad.]

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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3. BANKRUPTCY ⟸217½—STAYING SUITS IN STATE COURTS.
Order in bankruptcy court, staying creditors from prosecuting their suits in state courts against bankrupt to ascertain and enforce liens on bankrupt's property, are authorized by Bankruptcy Act, § 11 (Comp. St. 1916, § 9595).

4. BANKRUPTCY ⟸20(1)—EXCLUSIVE JURISDICTION.
The bankruptcy court's jurisdiction in administration of the estates of bankrupts is essentially exclusive.

5. BANKRUPTCY ⟸20(2)—VOLUNTARY PROCEEDINGS—EXCLUSIVE JURISDICTION—RECEIVER IN STATE COURT.
The bankruptcy court's exclusive jurisdiction is not affected in case of voluntary bankruptcy by the fact that more than four months before institution of the proceedings a receiver was appointed in a suit against a bankrupt in a state court.

6. BANKRUPTCY ⟸20(1)—LIENS—CONFLICTING JURISDICTION.
The bankruptcy court should not remit to the state court the right to administer, where there is reasonable ground to believe there will be a surplus for unsecured creditors, or where division between lien creditors as to method of administration is inevitable.

In Bankruptcy. In the matters of the Grafton Gas & Electric Light Company, bankrupt, the Grafton Traction Company, bankrupt, and the Grafton Light & Power Company, bankrupt. Heard on motions of state court receivers and others to vacate injunction and appointment of trustee. Motions overruled, stay of trustee vacated, and trustee and referee directed to proceed.

T. S. Riley and John J. Coniff, both of Wheeling, W. Va., and Warder & Robinson, of Grafton, W. Va., for bankrupts.

G. W. Ford and A. W. Burdett, both of Grafton, W. Va., and Geo. W. McClintic, of Charleston, W. Va., for opposing creditors.

DAYTON, District Judge. These three local corporations have each filed petitions and been adjudicated voluntary bankrupts.

The first named was incorporated for the purpose of manufacturing and supplying electricity for light, heat, and power; the second for the purpose of operating a city street railway; and the third to (1) acquire, lease, own, maintain, build, and operate lines of street and interurban railways; (2) acquire water, coal, oil, gas, electric, steam, and other light, heat, water, and power plants; (3) acquire, own, and operate telephone and telegraph lines and exchanges; (4) acquire coal, oil, gas, and other mineral lands, and manufacture, ship, and sell their products; (5) produce light, water, steam, heat, electricity, oil, gas, and power of all kinds, and sell the same; (6) lease and purchase easements over streets, etc., lay and erect poles, lines, and pipes to transport light, heat, oil, etc., and to operate telephone and telegraph lines, and street and interurban railways for transportation of passengers, mail, freight, and express matter; and (7) to acquire, lease, and own property, real, personal, and mixed.

This latter company by deeds has taken over and into its possession the property of the first two named companies. Its principal stockholder assumed payment of their debts, but has not paid them.

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Judgments have been rendered against the first named for an aggregate of more than $27,000, and it acknowledges itself to owe unsecured debts aggregating more than $116,000; against the second named company judgments have been rendered aggregating more than $71,000, and unsecured debts are outstanding against it of over $173,000; while against the third judgments have been rendered for an aggregate of over $21,000, a bond issue of $300,000 is outstanding, and over $17,000 of unsecured debts. In addition to all this an unsecured debt of over $3,000 exists against the three companies jointly and over $2,300 of taxes are in arrear upon the properties. These facts are disclosed by the schedules filed, which state the assets of the first and second companies to be nothing, by reason of their conveyances of February 28, 1914, to the third, and those of the third to be $400,000, consisting of its electric plant, something over six miles of electric street railway in the city of Grafton, its equipment, etc., and of certain real estate in that city.

The Allis-Chalmers Manufacturing Company, a judgment creditor in a sum of over $900, has instituted its equity suit to enforce its lien against the property of the first company (the Gas & Electric), conveyed by it to the third, and the city of Grafton, a judgment creditor in a sum in excess of $4,000, the Citizens' National Bank of Charleston, a judgment creditor in a sum in excess of $11,000, and the Ferris Bridge Company, whose interest is not disclosed by the petitions and schedules, have instituted like suits against the second company (the Traction). These four suits have been consolidated, are pending in the circuit court of Taylor county, and receivers have been appointed therein, and placed in possession of the properties now vested in the third company since the conveyance of February 28, 1914. The order of adjudication entered in the third named cause enjoined these creditors from the prosecution of their suits until this court's further order, and the referee to whom the causes were referred has appointed a trustee to take charge of the properties from the custody of the state court receivers. To vacate the injunction granted by the court, and the appointment of the trustee by the referee, petitions have been filed and motions made by the state court receivers, the Citizens' National Bank of Charleston, and the city of Grafton.

These petitions have given rise to questions which I have studied long and earnestly, and which have perplexed me greatly. In the conclusion I have reached I desire frankly to say that I still entertain grave doubt, and regret we have no provision of federal law whereby such questions could be certified direct to the appellate court for its authoritative determination. I desire to express my appreciation of the labor and industry incurred by counsel on both sides in the preparation and presentation of the very admirable briefs filed by them to aid me in the decision.

[1, 2] The first question that arises is: Did I err in adjudicating these companies, either one of them, and especially the last one, bankrupt? The Bankruptcy Act (Act July 1, 1898, c. 541, § 4a, 30 Stat. 547 [Comp. St. 1916, § 9588]) provides:

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"Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt."

The business of the first company was unquestionably that of operating a plant to generate and sell electricity; that of the second, to construct and operate a street railway; that of the third, to combine and operate both. In addition to the above provision of the Bankruptcy Act, and before its amendment in 1910, it had been held that in involuntary proceedings an electric light corporation could be adjudged bankrupt. In re Charles Town Light & Power Co. (D. C.) 183 Fed. 160, affirmed by the Circuit Court of Appeals for this circuit in Charles Town Light & Power Co. v. Delone, 184 Fed. 986, 106 C. C. A. 488. There can be no question, therefore, that the first company was properly adjudicated.

As to the second, the trouble comes here: Is a "street railway" operated by electricity within the meaning and intent of the word "railroad" used by the Bankruptcy Act? If so, then it is clear the second named company was improperly adjudicated. Finally, if a company manufacturing and selling electricity can be adjudicated, while a company operating a street railway by electricity cannot, what is to be done with a company like the third here, which is doing both? I can find no answer to these questions in any adjudicated case construing this particular section of the Bankruptcy Act. As to the question whether the word "railroad," by legal construction generally applied, shall include street railways, the authorities, state and federal, are in hopeless confusion. I am therefore left, so far as I can see, to construe the meaning of this word "railroad," as used in this section, as a question of first impression. Doing so, I hold it does not include electric street railways.

I am led to this conclusion (a) because I believe Congress, by the amendment of this section in 1910 (Act June 25, 1910, c. 412, 36 Stat. 839), in clause "b," whereby it cut out the words "corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits" (Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797), allowing such to be adjudicated involuntary bankrupts, and substituting the words "moneyed, business or commercial corporation except a municipal railroad, insurance or banking corporation," and by its amendment of clause "a" of this section, whereby it removed the inhibition of any corporation to be adjudged voluntary bankrupt, and provided, instead, that all could be "except municipal, railroad, insurance or banking" ones, had two purposes in view: First, to obliterate all distinctions between voluntary and involuntary proceedings in their relation to the liability of corporations, other than the ones excepted, to be declared bankrupt; second, to broaden out and more clearly define the application of the Bankruptcy Act, so as to include all corporations, as to which there were no special reasons for exception. Special reasons why municipal, insurance, and banking ones should be so excepted are obvious. So, too, such reasons can easily be conceived why the ordinary railroad transportation lines should also be excepted. They, as said by Justice Lamar in Omaha Street Ry. v. Int. Com. Comm., 230 U. S. 336, 33 Sup. Ct.

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891, 57 L. Ed. 1501, 46 L. R. A. (N. S.) 385, "are constructed on the companies' own property. The tracks extend from town to town and are usually connected with other railroads, which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce."

These special reasons for exception do not ordinarily exist in the case of street railways. The vast majority of them are purely local institutions, like the one here, not in any way concerned with interstate commerce. Such are, again quoting Justice Lamar, "laid in streets as aid to street traffic, and for the use of a single community, even though that community be divided by state lines, or under different municipal control. When these street railroads carry passengers across a state line, they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887. Street railroads transport passengers from street to street, from ward to ward, from city to suburbs; but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight 'between states,' 'between states and territories,' 'between the United States and foreign countries.'"

In so holding such purely local street railway corporations to be liable to bankrupt adjudication, I freely admit we are embarrassed by the fact that a modern tendency is to extend these electric lines for long distances through different towns and communities, and it may be through different states, which long lines, when operating in the several towns through which they pass, do so like the small local street ones, but in operating from town to town do so upon the methods of the regular steam railroads. It may be such corporations, operating these longer lines, should be excepted from bankruptcy jurisdiction for the same reasons that steam railroads are; but I am not called on here to pass upon that question and express no opinion as to it. The corporation here is purely local, operating a short line over the streets of a single town or community. In short, my study of the Supreme Court's rule of construction, enunciated in the Omaha Case, above cited, constrains me to the conclusion that a clear distinction ordinarily exists between "railroads" and "street railways"; that, ordinarily, the latter are subject to bankruptcy jurisdiction, subject, however, to possible exceptions growing out of exceptional existing conditions.

[3-6] Having concluded that all three of these companies were properly adjudicated bankrupt, a second question arises, which, although not new, in this case to me is particularly perplexing. How far should this court go toward assuming exclusive jurisdiction in the administration of these three estates; or, stated conversely, how far is it justified in either allowing or calling upon the state court to ascertain the liens existing against them and to enforce payment thereof out of such assets?

That the order staying the prosecution of these suits was justified seems apparent, and was based upon section 11 of the Bankruptcy Act (Comp. St. 1916, § 9595). Under it a stay of at least 12 months

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after adjudication is provided for. In these cases it is admitted that many months ago the four suits were instituted in the state court, that they have been there consolidated, receivers therein appointed who have taken possession of the properties, reference to a master to ascertain liens has been had, and much cost incurred.

Prior to the amendment of 1903 of the Bankruptcy Act, the cases of Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, and Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128, clearly applied the general rule applicable in other cases of conflicting jurisdiction, that the court first assuming jurisdiction, and taking possession of the assets, should retain it. These cases were decided December 1, 1902. On February 5, 1903, Congress amended the Bankruptcy Act by providing that acts of bankruptcy would exist if a person, "being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States" (Comp. St. 1916, § 9587). In May following the Supreme Court handed down its decision in Re Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, in which, construing the effect of this amendment, it holds:

"1. The jurisdiction of the courts in bankruptcy in the administration of the affairs of insolvent persons and corporations is essentially exclusive.

"2. The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent by the receiver of another court appointed in a subsequent suit, and although that rule has only a qualified application when winding up proceedings in a state court are superseded by proceedings in bankruptcy, it obtains as a rule of comity, and its considerate observance is adequate to avert collisions between federal and state courts."

This ruling, that the bankruptcy court's jurisdiction is essentially exclusive, has been since reiterated in many cases. Roger v. Levert Co., 237 Fed. 737, 150 C. C. A. 491; In re Mullings Clothing Co., 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918A, 539; Orinoco Iron Co. v. Metzel, 230 Fed. 40, 144 C. C. A. 338; Commercial Trust & Savings Bank v. Busch-Grace Produce Co., 228 Fed. 300, 142 C. C. A. 592; State of Missouri v. Angle, 236 Fed. 644, 149 C. C. A. 640; Pollack v. Meyer Bros. Drug Co., 233 Fed. 861, 147 C. C. A. 535; In re Louis Neuburger, Inc., 240 Fed. 947, 153 C. C. A. 633. The Supreme Court, in United States Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055, has confirmed this ruling in its Watts Case in fuller and more specific terms. It there says:

"A distinct purpose of the Bankruptcy Act is to subject the administration of estates of bankrupts to the control of tribunals having authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are bankruptcy courts. Under the Bankruptcy Act, the jurisdiction of the bankruptcy court in all proceedings in bankruptcy is intended to be exclusive of all other courts; such proceedings include matters of administration, such as allowance and rejection of claims, reduction of the estate to money and its distribution, preferences and priorities to be accorded to claims and supervision and control of the trustee."

Under the authorities cited, and especially this last Supreme Court one, it is difficult to perceive where much opportunity or right to ex-

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ercise comity toward state court jurisdiction longer exists in the administration of the estates of bankrupts.

Turning to the decisions of the Circuit Court of Appeals for this circuit, we find that court in the case of New River Coal Land Co. v. Ruffner Bros., 165 Fed. 881, 91 C. C. A. 559, held (a) the jurisdiction of the bankruptcy court, if appealed to within four months, to be exclusive, and (b) that it was a question of sound discretion for it to determine whether the state court would be stayed or permitted to administer. In Bank of Andrews v. Gudger, 212 Fed. 49, 128 C. C. A. 505, it was held that the exclusive jurisdiction of the bankruptcy court could be assumed more than four months after the institution of the state court cause, upon certain then existing conditions. Bank of Dillon v. Murcheson, 213 Fed. 147, 129 C. C. A. 499, affirmed the exclusive jurisdiction and the discretionary right to allow the state court to administer in the exercise of comity, but discouraged the exercise of it.

In Graham v. Davy-Pocahontas Co., 238 Fed. 488, 151 C. C. A. 424, it was held that the bankruptcy court is not deprived of its exclusive jurisdiction, although the sole act of insolvency charged is the appointment of a receiver by a state court in a suit more than four months old; the appointment of the receiver by it having been made within four months of the institution of the bankruptcy proceeding. This case, it seems to me, is important, because of its bearing upon the constantly assumed position taken by counsel interested in maintaining the state court jurisdiction in this class of cases, that the four months period is controlling and if the state suit has been pending and a receiver has been appointed more than that length of time the bankruptcy court should not take over the estate and administer it, but allow the state court to do so. In this Graham Case it is held, if I interpret aright, immaterial how long the state court suit has been pending, but in the exceptional case where one is sought to be forced into involuntary bankruptcy alone on the ground of the appointment of a receiver such appointment must have been within four months, because the act requires some act of bankruptcy to have been committed within four months before involuntary proceedings can be maintained at all. No such condition can ever arise in a voluntary proceeding; therefore, in such cases, I am constrained to believe the "four months period" has no relevancy whatever.

Finally, in Union Electric Co. v. Hubbard, 242 Fed. 248, 155 C. C. A. 88, it was held substantially to be an abuse of sound discretion for the bankruptcy court to remit to the state court the right to administer (a) when there exists any reasonable ground to believe there will be a surplus after payment of liens, or (b) where there is any division of agreement among lienholders as to the method or tribunal of administration. I decided this Union Electric Co. Case, and also the U. S. Fidelity & Guaranty Co. v. Bray Case, supra, in the court below. They are two examples of where I undertook to extend comity in bankruptcy administration and was held not warranted in doing so. I frankly say the clear reasonings of Judge Boyd, speaking for the Circuit Court of Appeals in the Bray Case, of Justice Van De-

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vanter, speaking for the Supreme Court in the same case, and Judge Smith, speaking for the Circuit Court of Appeals in the Hubbard Case, have fully convinced me that I was not so warranted, and further have led me to the conclusion that this extension of comity should be sparingly exercised.

Applying the rule laid down in the Hubbard Case by Judge Smith to the facts here, I am not prepared to hold that there exists no reasonable ground to believe that the unsecured creditors can realize nothing from the assets of these companies. It is strongly insisted that such is the case, and it may be so. Yet the properties are valuable. Leaving out the general bond mortgage, the extent and validity of which as a lien is not disclosed fully, the secured debts or liens aggregate somewhat more than $119,000, while the unsecured debts aggregate more than $306,000. I do not feel myself justified in saying the holders of this large amount of unsecured indebtedness will be unable to realize anything. It is to be borne in mind that the state court has jurisdiction only to ascertain and decree liens, as I understand the bills filed therein are only brought to enforce liens, not to dissolve the corporations, which can be done in West Virginia only under certain conditions provided for by special legislative acts. Further, it is to be remembered that the pendency of the bankruptcy proceedings, and they cannot be dismissed against protest of creditors, renders inoperative any effort on the part of these unsecured creditors to secure liens by judgment or otherwise that would be provable as such in the state court proceedings; and it is also to be borne in mind that the Circuit Court of Appeals has held in the Hubbard Case that—

"The action of judicial tribunals of competent jurisdiction cannot be indicated or required in advance. If the property in question should properly be turned over to the state court, it should be turned over without reservation or condition as to the after judicial action of that court."

But, aside from this, Judge Smith lays down in the Hubbard Case another limitation upon the exercise of this right to extend comity, to wit, where "there is any division or agreement among the lien creditors entitled as to the method or tribunal of administration." Enough has been disclosed to show that "division as to method of administration" between these lien creditors is inevitable. The segregation of the property of these individual companies, now held as a whole by the third, and the fixing of the liens thereon will inevitably create bitter contest.

All these things considered, much as I would welcome a release for this court from the labor involved in the administration of these involved estates, I am constrained to conclude that it cannot refuse the assumption of it. The motions made to dissolve the injunction, and to discharge the trustee, must be overruled, the order staying the trustee appointed by the referee from taking possession of the properties must be vacated, the order of the referee directing him to take such possession must be enforced, and the referee be directed in due course to proceed with the administration of these estates.

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COCKER v. NEW YORK, O. & W. RY. CO.

(District Court, S. D. New York. June 15, 1918.)

1. COURTS ⟸274—DISTRICT OF SUIT—CARRIERS UNDER FEDERAL CONTROL.
Suit against carrier while under federal control, brought, after promulgation of and contrary to General Orders Nos. 18 and 18a of the Director General of Railroads, in a county or district other than where the cause of action arose, or where plaintiff resided when it accrued, will be dismissed.

2. ACTION ⟸68—STAY OF TRIAL—CARRIER UNDER FEDERAL CONTROL.
Under General Order No. 26 of Director General of Railroads, as to staying trial, on showing that just interests of government will be prejudiced by present trial of action against carrier under federal control pending in a county or district other than where the cause of action arose or plaintiff then resided, but allowing a new action in the other county or district, stay depends on the circumstances of each case; the primary consideration being the situation of the government relative to railroad witnesses leaving their work.

3. ACTION ⟸68—STAY OF TRIAL—CARRIER UNDER FEDERAL CONTROL.
Under circumstances of case, *held*, trial of action against railroad, brought in New York, for injury, at Scranton, Pa., of a boy then residing there, should be stayed, under General Order No. 26 of the Director General of Railroads.

Action by Charles Cocker, Jr., an infant under the age of 14 years, by Charles Cocker, his guardian ad litem, against the New York, Ontario & Western Railway Company. On motion to stay trial. Motion granted.

Watts, Oakes & Bright, of Middletown, N. Y., for the motion.

William L. Schneider, of New York City (Edward J. McCrossin, of New York City, of counsel), opposed.

MAYER, District Judge. This is a motion by the defendant to stay the trial of this action during the continuance of federal control over the defendant Railway Company. The motion is made in view of General Order No. 26, issued by the United States Railroad Administration, acting by the Director General of Railroads.

Several motions coming under General Orders 18, 18a, and 26 have been disposed of by me from the bench without a written opinion, but I have stated orally my reasons for granting or denying motions, as the case may be.

In this memorandum, for the information of the bar, I shall deal, not only with the facts particularly applicable to this case, but shall restate what I have already endeavored to make clear in oral statements from the bench.

It is unnecessary to review the legislation which created the United States Railroad Administration and the office of Director General. Under the act certain authority was conferred upon the Director General, and I shall assume that he had the power to make General Orders 18, 18a, and 26, and in such circumstances such General Orders, when and if lawfully made, have the force and effect of law. Gen-

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eral Orders 18 and 18a are prospective, and deal with actions thereafter begun. These orders are as follows:

"United States Railroad Administration.

"Office of the Director General, Washington.

"April 9, 1918.

"General Order No. 18.

"Whereas, the act of Congress approved March 21, 1918, entitled 'An act to provide for the operation of transportation systems while under federal control,' provides (section 10) 'that carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or with any order of the President. * * *. But no process, mesne or final, shall be levied against any property under such federal control'; and

"Whereas, it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in states and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose, the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more, which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operation of the railroads, and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs:

"It is therefore ordered, that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose.

"W. G. McAdoo, Director General of Railroads."

"United States Railroad Administration.

"Office of the Director General, Washington.

"April 18, 1918.

"General Order No. 18a.

"General Order No. 18, issued April 9, 1918, is hereby amended to read as follows:

"'It is therefore ordered that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose.'

"W. G. McAdoo, Director General of Railroads."

[1] It will be seen from the foregoing that this court will dismiss any case brought after a promulgation of the foregoing orders in a county or district elsewhere than where the plaintiff resided at the time of the accrual of the cause of action or where the cause of action arose. There is no difficulty in construing General Order No. 18 as amended by General Order No. 18a. General Order 26 is as follows:

"United States Railroad Administration.

"Office of the Director General, Washington, D. C.

"May 23, 1918.

"General Order No. 26.

"Whereas, the act of Congress approved March 21, 1918, entitled 'An act to provide for the operation of transportation systems while under federal con-

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trol,' provides (section 10) 'that carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act * * * or with any order of the President. * * * But no process, mesne or final, shall be levied against any property under such federal control,' and authorizes the President to exercise any of the powers by said act or theretofore granted him with relation to federal control through such agencies as he might determine; and

"Whereas, by a proclamation dated March 29, 1918, the President, acting under the Federal Control Act and all other powers him thereto enabling, authorized the Director General, either personally or through such divisions, agencies, or persons, or in the name of the President, to issue any and all orders which may in any way be found necessary and expedient in connection with the federal control of systems of transportation, railroads, and inland waterways as fully in all respects as the President is authorized to do, and generally to do and perform all and singular acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject hereof, the President is authorized to do and perform; and

"Whereas, it appears that there are now pending against carriers under federal control a great many suits for personal injury, freight and damage claims, and that the same are being pressed for trial by the plaintiffs in states and jurisdictions far removed from the place where the persons alleged to have been injured or damaged resided at the time of such injury or damage, or far remote from the place where the causes of action arose, the effect of such trials being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more, which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operation of railroads, and the practice of trying such cases during federal control in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs:

"It is therefore ordered that upon a showing by the defendant carrier that the just interests of the government would be prejudiced by a present trial of any suit against any carrier under federal control, which suit is not covered by General Order No. 18, and which is now pending in any county or district other than where the cause of action arose or other than in which the person alleged to have been injured or damaged at that time resided, the suit shall not be tried during the period of federal control: Provided, if no suit on the same cause of action is now pending in the county or district where the cause of action arose, or where the person injured or damaged at that time resided, a new suit may, upon proper service, be instituted therein; and if such suit is now barred by the statute of limitations, or will be barred before October 1, 1918, then the stay directed by this order shall not apply unless the defendant carrier shall stipulate in open court to waive the defense of the statute of limitations in any such suit which may be brought before October 1, 1918.

"This order is declared to be necessary in the present war emergency. In the event of unnecessary hardship in any case, either party may apply to the Director General for relief, and he will make such order therein as the circumstances may require consistent with the public interest.

"This order is not intended in any way to impair or affect General Order No. 18, as amended by General Order No. 18a.

"W. G. McAdoo, Director General of Railroads."

It will be noted that in both General Order 18 and General Order 26 the preambles call attention to the fact that actions have been brought at places far remote from where plaintiffs reside or where the cause of action arose, with the result that necessary railroad men are required to travel "sometimes hundreds of miles," necessitating

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absence from their trains "for days and sometimes for a week or more." It is also stated that the practice of trying such cases during federal control "in remote jurisdictions" is not necessary for the protection of the rights or the just interests of plaintiffs.

[2] General Order No. 26 clearly indicates that the court is not expected to act automatically, even if there were power to compel it so to do, which, of course, would not be suggested, but that in each case, upon the facts shown, the court is to determine whether "the just interests of the government would be prejudiced by a present trial" of the suit.

It clearly was not the intention of the United States Railroad Administration to deprive those having claims against railroads of their day in court, nor to prevent, wherever possible, a speedy disposition of pending actions. Practically no case against a defendant railroad, whether in tort or in contract, can be satisfactorily tried without the presence in the courtroom, and consequently the absence from the railroad, of some one or more witnesses. The requirements of the railroad, in so far as it is concerned with the movement of war materials and supplies, or any other part of its operation or administration deemed important by the government, can easily be met by the trial judge so arranging and conducting his calendar as to necessitate a minimum period of absence of railroad employés from railroad work. If, for instance, an accident occurred at the terminal of a railroad in New York City, whether the case was brought in the United States District Court or in a state court, the railroad witnesses would necessarily be absent for such period of time as their presence would be necessary in the courtroom. To hold, under such circumstances, that the case should be stayed until after the expiration of federal control, would be, in effect, to deprive the plaintiff of his day in court.

Similarly, in view of the quick communication between, for instance, Jersey City and the courthouse of this court, the trial of a case requiring the bringing over of witnesses from Jersey City would occupy very little more time, if any, of the railroad witnesses, than that which would be occupied if the witnesses were brought from the New York terminals of the Pennsylvania, New York Central, or other railroads. The point is that in such cases it would be manifestly against the purpose and spirit of the order to stay trials of pending actions until the expiration of federal control, although as to trial on a particular date it may be well assumed that the trial judge will accommodate his calendar to the legitimate requirements and necessities of the railroad.

To illustrate with two cases which require different treatment, the following examples, which were before me for consideration, may be noted: In one case the accident happened near Pittsburg, the plaintiff resided in or near Pittsburg, the railroad men were engaged in important railroad service having to do with the movement of war materials and troops, and obviously it would be prejudicial to the best interests of the government that the railroad should be required to bring these men to New York, when a trial could be had in the appropriate forum in Pennsylvania. In another case the accident hap-

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pened at Perth Amboy, N. J., and the railroad witnesses were some three, four, or possibly five men employed at Perth Amboy, and whether the case was tried in Newark or New York would make very little difference in time. In this case plaintiff was a railroad employé, and had suffered shocking injuries, which it is claimed fully incapacitated him, and the case was well up on the calendar. To require such a plaintiff to start all over again and bring his action in New Jersey, delaying him perhaps for many months, would be the kind of result which I am confident General Order No. 26 never contemplated. In cases of grave injury, speedy trials are important, to prevent the injured person from becoming a public charge, a result which imposes an additional burden upon the other members of the community.

Counsel for the railroad company in many instances have deemed it necessary to produce in court all of the members of the train crew, even though many of them know nothing concerning the accident; but this has doubtless been a necessary precaution to counteract any reference by attorneys for plaintiff as to the absence of some members of the crew. In every case where I have denied the motion for a stay, the attorney for plaintiff has stipulated that no reference will be made to the absence of any witness who, according to the statement of counsel for the railroad company, knows nothing about the accident. It is impossible to lay down a general rule in this regard, but on the facts of each case as presented motions in proper cases can be denied upon appropriate conditions, and in dealing with the subject sensibly and practically there should be no real difficulty in making such disposition in each case upon its own facts as may seem just and proper.

The questions here involved, in any event, are confined only to pending actions, and from my point of view many elements must be taken into consideration. Primarily there must be, of course, the situation of the government, which at this time requires first consideration, and to whose necessities private rights must yield; but, in addition, the position of the case on the calendar, the physical and financial condition of plaintiff, the number of witnesses for the railroad, the character of the work in which they are employed, the probable length of the trial, and the distance from the place of employment of the railroad employés to the court house, are all matters which will have a bearing on the question as to whether or not the action shall be stayed.

In the foregoing I have not attempted to outline all the possibilities which may arise, or all of the considerations which may be relevant; but I have merely attempted to sketch certain broad considerations for the guidance of those concerned with this subject-matter.

Coming, now, to the case at bar, it appears that the plaintiff is an infant about 14 years of age, now suing by his guardian for an injury which occurred at Scranton, Pa., on August 9, 1916. Plaintiff and his guardian then resided and now reside in Scranton, Pa. Four witnesses of the railroad are actively employed by it in its freight service, and are at present engaged in moving coal, freight, munitions, and other war materials at and in the vicinity of Mayfield Yard, in Pennsylvania. The most important branch of the defendant railroad at

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this time is the one running from Cardozia, N. Y., to Scranton, Pa., over which are hauled many carloads of coal from the mines in Pennsylvania, and in which freight service the railroad witnesses are engaged. The showing is well made that the absence of these employés at this time would be serious, because defendant is shorthanded, owing to the large number of employés who have gone into the military service, or who have left to obtain positions at shipyards and other industries performing war service, for which larger compensation is paid. The engineer, the fireman, the conductor, and one of the trainmen are all necessary and material witnesses concerning the accident.

Defendant further submits the affidavit of a physician to the effect that, although the infant plaintiff's left leg has been amputated above the knee, he is strong and robust, and his heart, lungs, and abdomen are normal, and he is otherwise physically normal. Defendant also submits an affidavit from one O'Boyle, presumably an investigator, that he has seen the infant plaintiff, and called upon him with the physician, and that the boy is regularly attending school.

In this case it is manifest that no one is dependent for support upon the plaintiff, and he does not need any medical attendance. On the other hand, the showing made by the railroad indicates beyond question that the just interests of the government would be prejudiced by a present trial of the action in this jurisdiction. An action can be promptly brought in Scranton, where plaintiff resides, and where the witnesses of defendant will be available at a minimum of inconvenience.

[3] In such circumstances I am of opinion that the just interests of the government require that the motion should be granted.

Motion granted.

Addendum.

Since writing the foregoing I note the opinion of Judge Manton, in Harnick v. Pennsylvania Railroad Co., 254 Fed. 748, filed June 14, 1918. In that opinion I find agreement with the view expressed by me, supra, that each case must be considered on its own merits.

WASHINGTON WATER POWER CO. v. HARBAUGH.

(District Court, D. Idaho, N. D. August 30, 1918.)

No. 701.

1. ELECTRICITY ⇐4—LICENSES—RIGHT OF WAY—INDIAN RESERVATION—REVOCATION BY PATENT.

In view of the ruling of the Secretary of Interior a license granted plaintiff pursuant to Act Feb. 15, 1901, to maintain a power line across the Cœur d'Alene Indian reservation, *held* not revoked by the granting of a patent under Act June 21, 1906, to lands used as part of the right of way, though no reservation was contained therein.

2. ELECTRICITY ⇐4—LICENSES—RIGHT OF WAY—INDIAN RESERVATION.

A permit under Act Feb. 15, 1901, to construct a power line over the Cœur d'Alene Indian reservation, *held* a mere license revocable by the

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Secretary of Interior, together with a right of way for a telephone line granted to the same company under Act March 3, 1901, § 3; the latter being a mere incident to the license.

3. ELECTRICITY ⟸4—RIGHTS OF WAY—DUTIES OF OWNER.
Where a patentee of public lands took same burdened by license for power line granted power company, *held*, that power company was entitled to access under certain conditions prescribed to govern both parties.

In Equity. Suit by the Washington Water Power Company, a corporation, against C. W. Harbaugh. Decree for plaintiff.

John P. Gray, of Cœur d'Alene, Idaho, for plaintiff.
C. H. Potts, of Cœur d'Alene, Idaho, for defendant.

DIETRICH, District Judge. [1, 2] The defendant is the owner of 160 acres of land in Kootenai county, Idaho, across which extends a high-tension power line owned and operated by the plaintiff. The land was formerly part of the Cœur d'Alene Indian reservation, and while it was still tribal property the power line was constructed, under a permit granted by the Secretary of the Interior on July 7, 1902, pursuant to provisions of Act Feb. 15, 1901, c. 372, 31 Stat. 790. Upon the same poles the plaintiff also maintains a telephone line, used in connection with the maintenance and operation of the power line, the application for which was approved by the Secretary of the Interior April 15, 1902, under section 3 of the act of March 3, 1901 (31 Stat. 1083, c. 832). After the construction of the power and telephone line, Congress made provision for the opening of the reservation, by Act June 21, 1906, c. 3504, 34 Stat. 335. Pursuant to the terms of this act, the land in question was allotted to one Sophia Christene Mishell, an Indian, who died before final patent issued, and thereafter, on February 8, 1915, it was duly offered for sale, and the defendant, being the highest and best bidder therefor, became the purchaser. Patent in fee simple issued under date of August 18, 1915. The patent contains no notation of any kind referring to the power and telephone line or the right of way therefor. The defendant had knowledge of the existence of the power line at the time he purchased, and apparently made no inquiry touching the rights or claims of the plaintiff company. After his purchase he inclosed the land with a fence, but left no gateways or other openings through which the plaintiff could enter for the purpose of inspecting and repairing its line. He also plowed up the land along the line. It is also alleged in the complaint that he declined to permit the plaintiff to patrol the line, and gave out and threatened that he would prevent it and its employés from going on the same. The plaintiff asserts a right of way extending 50 feet upon either side of its line, and prays for an injunction restraining the defendant from interfering with its proper use of the right of way.

It is not questioned by the defendant that the plaintiff duly procured a right of way for the maintenance of a telephone line, and a permit for the construction and maintenance of its power line, at the dates hereinbefore stated and pursuant to the provisions of the acts of Congress above cited. His contention is that the telephone line is

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a mere incident of the power line, and that for the transmission line the plaintiff never acquired anything more than a revocable license, and that the issuance of the patent ipso facto operated to revoke the license. It seems clear that the right acquired for the telephone line was in the nature of an easement, and that the right acquired for the maintenance of a power line was in the nature only of a permit or license revocable at the will of the Secretary of the Interior. It is further true that the telephone line is a mere incident of the transmission line. Hence the controlling question is whether the license or permit for the power line was revoked by the issuance of patent. In transactions between private individuals the general rule is that a conveyance of the land by the licensor operates to revoke the license, and all rights and privileges of the licensee terminate as of course. This principle, it seems, was for some time recognized by express rule of the Interior Department, as being applicable to licenses granted under the act of February 15, 1901, but upon August 23, 1912, after consideration, the conclusion was reached by the department that, "to effectuate the purpose of the statute, it is necessary that a permit once given should be superior to the rights of the subsequent patentee of the land until such time as the permit is duly revoked by the Secretary of the Interior in the exercise of the express authority given by the statute." (Letter of August 23, 1912, to the Commissioner of the General Land Office, by Walter L. Fisher, Secretary of the Interior.) In discussing the question, among other things, the honorable Secretary said:

"The rule of private real property law under which such a license is revoked by the transfer of the fee-simple title has no application to either the legal or the economic data with which Congress was dealing in this legislation, and therefore the intent to enact the said rule should not be imputed to Congress in the absence of clear implication of such intent."

And again:

"In view of the permanent character of the works authorized to be constructed under the act of February 15, 1901, and the large investment necessary to such construction, the statute ought not to be interpreted as giving a precarious tenure except in so far as clearly appears from the words used by Congress. After careful consideration of the matter, I am of the opinion that the intent of Congress was to protect the public by retaining in the hands of the Secretary of the Interior full control over water power development, through the device of making permits revocable at his discretion. The statute authorized, in more generous and comprehensive terms than had been used in any preceding statute, the development of water for domestic and public supply, irrigation, mining, and power, and also the development and transmission of electricity. Its primary purpose was to encourage development under unquestioned public control. The former regulation, which provided that 'the final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the department, a revocation of the permission, so far as it affects that tract,' was directly contrary to the purpose of the statute as above interpreted. It discouraged development by making the title of the permitee subject to that of the final patentee of the land occupied under the permit, and it abandoned all attempt at public control as soon as the land was finally disposed of."

Accordingly, by express regulation, which was still in force at the time the defendant purchased the land and received his patent, it was provided that—

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"The final disposal by the United States of any tract traversed by a right of way permitted under the said act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act."

It is to be admitted that the language of the act does not put the intent of Congress beyond all doubt, but the reasoning of the honorable Secretary as in part set forth in the foregoing extracts from his letter of August 23, 1912, is not without force, and besides, under a familiar rule, some weight is to be accorded to the practical construction given to a doubtful statute by a high administrative officer. The view is therefore adopted that the issuance of the patent to the defendant did not revoke the plaintiff's license. It may be unfortunate, but it is not of controlling importance, that the patent did not contain a notation referring to the plaintiff's right of way, as required by the regulations of August 23, 1912. The record does not purport to furnish any explanation for this omission, but in view of the other express provisions of the regulations it cannot be held that the silence of the patent in this respect imports an intent on the part of the Secretary of the Interior to revoke the license. It is much more reasonable to assume that the absence of the notation is the result of inadvertence or carelessness on the part of some subordinate officer or employé, and neither the right of the plaintiff to use such right of way nor of the government to control it could be divested by a mere clerical omission. It is hardly possible to contend that the defendant was in any wise misled to his injury. Admittedly he knew that the plaintiff was maintaining and operating the transmission line, and so far as appears he was willing to purchase the property subject to such right as it then had. When he made his offer he had no assurance or intimation that a patent would be issued without a notation referring to the right of way. Accordingly it is held that neither the integrity nor the extent of the plaintiff's right was affected by the issuance of the patent.

[3] The other important question relates to the measure of such right. It is hardly necessary to say that the courts can neither enlarge nor diminish such right as was conferred by the Secretary of the Interior. The definition of this right is to be looked for in the instrument of license. The writings constituting the license consist of a map filed by plaintiff with the Secretary of the Interior simply delineating by course and distance its proposed power line, and of the following indorsement thereon:

"Dept. of the Interior, July 7, 1902.

"The use of the right of way shown on the map is hereby permitted in accordance with the provisions of the act of Congress approved February 15, 1901—31 Stat. 790—and the regulations, present or future, thereunder.

"E. A. Hitchcock, Secretary."

It will be noted that neither upon the map nor in the indorsement thereon is any specific width designated. It must therefore be held that it was the intention of the plaintiff to claim and of the Secre-

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tary of the Interior to grant only such occupancy and use, within the maximum width of 100 feet authorized by law, as were reasonably necessary to enable the plaintiff to construct, maintain, and operate its line, and such is now thought to be the measure of the plaintiff's rights. The land belongs to the defendant. He has the right to occupy and use the same, subject to the reasonable needs of the plaintiff in maintaining and operating its line. By the evidence it is shown that, in maintaining and operating the line, the employés of the plaintiff must from time to time pass along it for the purpose of inspection, and of course it will also be necessary to have access at irregular intervals for the purpose of repairs and renewals. It is not necessary that the line be excluded from the defendant's inclosure; but if he maintains fences he must provide gates therein along the line, for the plaintiff's use—gates of sufficient width for the passage of ordinary vehicles. It will be the duty of the plaintiff to furnish locks and to keep such gates locked. In passing along the line the plaintiff's employés must take care not to do more injury to the defendant's growing crops than may be reasonably necessary, and they must keep within 50 feet of the center of the line, and within a roadway upon one side or the other. Likewise, in making repairs or renewals, reasonable care should be exercised not to do unnecessary damage to crops growing along and near the line.

A proper form of decree will be prepared by counsel for the plaintiff, and submitted to counsel for the defendant for his approval, before it is presented for signature.

SIEBERT v. PATAPSCO SHIP CEILING & STEVEDORE CO. et al.

(District Court, D. Maryland. November 7, 1918.)

1. MASTER AND SERVANT ⟸358—ELECTION OF REMEDY—WORKMEN'S COMPENSATION ACT.

A stevedore, injured while loading a vessel, who was entitled under Judicial Code, § 24, par. 3, as amended by Act Oct. 6, 1917, to the remedy afforded by the state Workmen's Compensation Act, *held* not to have elected that remedy by signing at the request of an attorney the notice to his employer contemplated by the Compensation Act, and to be entitled to sue in admiralty, etc.

2. SHIPPING ⟸84(3)—INJURIES TO STEVEDORE—SAFE PLACE TO WORK—ORDERS.

A stevedore company, though it ordered its foreman to remove all hatch beams, etc., *held* charged with knowledge of noncompliance with order, so that it could not escape liability to a stevedore, injured by the falling of a beam on the ground the company had discharged its duty as to furnishing safe place, etc.

3. SHIPPING ⟸84(4)—INJURIES TO STEVEDORE—VICE PRINCIPAL.

The foreman of a stevedore company *held* a vice principal as to a stevedore, so the company could not escape liability for the foreman's negligence on the ground he was a fellow servant of the injured stevedore.

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4. DAMAGES ⇐132(9)—PERSONAL INJURIES—MEASURE.
Held, that $3,791 should be allowed a stevedore for injuries which necessitated the amputation of his leg below the knee, and caused a loss of wages and expenditure for medical attention amounting to $791.

In Admiralty. Libel by John Siebert against the Patapsco Ship Ceiling & Stevedore Company, the Prince Line, Limited, and Furness Withy & Co., Limited. Decree for libelant against the first-named respondent.

George T. Mister, of Baltimore, Md., for libelant.
John B. Deming and Whitelock, Deming & Kemp, all of Baltimore, Md., for respondents.

ROSE, District Judge. On January 5th last the respondent, the Patapsco Ship Ceiling & Stevedore Company, hereinafter called the "employer," was engaged through its employés, of whom the libelant was one, in loading the Chinese Prince, hereinafter referred to as the "ship." The respondents the Prince Line, Limited, and Furness Withy & Co., Limited, were respectively owner and agent of the ship.

The libelant was working in the ship's hold. By the fall of one of the strong backs intended to support the hatch covers, one of his legs was so badly crushed as to necessitate amputation below the knee. He suffered other serious and painful injuries, but these, fortunately, proved to be temporary.

[1] One week after the accident libelant signed the notice to the employer, contemplated by the Workmen's Compensation Act of Maryland, that he had been hurt, and requesting that it should, in accordance with law, supply him with medical attendance. This notice was countersigned by a well-known member of the Baltimore bar, and by or through the latter was promptly served upon the employer. Thereafter the same attorney filed a claim with the state Industrial Accident Commission. Because libelant was long in the hospital, the hearing was put off, and before it was actually held he asked permission of the commission to withdraw his claim. After inquiry, the commission permitted him to do so, on the ground that in the condition he was at the time he signed the notice he did not so appreciate its nature as to make it fair to hold that he had irrevocably committed himself by it. The employer in this court insists that, in spite of the findings and action of the commission, the delivery of the notice was a final election to waive libelant's right to proceed in the admiralty.

The libelant here testified that he signed such notice because it was brought to him by a young man who told him he should sign it. It was then only a week after the accident, and he was in such a state of pain from some of his injuries that he could not, and did not, give the matter any consideration, but appended his signature, as he had been bidden to do. He said he thought the young man referred to was an assistant to the member of the bar who had countersigned the paper, but how either of them had learned of the accident, or who, if any one, had asked either of them to interest himself in the mat-

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ter, he did not know. I sent at once for the attorney in question, and he testified that he had never seen the libelant until the latter was out of the hospital, and had come to tell him that he wanted to put his case in other hands. He further stated that the matter had originally been brought to him by a young lawyer, whose name he gave, and for whom he had occasionally tried cases; but the gentleman had at least temporarily quit practice to accept employment in a munition plant. There the evidence on this branch of the case stopped, except that it appeared that the employer, in consequence of the notice referred to, but without the knowledge of the libelant, had shortly after the accident paid $29 of the latter's hospital expenses. Before he was discharged from the hospital, his total bill had run up to $266.

The evidence shows, as the commission held, that the libelant did not appreciate, and was not in a condition to appreciate, the significance of the paper he had signed, nor did he know that the person who procured his signature was claiming to act as his representative. Every rational system of jurisprudence strives to insure, as far as may be, that a man shall not lose important rights merely because he has done some formal thing in excusable ignorance of its nature and significance.

When it came out for the first time at the hearing in this court that the $29 had been paid, I required the libelant to reimburse the employer as a condition to going on with his case. This was done at once. I did not intend to rule that such a requirement should always be made, as sometimes it might work hardship and injustice; but it is obviously fair wherever the libelant is in a condition to comply with it, as in this case he was. In this state of the record, it is unnecessary to decide anything, except that this libelant was free to prosecute his libel. Whether he could have done so, had he understandingly invoked the jurisdiction of the commission, need not be passed upon.

The act of Congress approved October 6, 1917 (40 Stat. 395, c. 97) gave an employé, injured on water, the right to avail himself of the Workmen's Compensation Law of the state. This result was accomplished by amending paragraph 3 of section 24 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. 1916, § 991]). The relevant portions of that paragraph were a part of the original Judiciary Act of 1789, and gave the District Courts of the United States cognizance of "all civil cases of admiralty and maritime jurisdiction, saving to all suitors the right of a common-law remedy, where the common law is competent to give it." The amending statute added the words, "and to claimants the rights and remedies of the Workmen's Compensation Law of any state." So far as I know, it has never been held that the mere institution of a common-law suit to recover for a maritime tort precluded the plaintiff from subsequently seeking relief in admiralty.

[2, 3] It remains to pass upon the merits. The accident happened because the libelant was working under a hatch beam or strong back, which had not been removed, and which was not bolted in place. The hook or the chain, used to raise and lower the load, caught under the beam and pulled it out of its support. There is no question that the

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place in which the plaintiff was working was, under such circumstances, unsafe.

It is in evidence that the employer had given general instructions to its foremen always to remove all the hatch beams, or, if any were left in place, to see that they were firmly secured by bolts or pins. It is argued that the foreman was a fellow servant of the libelant, and that the latter assumed the risk of his negligence. It is true that the instruction was given, and that the chief executive of the employer appreciated its importance, and was sincerely anxious that it should be obeyed. It is equally clear, however, that his subordinates habitually disregarded it, in that they never made any real attempt to see that it was enforced.

To remove the hatch beam took from 5 to 15 minutes. The bolts for it were not always right at hand. The foreman and the gang leaders were anxious to maintain their tonnage record. Familiarity with danger made them careless of the safety of the men under them. So generally was the instruction ignored, and so easy would it have been for the employer to have discovered that fact, that it cannot now successfully claim that by merely issuing the order it had done all that was incumbent on it to make sure that the men were given a safe place in which to work. That obligation it could not delegate. Moreover, the foreman or "chargeman," who should have seen that the beam was removed or bolted in, was, upon the evidence, a vice principal, rather than a fellow servant, of the libelant. He had full charge of the loading of the ship and of all the men employed in doing it. Subject to his orders were the gang leaders, who had the right to employ and discharge the workmen—in the modern vernacular, the power of "hiring and firing." The men who did the actual work were bound to obey the orders of the foreman. I am satisfied, although he denies it, that he gave the order not to remove some of the beams, including the one which fell on the libelant, and that the libelant and his fellow workmen, if they were to maintain their places, had no choice other than to do what he told them to do. The employer must be held liable.

There is nothing shown to charge either of the other respondents, and as to them the libel must be dismissed.

[4] The costs of medical attendance, of the artificial limb, and the loss of wages of libelant while in the hospital, total $791. I will allow $3,000 more as compensation for his suffering and permanent injuries, or an aggregate of $3,791.

A decree against the employer for that amount will be signed.

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CORSICA TRANSIT CO. v. W. S. MOORE GRAIN CO.

THE CORSICA.

(Circuit Court of Appeals, Eighth Circuit. November 11, 1918.)

No. 4950.

1. SHIPPING ⟸51—BREACH OF CONTRACT FOR CHARTER—LIEN.
Act Cong. June 23, 1910 (Comp. St. 1916, § 7783), applies only to repairs, supplies, and other necessaries furnished the vessel at the home port, and does not give a lien for damages, for breach of contract, for a charter.

2. SHIPPING ⟸51—CHARTER—BREACH BY OWNER—LIEN.
While liens on vessels which are of a maritime nature may be given by state statute which are not cognizable and enforceable under the general admiralty law, Gen. St. Minn. 1913, § 8318, declaring that every vessel used in navigating the waters of the state shall be liable for nonperformance of any contract of affreightment, etc., did not give a lien on a vessel used in navigating the waters of the Great Lakes for breach of a charter party to carry grain from Minnesota to Ohio.

3. SHIPPING ⟸51—BREACH OF CONTRACT FOR CHARTER—LIEN.
An executory contract for the future employment of a vessel is not a maritime contract, and consequently a breach gives the charterer no lien.

4. MARITIME LIENS ⟸16—POWER OF STATE—BREACH OF CHARTER.
A state has no power to grant a maritime lien against foreign vessels navigating the Great Lakes for causes of action which have never been recognized as maritime liens.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Libel by the W. S. Moore Grain Company against the steamer Corsica, claimed by the Corsica Transit Company. From a decree for libelant, claimant appeals. Reversed.

Frederick L. Leckie, of Cleveland, Ohio (Frank S. Masten and Holding, Masten, Duncan & Leckie, all of Cleveland, Ohio, on the brief), for appellant.

H. R. Spencer, of Duluth, Minn. (R. W. Spencer, of Duluth, Minn., on the brief), for appellee.

Before HOOK and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. This is an appeal from a decree in favor of the appellee in a proceeding in rem in admiralty. The libel was against the steamer Corsica, of which the appellant is the owner and claimant. The allegations in the libel, so far as they are material are that on or about September 14, 1915, the libelant at the city of Duluth, Minn., chartered said steamer for a cargo of wheat from the port of Duluth to Lake Erie ports, at the rate of 3½ cents per bushel, shipment to be made during the last half of October, 1915, at such times during said period as libelant might select. That the owners of said vessel refused to carry out that contract, after request from libelant, although it was ready and willing at all times to pay the carrying charges thereon. That by reason thereof libelant will suffer damages in the sum of

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$5,000; that it has a statutory lien on the vessel for the damages sustained. The prayer for relief is the usual one in proceedings in rem in admiralty proceedings.

The appellee filed its claim of ownership of the vessel, and filed exceptions to the libel, alleging as ground that the allegations thereof do not disclose any admiralty or maritime claim or lien upon the vessel whereupon an attachment could be founded. The exception to the libel having been overruled an answer was filed by the claimant, and upon final hearing a decree in favor of libelant entered. In view of the conclusions reached by us it is unnecessary to set out the allegations in the answer or the proofs upon which the cause was heard.

[1, 2] The appellee makes no claim of a lien by virtue of the maritime law, but in the libel and argument claims a statutory lien under a statute of Minnesota. As the libel alleges that the charter of the boat was made in Duluth, in the state of Minnesota, and the cargo was to be delivered to the boat there, it is immaterial what the laws of the state of Ohio are, which were referred to in appellee's brief and oral argument. The statute of Minnesota, upon which the libelant relies, is section 8318, Gen. St. Minn. 1913, and so far as it is applicable to the issues in the case at bar is as follows:

"Every boat or vessel used in navigating the waters of this state shall be liable for the claims or demands hereinafter mentioned, and which shall constitute liens thereon. * * *

"(3) For all demands or damages accruing from the non-performance or malperformance of any contract of affreightment, or any contract touching the transportation of persons or property entered into by the master, owner, agent, or consignee of the boat or vessel on which such contract is to be performed."

Act Cong. June 23, 1910, c. 373, 36 St. 604, U. S. Comp. St. 1916, § 7783, applies only to repairs, supplies, and other necessaries furnished the vessel at the home port, and not to damages for a breach of contract for a charter, and therefore has no application to the issue involved in the instant case. The Rupert City (D. C.) 213 Fed. 263, 273; The Dredge A. (D. C.) 217 Fed. 617.

Does the statute of Minnesota, where the action was instituted, the contract made, the freight was to be furnished, and the contract performed, give such a lien, which may be enforced in an admiralty court, in a proceeding in rem against the vessel? That liens on vessels, which are of a maritime nature, may be given by state statutes, which are not cognizable and enforceable under the general maritime law may be conceded. The leading case on this subject in The Lottawanna, 21 Wall. 558, 22 L. Ed. 654, which has been consistently adhered to ever since. In The Robert W. Parsons, 191 U. S. 17, 24, 24 Sup. Ct. 8, 9 (48 L. Ed. 73) the court said:

"That a state may provide for liens in favor of materialmen for necessaries furnished to a vessel in her home port, or in a port of the state to which she belongs, though the contract to furnish the same is a maritime contract, and that such liens can be enforced by proceedings in rem in the District Courts of the United States, is so well settled by a series of cases in this court as to be no longer open to question."

But in all the cases the claims were of a nature which were maritime, but unenforceable in a court of admiralty, because furnished at the home port. A rule changed by the act of June 23, 1910.

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What is the effect of the Minnesota statute? It will be noted that the statute is limited to "boats or vessels used in navigating the waters of this state." This statute has never been construed by the court of last resort of that state, but other courts, involving state statutes containing the same limitation, have held that it was clearly restricted to vessels "which are confined in their usual and substantial employment in the waters of the state." The Sea Witch, 1 Cal. 162; The Haytian Republic (D. C.) 65 Fed. 120. In The San Rafael, 141 Fed. 270, 280, 72 C. C. A. 388, 398, the court, referring to the California statute, held:

"Courts of admiralty do not get their jurisdiction from state statutes. Roach v. Chapman, 63 U. S. [23 How.] 129 [16 L. Ed. 294]. * * * That state Legislatures cannot restrict or extend the admiralty jurisdiction exclusively vested in the federal courts, said the court in the case of The H. E. Willard [D. C.] 53 Fed. 600, 'has been often decided and conclusively settled. * * * It follows, necessarily, that a lien given by a state statute is not the test of jurisdiction. If it were, a state Legislature might at pleasure modify the jurisdiction of the courts of admiralty by creating or abrogating liens not given by the maritime law.' The lien sought to be enforced in the present case is one given by the general maritime law."

Not only does the libel fail to allege that the libeled vessel is used in navigating the waters of the state of Minnesota but it expressly charges that the breach was the refusal to carry the grain offered at Duluth to the port of Sandusky, in the state of Ohio.

The Menominie (D. C.) 36 Fed. 197, which appellee cites as sustaining its contention, does not construe this act, but a former act, giving a lien for supplies, repairs, and material furnished, all of which are maritime liens, but an action therefor could not be maintained in a court of admiralty, if furnished at the home port.

[3, 4] But, aside from this, we are of the opinion that a state has no power to grant a maritime lien against foreign vessels, navigating, as alleged in the libel, the Great Lakes, for causes of action which have never been recognized as maritime liens. In The Chusan, 2 Story, 455, Fed. Cas. No. 2717, Mr. Justice Story held that such a statute of a state cannot apply to foreign vessels. It is true this opinion was delivered before the decision in the Lottawanna Case, holding that state statutes giving liens for materials and supplies furnished in a home port, which, if furnished in a foreign port, would be enforced in an admiralty court, if maritime liens. In The Lyndhurst (D. C.) 48 Fed. 839, 841, Judge Brown expressed a serious doubt, whether a state is competent to enact a statute affecting foreign vessels, and in The Advance (D. C.) 60 Fed. 766, the same learned judge held:

"To sustain a maritime lien, there must be in all cases, either in fact, or by presumption of law, a credit of the ship; and whenever such credit is negatived by the evidence, no such lien, whether maritime or statutory, will be recognized."

The same doubt was expressed in The Roanoke, 189 U. S. 185, 194, 23 Sup. Ct. 491, 47 L. Ed. 770, citing The Chusan and The Lyndhurst. A similar doubt was expressed in The America, 1 Lowell, 176, Fed. Cas. No. 289, by Judge Lowell. In a late case the Supreme Court has practically removed all doubt on that subject. In Southern Pacific Co. v. Jensen, 244 U. S. 205, 216, 37 Sup. Ct. 524, 529 (61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900) the court held:

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"Equally well established is the rule that state statutes may not contravene an applicable act of Congress or effect the general maritime law beyond certain limits. They cannot authorize proceedings in rem according to the course in admiralty, * * * nor create liens for materials used in repairing a foreign ship"—citing The Roanoke, supra, and Workman v. New York City, 179 U. S. 552, 563, 21 Sup. Ct. 212, 45 L. Ed. 314.

In the last-cited case, after a careful review of the authorities, it was held that:

"The local decisions of a state court cannot as a matter of authority abrogate maritime laws."

Other cases to the same effect are The Electron, 72 Fed. 689, 695, 21 C. C. A. 12; Cuddy v. Clement, 113 Fed. 454, 51 C. C. A. 288; The Athinai (D. C.) 230 Fed. 1017, 1020; The Sagamore, 247 Fed. 743, 757, 159 C. C. A. 601; The Atlantic City, 220 Fed. 281, 284, 136 C. C. A. 297, Ann. Cas. 1915D, 50.

There are some authorities which hold that such state statutes are enforceable in admiralty against foreign vessels. It was so held by Judge Brown, while District Judge of Michigan, and later a Justice of the Supreme Court, in The J. F. Warner (D. C.) 22 Fed. 342. He was the same judge who delivered the opinion of the Supreme Court in The Roanoke, where he expressed a doubt on that subject, without referring to his earlier decision as District Judge. The only authority which holds that a state statute giving a lien on a vessel for breach of an executory contract is valid and is applicable to foreign vessels is The Energia (D. C.) 124 Fed. 842. It has never been followed by any other court and we are unable to follow it. In The Glide, 167 U. S. 606, 624, 17 Sup. Ct. 930, 934 (42 L. Ed. 296), the court only held that—

"The contract and the lien for repairs or supplies in a home port, under a local statute, are equally maritime, and equally within the admiralty jurisdiction."

Or, in other words, that a state may provide for a lien on a vessel for causes of action which are maritime.

An executory contract for the future employment of a vessel is not a maritime contract. The Schooner Freeman v. Buckingham, 59 U. S. (18 How.) 182, 188, 15 L. Ed. 341; Vandewater v. Mills, 60 U. S. (19 How.) 82, 90 (15 L. Ed. 554). It was there held:

"Consequently, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages, as in other cases."

In Knapp, Stout & Company v. McCaffrey, 177 U. S. 638, 642, 20 Sup. Ct. 824, 827 (44 L. Ed. 921) after a learned review of the former decisions of the court, the following rules are deduced:

"That wherever any lien is given by a state statute for a cause of action cognizable in admiralty, either in rem or in personam, proceedings in rem to enforce such lien are within the exclusive jurisdiction of the admiralty courts. But the converse of this proposition is equally true, that if a lien upon a vessel be created for a claim over which a court of admiralty has no

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jurisdiction in any form, such lien may be enforced in the courts of the state."

Other authorities in point are The Keokuk, 76 U. S. (9 Wall.) 517, 519, 19 L. Ed. 744; The Lady Franklin, 75 U. S. (8 Wall.) 325, 329, 19 L. Ed. 455; The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345; Martin v. West, 222 U. S. 191, 197, 32 Sup. Ct. 42, 56 L. Ed. 159, 36 L. R. A. (N. S.) 592; The Benefactor (D. C.) 242 Fed. 582, 584, affirmed Clinton v. Smith & Terry, 249 Fed. 119, — C. C. A. —; The Thomas P. Sheldon (D. C.) 113 Fed. 779, 782, affirmed The S. L. Watson, 118 Fed. 945, 953, 55 C. C. A. 439.

But whatever doubt may have existed at one time, Southern Pacific Company v. Jensen, 244 U. S. 205, 216, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, has removed. See, also, The Samuel Marhall, 54 Fed. 396, 402, 4 C. C. A. 385. The death cases relied on by counsel for libelant do not sustain the contention that a state can make them a lien on foreign vessels for torts not maritime. The leading cases on this subject are The Hamilton, 207 U. S. 389, 28 Sup. Ct. 133, 52 L. Ed. 264, and La Bourgogne, 210 U. S. 95, 138, 28 Sup. Ct. 664, 52 L. Ed. 973. In La Bourgogne, it was held:

"It was settled in The Harrisburg, 119 U. S. 199 [7 Sup. Ct. 140, 30 L. Ed. 358] that no damages can be recovered in admiralty for the death of a human being on the high seas, or on the waters navigable from the seas, caused by negligence, in the absence of an act of Congress, or a statute of a state, giving the right of action therefor. As said in Butler v. Boston Steamship Co., 130 U. S. 555 [9 Sup. Ct. 612, 32 L. Ed. 1017], the maritime law of this country, at least, gives no such right. But in The Hamilton, 207 U. S. 398 [28 Sup. Ct. 133, 52 L. Ed. 264] it was also settled that where the law of the state to which a vessel belonged—in other words, the law of the domicil or flag—gives a right of action for wrongful death if such death occurred on the high seas on board of the vessel, the right of action given by the law of the domicil or flag will be enforced in an admiralty court of the United States as a claim against the fund arising in a proceeding to limit liability. As La Bourgogne was a French vessel, the question is, therefore, did the law of France give a right of action for wrongful death caused by the collision in question?"

This case does not sustain appellee's contention as the tort was maritime, committed on the high seas.

The cases sustaining the half pilotage laws are based on the ground, as expressed by the Supreme Court in Cooley v. Board of Wardens, 53 U. S. (12 How.) 299, 316, 13 L. Ed. 996, and Ex parte McNiel, 80 U. S. (13 Wall.) 236, 241, 20 L. Ed. 624, that such state laws existed ever since the adoption of the Constitution, and that Congress had recognized them by various acts, referring to the acts of August 7, 1789 (1 Stat. 54, c. 9 [Comp. St. 1916, § 7981]), of March 2, 1837 (5 Stat. 153, c. 22 [Comp. St. 1916, § 7982]), of July 13, 1866 (14 Stat. 93, c. 177 [Comp. St. 1916, § 7983]), and of February 25, 1867 (14 Stat. 412, c. 83).

To sustain a state statute giving a lien on a vessel, the cause of the action must be maritime in nature, and a breach of an executory contract for the charter of a vessel is not maritime in nature, and therefore cannot be enforced in a proceeding in rem in an admiralty court, but the party injured must seek redress by a common-law action.

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We are of the opinion that the learned District Judge erred in overruling the claimant's exceptions to the libel and therefore the decree is reversed.

SMITH, Circuit Judge (concurring). Owing to the fact that it is not wholly clear to me that the reasons assigned in the foregoing opinion are sound, but being thoroughly satisfied from the whole record that the libelant is not entitled to recover, I simply concur in the result.

DR. J. H. McLEAN MEDICINE CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5097.

1. CRIMINAL LAW ⊜970(7)—MOTION IN ARREST—INFORMATION.
An information charging defendant made an interstate shipment of drugs misbranded in violation of Food and Drugs Act June 30. 1906, § 8, as amended by Act Aug. 23, 1912 (Comp. St. 1916, § 8724), which alleged false statements were applied by defendant to the article knowingly and in wanton disregard of their falsity, *held* sufficient as against motion in arrest, in view of Rev. St. 1025 (Comp. St. 1916, § 1691).

2. INDICTMENT AND INFORMATION ⊜59—SUFFICIENCY.
In view of Rev. St. § 1025 (Comp. St. 1916, § 1691), the allegations of an information need only fairly inform defendant of crime intended to be alleged, and to make available a plea of former acquittal or conviction, if a second prosecution were instituted for the same offense.

3. DRUGGISTS ⊜12—MISBRANDING—OFFENSES.
In a prosecution under Food and Drugs Act, § 8, as amended (Comp. St. 1916, § 8724), for misbranding an interstate shipment of drugs, an actual intent to deceive, which may be inferred from the circumstances is essential to conviction, so an instruction that one who makes a statement, not knowing whether it is false, is as guilty as one knowingly making a false statement was erroneous.

4. CRIMINAL LAW ⊜823(1)—INSTRUCTIONS—CURE OF ERRORS.
Though a portion of the charge stated the correct rule, error in another portion was not cured, where the jury were left free to follow the erroneous charge, and there was no attempt to correct it.

5. CRIMINAL LAW ⊜829(1)—TRIAL—INSTRUCTIONS.
The refusal of a requested instruction was not error, where it was substantially covered by the charge given.

6. CRIMINAL LAW ⊜476—EVIDENCE—OPINIONS—EFFECT OF DRUGS.
In a prosecution under Food and Drugs Act, § 8, as amended (Comp. St. 1916, § 8724), for misbranding an interstate shipment of drugs, where physicians testified the drugs were not effective for treatment of disease as asserted by the labels, etc., testimony that there was no difference of medical opinion on the matter was competent, though the individual opinions of such physicians were incompetent.

7. CRIMINAL LAW ⊜442—EVIDENCE—DOCUMENTS.
In a prosecution under Food and Drugs Act, § 8, as amended (Comp. St. 1916, § 8724), for misbranding an interstate shipment of drugs, testimonials, etc., are admissible on the question of defendant's good faith, without proof of their execution, etc., where the officer in charge of defendant's business testified he relied thereon, but not where no such reliance was asserted.

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8. DRUGGISTS ⇐12—MISBRANDING—EVIDENCE.
In a prosecution under Food and Drugs Act, § 8, as amended (Comp. St. 1916, § 8724), for misbranding an interstate shipment of drugs, evidence *held* sufficient to carry to the jury the charge that statements in the labels, etc., were made in reckless disregard of their truth or falsity.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

The Dr. J. H. McLean Medicine Company was convicted of a violation of Food and Drugs Act June 30, 1906, § 8, as amended by Act Aug. 23, 1912, and it brings error. Reversed, and new trial awarded.

Chester H. Krum, of St. Louis, Mo., for plaintiff in error.

W. H. Woodward, Asst. U. S. Atty., of St. Louis, Mo. (Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. The plaintiff in error, hereafter called the defendant, was convicted of a violation of the Food and Drugs Act of June 30, 1906 (34 Stat. 768, c. 3915, § 8), as amended by the act of August 23, 1912 (chapter 352, 37 Stat. 416 [Comp. St. 1916, § 8724]), under an information charging an interstate shipment of drugs that were misbranded. The information charged that defendant had shipped an article called "Dr. J. H. McLean's Liver and Kidney Balm," and the misbranding charged was with reference to a number of statements made on the label on the bottle, on the carton in which the bottle was contained, and in circulars inclosed with the bottles regarding the curative or therapeutic effects of the medicine, which statements were alleged to be false and fraudulent.

[1, 2] The first assignment of error argued challenges the overruling of a motion in arrest of judgment. The defendant claims that the information states no offense under the statute, because it is not charged that the statements made were known by the defendant to be false and fraudulent. The information alleged that these statements were applied by the defendant to the article knowingly and in reckless and wanton disregard to their truth or falsity. This was a sufficient description, as against a motion in arrest of judgment, of an intent to deceive which made such statements fraudulent. The allegations of the information need only be so specific as fairly to inform the defendant of the crime intended to be alleged, and to make available a plea of former acquittal or conviction, if a second prosecution were instituted for the same offense. Rev. St. § 1025 (Comp. St. 1916, § 1691); Simpson v. United States, 241 Fed. 841, 154 C. C. A. 543; Dosset v. United States, 248 Fed. 902, — C. C. A. —.

[3, 4] In the instructions to the jury on the question of the fraudulent character of the statements made by defendant the court inadvertently said that—

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"One who makes a false statement, not knowing whether it is true or false, is as guilty of wrong as the man who makes a false statement knowing it is false."

An exception was saved to this instruction. This portion of the charge was erroneous, as it permitted the jury to find that the false statements were fraudulent, although the defendant honestly believed them to be true. In cases of this character there must be proof of an actual intent to deceive, an intent that may be inferred from facts and circumstances, but which must be proved. Seven Cases v. United States, 239 U. S. 510, 36 Sup. Ct. 190, 60 L. Ed. 411, L. R. A. 1916D, 164; Eleven Gross Packages, etc., v. United States, 233 Fed. 71, 147 C. C. A. 141; Samuels v. United States, 232 Fed. 536, 146 C. C. A. 494. Other portions of the charge correctly stated the rule as to the good faith of the defendant, but did not purport to correct the portion of the charge we have quoted, and did not cure the error, for the jury were at liberty to follow the erroneous portion of the instructions. Mills v. United States, 164 U. S. 644, 17 Sup. Ct. 210, 41 L. Ed. 584.

[5] Complaint is made of the refusal of an instruction tendered by defendant to the effect that evidence of the good reputation of the defendant might be considered on the question of its guilt, and might alone be sufficient to raise a reasonable doubt of such guilt. The court gave an instruction that this evidence might be taken into consideration with the other testimony. This was the practical equivalent of the instruction requested, and was sufficient. Sandy White v. United States, 164 U. S. 100, 17 Sup. Ct. 38, 41 L. Ed. 365.

[6] As a part of the government's case some well-qualified physicians were called as witnesses, and asked if a drug composed according to the formula used by defendant in preparing this article would, in their opinions, be effective for the treatment of the diseases for which the defendant's labels and statements claimed it was effective treatment, and, after answering that it would not be effective, they testified that there was no difference of opinion among medical men on that subject. Objections were made to this testimony, and it is urged that it calls for the opinion of the witnesses, for a conclusion that only the jury could properly make, and that no conviction could be based on such matters of opinion. The testimony that there was a general agreement of medical opinion as to the therapeutic effect of such a preparation, and what that general medical opinion was, was properly admitted to show the falsity of the statements made by defendant. Seven Cases v. United States, supra; Eleven Gross Packages, etc., v. United States, supra; Simpson v. United States, supra; Samuels v. United States, supra; Moses v. United States, 221 Fed. 863, 137 C. C. A. 433. The testimony of the physicians as to their individual opinions of the efficacy of the preparation would have been properly rejected, if there had been disclosed a difference of medical opinion on the subject, as a conviction could not properly rest upon a claim of fraudulent statements, when they were based upon mere matters of opinion on such debatable subjects. School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90; Bruce v. United States, 202 Fed. 98, 120 C. C. A. 370. But a mere concurrence

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of such witnesses' opinions with the uniform course of medical opinion was not open to that objection.

[7] To combat the theory of the prosecution that the statements of the defendant as to the therapeutic efficacy of its medicine for certain diseases were not founded in honest belief, the defendant offered in evidence a number of testimonials it had received. The defendant's president testified that he was the manager of its business, and had found some of these testimonials in the company's safe when he had taken charge in 1911, and that others came to the company since that time. The government's counsel objected to the offer, because the testimonials had not been shown to be genuine, and because the writers were not shown to have been qualified to state the nature of the disease from which they suffered. The court excluded them, as not competent nor material. The defendant claims they were admissible to show the good faith of the defendant in preparing its challenged statements. If these letters had related to the statements made, and had been seen by the defendant's manager, and he believed them to be genuine, and in that belief he had put forth the statements in issue, they would have been admissible on the question of intent, without proof of their execution, or of the truth of their subject-matter. Harrison v. United States, 200 Fed. 662, 119 C. C. A. 78; 4 Chamb. on Evidence, § 2649. As none of the testimonials are contained in the bill of exceptions, we cannot say that they were pertinent to the particular statements of defendant in issue, and they were not material in any event on this record, because the witness did not testify that he relied upon them. The only question answered by him as to his faith in the medicine was asked "on the basis of those letters or any other information you had." There is no error shown in the exclusion of this line of evidence.

[8] One other assignment of error relied upon, that the court erred in refusing to direct a verdict for defendant because there was no evidence of a fraudulent statement, requires a brief statement of the charge in the information and of the evidence in its support. The information after alleging a misbranding of defendant's medicine by reason of false statements made in reckless and wanton disregard of their truth or falsity, set forth the statements made relating to the curative or therapeutic effects of the medicine for a very large number of diseases. One of the statements will suffice as an illustration, as follows:

"Gall Stones—Dr. J. H. McLean's Liver and Kidney Balm will aid in dissolving the gall stones, so that they may pass away."

The defendant admitted the making of this statement. Competent medical men testified that no known medicine would aid in dissolving gall stones in the human body, and that there was no difference in medical opinion on that subject. There was no evidence to the contrary. The president of the company, who had had the management and conduct of the business since 1911, and had dictated its policy in every way, testified that he did not know and had never attempted to learn the therapeutic action of any of the ingredients of defendant's medicine, and that he was neither a druggist nor a doctor. As heretofore indicated, he based his belief in the general efficacy of the medicine on some source which was not definitely disclosed. The defense

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offered evidence to show that the Secretary of Agriculture, a year and a half before that shipment, had notified the defendant that the label on the bottle containing this medicine appeared to be misbranded with reference to the statement about gall stones and about other diseases, because the medicine contained no ingredient capable of producing the therapeutic effects claimed for it. This was sufficient evidence to require the court to submit to the jury the charge made in the information of a reckless disregard of the truth or falsity of the statements. Eleven Gross Packages v. United States, supra; Samuels v. United States, supra; Moses v. United States, supra.

Because of the error in the instructions of the court, the judgment is reversed and a new trial awarded.

HOOK, Circuit Judge (concurring). I think there was also error in excluding the so-called testimonials. It is said they are not in the record, but for the purpose of the point here the name applied to them at the trial discloses their character as clearly as if they were set out in full, and that is sufficient. A testimonial is "a writing or certificate in favor of the value of a thing." As testimonials they were excluded; whereas, if they were relied on wholly or in part, of which there was some testimony, they bore upon the defense of honest belief in the advertised efficacy of the medicine—not very strongly perhaps, but that was for the jury.

Neither of the reasons in support of the ruling below was offered there or here.

BUCHANAN v. ST. LOUIS & M. R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5084.

1. RAILROADS ⟸72(7)—CONVEYANCE OF LAND—CONSTRUCTION—REVERSION.
   A condition in a deed to a railroad company that, if the railroad be not built, etc., the lands should revert to the grantors, etc., *held* a condition subsequent, under which title passed to the company, subject to a right of forfeiture that might be asserted in case of breach of condition.

2. TAXATION ⟸679(4)—SALE OF LAND—TITLE OF STATE—SALE TO RAILROAD COMPANY—REMISSION OF TAX.
   Where the former owner of Arkansas lands sold to the state for taxes granted them to a railroad company in July, 1873, by deeds containing conditions subsequent providing for forfeiture in case the railroad should not be built, *held* that, under the Arkansas acts of April 8, 1869 (Acts 1868–69, p. 130), of March 27, 1871 (Acts 1871, p. 199), and of April 21, 1873 (Acts 1873, p. 172), the state's title to the land did not pass to the railroad company, and so no title reverted to the grantor because of breach of the condition.

3. TAXATION ⟸679(4)—SALE TO STATE—TITLE—GRANT TO RAILROAD COMPANY.
   Where lands sold to the state for taxes were granted by the former owner to a railroad company, *held* that, under the Arkansas acts of April 8, 1869 (Acts 1868–69, p. 130), and April 27, 1873 (Acts 1873, p. 172), no title passed to the railroad company which could revert to the former

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owner for breach of condition subsequent; the acts providing merely for remission of taxes, leaving the title where it was, and there being no showing that the state released the lands.

4. QUIETING TITLE ⟸10(1)—RELIEF.
In order to have title quieted, one must have some title, and the suit cannot be based on the weakness of his adversary's title.

5. QUIETING TITLE ⟸10(2)—SUITS—TITLE OF COMMON GRANTOR.
Where both parties to a suit to quiet title claim from a common grantor, neither can question that title.

Appeal from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Suit by R. E. Buchanan, trustee, against the St. Louis & Memphis Railroad Company and others. A motion to dismiss the bill was sustained, and plaintiff appeals. Affirmed.

W. G. Cavett, of Memphis, Tenn. (R. T. Simpson, of Florence, Ala., and Manning & Emerson, of Little Rock, Ark., on the brief), for appellant.

George H. Williams, of St. Louis, Mo., Allen Hughes, of Memphis, Tenn., and W. H. Woodward, of St. Louis, Mo. (R. B. Campbell, of Helena, Ark., W. M. Allen, of Springfield, Ill., J. D. Block, of Paragould, Ark., Charles T. Coleman, of Little Rock, Ark., S. W. Ogan, of Wynne, Ark., and C. L. Marsilliot, of Memphis, Tenn., on the brief), for appellees.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. By this suit the plaintiff sought to quiet his title to about 40,000 acres of land in Arkansas. A motion to dismiss the bill was sustained, and plaintiff below appeals. The question involved is whether the bill states a cause of action. There are two separate tracts of land involved, and the decision as to them depends on somewhat different facts.

One tract of land, which Thomas H. McCray assumed to convey to the St. Louis & Memphis Railroad Company, will be referred to as the McCray land, and the other tract, which Isaac Saffron assumed to convey to the railroad company, will be referred to as the Saffron land.

In his bill plaintiff sets forth a chain of title to these lands. He alleges a conveyance of the McCray lands from the United States to the state of Arkansas, and conveyances from the state to various persons other than McCray. He then alleges the assessment of taxes for some of the years between 1865 to 1871, inclusive, against these lands, delinquency in payment of the taxes, a sale of the land for the taxes, and that the lands were bid in and purchased by the state of Arkansas, and that the title to these lands prior to and in 1872 was in the state of Arkansas. It is also averrred that McCray, prior to July 15, 1873, claimed, subscribed, and donated these lands to the railroad company, and it is then stated that McCray executed a deed for these lands to the railroad company, which was dated July 12, 1873, and filed for record on July 15, 1873. This deed recited a consideration of $2 per acre, one-fourth to be paid in first mortgage bonds, and the balance in capi-

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tal stock of the railroad company, and in consideration of the building and completion of the railroad in 3 years. Further provisions in the deed read as follows:

"Provided, said railroad shall be built and completed within three years after date hereof."

"That, if the said railroad be not built and completed within three years from date hereof, said lands shall revert to us, our heirs, administrators, and assigns, and this deed to be void."

And in the habendum clause appeared this provision:

"To have and to hold the same unto the said St. Louis & Memphis Railroad Company, and unto their assigns forever, with all the appurtenances thereunto belonging: Provided, said railroad shall be built and completed within three years after date hereof. And we hereby covenant with the said St. Louis & Memphis Railroad Company that we will forever warrant and defend the title to said lands against all claims whatsoever, subject only to the condition that if the said railroad be not built and completed within three years from date hereof, said lands shall revert to us, our heirs, administrators, and assigns, and this deed to be void."

[1, 2] It is alleged that the railroad company did not build and complete the railroad within 3 years nor since. Plaintiff alleges that in 1910, 37 years after McCray's deed to the railroad company, the heirs of McCray executed deeds to grantees through whom plaintiff now claims title, and it is claimed that the lands have been unoccupied up to the time of filing this suit. Plaintiff claims that title is shown in him, as to the McCray lands, by these allegations because a forfeiture was declared of the condition subsequent contained in McCray's deed to the railroad company and he is therefore entitled, not only to the title that McCray conveyed and of which plaintiff claimed a reversion, but also to an independent title which he says the railroad company acquired after it received that deed, and which also reverts to the plaintiff because of the McCray deed.

Taking up these claims of reversion separately, it was held by this court in Rannels v. Rowe, 145 Fed. 296, 74 C. C. A. 376, and in Bryan v. Bliss-Cook Oak Co., 178 Fed. 217, 101 C. C. A. 577, under deeds essentially similar that the conditions recited in the deeds were conditions subsequent, and that title passed to the grantee subject to a right of forfeiture that might be asserted in case of a breach of condition, such as a failure to build and complete the railroad in the time limited. McCray, however, is shown by plaintiff's bill to have been a stranger to the title at the time he conveyed, and, as he conveyed no interest in the lands, none could revert to his heirs, unless, as plaintiff claims, his grantee acquired a new title, and this reverted to McCray's heirs. This claim of title depends on the construction of certain statutes of Arkansas.

By an act of the Legislature approved April 8, 1869 (Acts Ark. 1868–69, p. 130), it was provided:

"That whenever any person having title to, or being the owner of, any lands which have been or may be stricken off to the state, or forfeited for nonpayment of taxes, shall donate or subscribe the same in aid of the construction of any railroad, and the same shall be reported to the auditor of public accounts, as provided in section two hereof, the auditor shall grant his certificate, as in case of redemption, and thereupon all taxes and claims of the state

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on account of nonpayment of taxes, on each tract of land so subscribed or donated, shall be remitted and discharged: Provided, that a lien shall exist in favor of the state for the taxes hereby remitted, which may be enforced, and said taxes collected according to law, if such railroad shall not be completed through the county in which, or nearest to which, such lands are selected, within five years from the date of such subscription or donation."

The railroad company was required to furnish annually to the auditor a list of lands acquired by grant, donation, or subscription, and these lands were not to be listed nor subject to taxation until conveyed to actual purchasers by the railroad company.

In 1871 by an act approved March 27, 1871 (Acts Ark. 1871, p. 199), it was made the duty of the president and secretary of any railroad company having lands subscribed and donated to it to certify under oath to the auditor that these lands were subscribed to the companies in good faith, and that there was no arrangement or understanding that the subscribers should have the right to withdraw such lands at any time or for any purpose. Deeds to all lands then subscribed that were to be certified to the auditor were required to be filed for record with the proper county officer by July 1, 1871, and the auditor was then to classify as subject to taxation laws the lands as to which no such additional certificate had been made. By a further act of the Legislature approved April 21, 1873 (Acts Ark. 1873, p. 172), it was recited that gross frauds were being perpetrated on the revenues of the state by the failure of railroad companies to comply with the laws relating to lands subscribed to them and in their exemption from taxation, and it was made the duty of the county clerks to examine the records of deeds by June 1, 1873, and to make out therefrom a list of lands that had been subscribed or donated to any railroad company by deed filed for record on or before July 1, 1871, as required by the act of 1871, and to forward such certified list to the auditor by June 1, 1873. Sections 2 and 3 of the act are as follows:

"Sec. 2. On or before the 1st day of June, 1873, the auditor of the state shall make out a correct list of all the lands and town lots claimed to be exempt from taxation by the various railroad companies, making a separate list for each company; and he shall, on or before the 10th day of June, 1873, or as soon thereafter as such lists shall have been received from the county clerks, proceed to compare the list made out by himself with the list forwarded to his office by the county clerks in accordance with the provisions of this act, and shall forthwith classify all such lands and lots, and all such lands and lots as shall be claimed by any railroad company as exempt from taxation by reason of having been donated or subscribed to such railroad company, and for which it shall be found no deed has been filed for record with the proper officer of the county in which such lands are situated, as is required by section 2 of an act entitled 'An act to protect the state revenue,' approved March 27, 1871, shall be made subject to the revenue laws; and such lands and lots as appear to have been forfeited to the state for nonpayment of tax shall be so classed and shall be sold or otherwise disposed of as is or may be provided by law for the disposal of forfeited lands; and any deed of quitclaim or release by which the claim of the state to such lands or lots, for taxes due thereon, may have been relinquished in favor of any railroad company, shall be cancelled and annulled; and the auditor of the state shall so declare, and shall notify any railroad company claiming such land of his action in the premises; and such lands and lots as do not appear to have been forfeited shall be listed for taxation as other lands are listed; and the auditor of state shall notify the clerk of the county in which such lands and lots

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are situated, and he shall place such lands and lots on the tax books of the county, and shall charge the same with all the taxes due thereon; and the collector of said county shall, at the next annual collection of taxes thereafter, collect all taxes due on said lands and lots, but no penalty shall be added for the nonpayment of any taxes up to date of such collection.

"Sec. 3. If any person or persons owning or claiming to own any of the lands or lots mentioned in the preceding section of this act, shall donate or subscribe the same as stock to any railroad company chartered or organized according [to] the laws of this state, and shall subscribe or donate them by deed to such railroad company, and shall file such deed for record with the proper officer of the county in which such lands are situated on or before the 15th day of July, 1873, then the state shall release all the claim which it may have to said lands or lots on account of taxes, as is now provided by law in such cases; and the laws of this state in relation to lands subscribed or donated to railroad companies shall be in force as to such lands; and all such lands or lots as may be classed as forfeited lands or lots, and which any person or persons owning or claiming to own them shall elect to redeem them instead of donating or subscribing them to any railroad company, such lands or lots may be redeemed as is now or may be provided by law for the redemption of forfeited lands on or before the said 15th day of July, A. D. 1873, after which time if not then redeemed or conveyed to any railroad company they shall be sold by the auditor at the next regular sale of forfeited lands thereafter, or otherwise disposed of according to law. And the county clerks of the several counties in this state shall, on the said 15th day of July, 1873, make out and forward to the auditor of the state a correct list of such lands and lots as may appear from deeds then on file in the proper office for record to have been subscribed or donated to any railroad company."

The plaintiff claims that under the provisions of section 3, McCray, although he had no title to these lands, could claim to own them, and did so claim, and that he donated and subscribed them to the railroad company by his deed filed on July 15, 1873, and thereupon the state granted to the grantee named in McCray's deed its title which it had theretofore acquired by reason of the purchase for taxes, and that this title reverted to McCray's heirs when a forfeiture of the estate conveyed by McCray to the railroad company was declared for breach of the condition subsequent, and therefore he is now vested with sufficient title to maintain this suit.

It is urged by appellees that the Legislature of Arkansas, under the restrictions of the state Constitution, had no power either to convey lands that the state had purchased for taxes or to remit or release such taxes, except upon full payment of the amount due. We do not find it necessary to decide this question, for, if this legislation did not purport to convey title to the lands to the railroad company, the plaintiff cannot have acquired any title by claim of a reversion of estate.

Did the acts of the Legislature grant the state's title to the railroad company? The privileges granted by section 3 of the act of 1873 are limited to lands mentioned in section 2 of the act. The lands mentioned in section 2 are those listed by county clerks on or before June 1, 1873, from their records of deeds filed on or before July 1, 1871, and the lands listed by the auditor on or before June 1, 1873, as claimed to be exempt by the railroad companies. The purpose of the act was to limit the list of exempted lands to those in these two classes, but a provision was made that if land appeared on the auditor's list, and no deed thereto had been filed by July 1, 1871, it could still have the benefits of the act, if the owner or claimant donated or subscribed it to a

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railroad company and filed the deed for record by July 15, 1873. It was not intended that the door should be opened, so that any lands could be subscribed or donated to railroads, and thus be exempted from taxation; but the purpose was to leave the door ajar for such lands as the auditor had listed on or before June 1, 1873, even though the deeds thereto had not been filed by July 1, 1871, and to close it to all others. The plaintiff does not allege that the McCray lands were so listed by either the county clerk or by the auditor and as the deed by McCray was not made until July 12, 1873, neither the county clerk nor the auditor was authorized to enter it upon their list and the railroad companies were not authorized to make the verified statement required by section 2 that the McCray land was claimed as exempt on or before June 1, 1873, because it had not been conveyed and the presumption is that the officers all observed the requirements of the statutes, and hence it does not appear that these lands were subject to the act of 1873.

[3, 4] There is another reason why this act did not confer any title in the railroad company. The terms of this act provide that the state shall release all the claim it may have to the lands on account of taxes "as is now provided by law in such cases." The law thus referred to is found in the act of 1869 heretofore quoted, and provides merely for the remission or discharge of the taxes to be evidenced by the auditor's certificate "as in case of redemption" and thus left the title where it happened to rest before the issuance of such certificate.

There is no allegation that the state of Arkansas ever executed a release or conveyance of these lands to plaintiff or his predecessor in title. It therefore appears that the plaintiff has no title, if a forfeiture were properly declared, except such title as McCray had when he made his deed to the railroad company, and as he had none the plaintiff acquired none. He does not allege that he has possession of the land. In order that one may have his title quieted to lands he must have some title. Under the liberal modern statutes broadening the remedy one cannot "have a cloud removed from a title which has no existence." The suit cannot be based alone upon the weakness of an adversary title. Dick v. Foraker, 155 U. S. 404, 415, 15 Sup. Ct. 124, 39 L. Ed. 201; Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010; Stark v. Starr, 6 Wall. 402, 18 L. Ed. 925; Guarantee Trust & Safe Deposit Co. v. Delta & Pine Land Co., 104 Fed. 5, 43 C. C. A. 396; Ripinsky v. Hinchman, 181 Fed. 786, 105 C. C. A. 462; Mason v. Gates, 82 Ark. 294, 102 S. W. 190; Chapman & Dewey Land Co. v. Bigelow, 77 Ark. 338, 92 S. W. 534; Reynolds v. Snyder, 121 Ark. 33, 180 S. W. 752, 183 S. W. 979; Greer v. Vaughan, 128 Ark. 331, 194 S. W. 232; 32 Cyc. 1329, 1330.

[5] An exception to this rule exists where suit is brought to quiet title and both parties claim title alone from a common source. In that case neither party can question the title of the common grantor. Bull v. Campbell, 225 Fed. 923, 141 C. C. A. 47; Wood v. Freeman-Smith Lumber Co., 109 Ark. 499, 160 S. W. 396; 2 Gr. on Ev. § 307; English v. Otis, 125 Iowa, 555, 101 N. W. 293; Howard v. Twibell, 179 Ind.

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67, 100 N. E. 372, Ann. Cas. 1915C, 93; Phillips v. Menotti, 167 Cal. 328, 139 Pac. 796; People's Bank v. West, 67 Miss. 729, 7 South. 513, 8 L. R. A. 727.

This suit is not within the exception because the plaintiff shows that the state of Arkansas was the owner of these lands when McCray made his deed to the railroad company, and that the defendants claim the lands through tax sale proceedings by the state and through deeds from other persons than McCray or his successors in interest.

The plaintiff's claim to the Saffron land rests upon a chain of conveyances from the United States to the state of Arkansas, by the state to Jones, by Jones to Ford, and by Ford to Saffron. The deed to Saffron is dated January 1, 1873. He alleges a deed from Saffron to the railroad company dated July 11, 1873, and filed for record on July 14, 1873. A deed from Saffron to plaintiff's predecessors in title was made November 22, 1910. The deed from Saffron to the railroad company contained the same conditions that were contained in the McCray deed. The plaintiff makes the same allegations as to the Saffron land that have been referred to as made with reference to the McCray land, to the effect that the lands had been sold for taxes and purchased by the state and that title was in the state of Arkansas in 1872. The claim of title to these lands is based upon the same contention that has been stated with reference to the McCray lands, that by reason of a donation and subscription of them by Saffron to the railroad company the state then granted its title to the railroad company, and plaintiff is entitled to the reversion of this title for condition broken in the Saffron deed. Our decision that no title passed from the state to the railroad company as to the McCray lands also determines that no title passed from the state to the railroad company as to the Saffron lands and for the same reasons. As it is further shown that Saffron had lost his title in 1872 to the state of Arkansas, his deed to the railroad company in 1873 conveyed nothing and the claim of a reversion for condition broken, if sustained, can restore no title to plaintiff, and he has no standing to ask to have his title quieted.

The defendants who claim the Saffron lands are also shown to be claimants under the tax sale proceedings of the state, and under deeds which are not derived from Saffron's claim of title, and hence they do not claim from a common source with the plaintiff.

The conclusions announced dispose of the case, and render unnecessary the discussion of other questions argued.

The decree will be affirmed.

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CHICAGO, R. I. & P. RY. CO. v. LAWTON REFINING CO.*

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5080.

1. CARRIERS ⇐=45—DUTY TO FURNISH CARS—JURISDICTION OF COURTS.
The courts have jurisdiction over a suit by a shipper to compel a railroad company to furnish cars, as a shipper has a remedy by action for a carrier's refusal to accept proper shipments or supply reasonably adequate facilities.

2. CARRIERS ⇐=39—CARRIAGE OF GOODS—DUTY OF CARRIER.
There is a general duty on common carriers to receive, and carry by suitable means, goods which they assume to transport, or which are usually carried.

3. CARRIERS ⇐=40—CARRIAGE OF GOODS—DUTY OF CARRIER.
The obligation to carry goods safely often requires that special kinds of cars be supplied for the transportation of goods, which the carrier has accepted or holds itself out to carry.

4. CARRIERS ⇐=40—CARRIAGE OF GOODS—DUTY OF CARRIER.
Where articles of an extraordinary character are offered, a carrier is not bound to accept them, or provide facilities of a different kind from those usually furnished for transportation; hence a railroad company was not required to furnish tank cars to carry the oils of a refinery.

5. CARRIERS ⇐=40—CARRIAGE OF GOODS—DUTY OF CARRIER.
Where the tariffs of a railroad company, which owned no tank cars, did not purport that the tank cars would be furnished, *held*, the railroad company having leased tank cars some of which it allowed a refinery to use, might withdraw the use of the cars from the refinery when they were needed to carry water to supply its engines and roundhouses, etc.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit by the Lawton Refining Company against the Chicago, Rock Island & Pacific Railway Company. From an order granting a temporary injunction, defendant appeals. Order reversed and set aside, with directions.

C. O. Blake, of El Reno, Okl. (R. J. Roberts, W. H. Moore, and J. E. Du Mars, all of El Reno, Okl., on the brief), for appellant.

B. M. Parmenter, of Lawton, Okl., for appellee.

Before SANBORN and CARLAND, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. This is an appeal from an order granting a temporary injunction. The plaintiff below was a corporation doing business at Lawton, Okl., as a refiner of crude petroleum oils. The defendant was a railway company doing business in Oklahoma, and having connection with plaintiff's refinery by means of a switch track. The parties will be referred to as the refining company and the railway company. The order of the court enjoined the railway company from failing to furnish to the refining company five designated tank cars for the transportation in Oklahoma of its products of gasoline, kerosene, and fuel oil. The facts are undisputed.

The refining company has been engaged in business since 1916. It

⇐=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied January 20, 1919.

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receives crude oil from stations in Oklahoma, and ships its refined products extensively to Oklahoma consumers. It has 25 tank cars of its own. The railway company owns no tank cars, but has leased some from private owners; but it has not supplied tank cars to patrons, except that the five cars in controversy had been furnished to the refining company for three months before this suit was begun. This was in pursuance of some arrangement between the companies; but counsel for the refining company denied that the injunction was asked in enforcement of any agreement.

The railway company is a member of the American Railway Association, and by its rules, as well as by common usage, cars are interchanged between railroads in the United States, and cars are distributed ratably to patrons needing them. The railway company would need a large number of tank cars in order to supply the demand of its patrons, if it undertook to furnish such cars, as very few railway companies furnish tank cars to shippers, and, under the usage of interchange of cars, many of the cars would be absent for long periods. The railway company publishes a tariff for the transportation of oil in tank cars. The five cars in controversy had been leased by the railway company from private owners, and for several years had been used by the railway company in carrying its fuel and water supply, and in transporting creosote oil for treatment of its ties and structural timbers.

At the time of this suit a prolonged drought in a portion of Oklahoma adjacent to the railway company's lines had caused a failure of its water supply at many stations, and it had become necessary to haul water over the railroad for use by its engines, its roundhouses, and other instrumentalities. It had no other tank cars available, except these cars, and no other means of securing water, and it intended to prepare them for that use, and had begun the alteration of one of the cars to fit it for such purpose, when the injunction was granted.

The questions involved in this appeal relate to the jurisdiction of the court over the subject-matter, and the sufficiency of the evidence to support the order.

It is to be observed that the injunction is limited to use of the cars in intrastate traffic, and that there was no evidence of the effect upon interstate commerce that would result from enforcement of the order. There was no evidence to show that any other shippers desired that the railway company should furnish them with such cars. Questions of dissemination are therefore not presented by this record, nor are there any questions arising under the acts of Congress regulating interstate commerce; but the case is to be determined by the laws in force in Oklahoma relating to intrastate shipments.

[1] A contention is made that the courts have no jurisdiction over questions relating to the duty of a carrier to furnish cars to a shipper, and that such an order should be made by an administrative body; but counsel do not advise us of any special tribunal having such powers. A similar contention was made in the case of U. S. et al. v. Pennsylvania Railroad Company, 242 U. S. 208, 37 Sup. Ct. 95, 61 L. Ed. 251, as to tank cars demanded for interstate shipments, and it was then held that, if any duty to furnish such cars exists, it is enforceable in the courts, not by the commission. For a carrier's refusal to accept prop-

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er shipments, or to supply reasonably adequate facilities of carriage, the shipper has a remedy by action. Louisville & Nashville Railroad Co. v. F. W. Cook Brewing Co., 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355; Danciger et al. v. Wells Fargo & Co. (C. C.) 154 Fed. 379; Pennsylvania Railroad Co. v. Puritan Coal Mining Co., 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867; Illinois Central Railroad Co. v. Mulberry Hill Coal Co., 238 U. S. 275, 35 Sup. Ct. 760, 59 L. Ed. 1306; Missouri Pacific Railway Co. v. Larabee Flour Mills Co., 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352; Chicago, Burlington & Quincy Railway Company v. Burlington, C. R. & N. Railway Co. et al. (C. C.) 34 Fed. 481; Butchers' & Drovers' Stock Yards Co. v. Louisville & N. R. Co., 67 Fed. 35, 14 C. C. A. 290; Moore on Carriers, p. 3.

[2] The remaining question is the right of the refining company to the use of these specific tank cars. There is a general duty of common carriers to receive and carry, by suitable means, goods which they assume to transport or which are usually carried. Covington Stockyards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73; Atlantic Coast Line Co. v. Geraty, 166 Fed. 10, 91 C. C. A. 602, 20 L. R. A. (N. S.) 310; Citizens' Bank v. Nantucket Steamboat Co., 2 Story 16, Fed. Cas. No. 2730; McManus v. Lancashire R. R. Co., 4 H. & N. 327; Elliott on Railroads, §§ 1465, 1466, 1474.

[3] The obligation to carry goods safely often requires that special kinds of cars be supplied for the transportation of goods which the carrier has accepted, or which it holds itself out to carry, such as refrigerator cars for perishable products, stock cars for cattle, and the like. Atlantic Coast Line Co. v. Geraty, supra; Johnson v. Toledo S. & M. Ry. Co., 133 Mich. 596, 95 N. W. 724, 103 Am. St. Rep. 464; New York, P. & N. R. Co. v. Cromwell, 98 Va. 227, 35 S. E. 444, 49 L. R. A. 462, 81 Am. St. Rep. 722; St. Louis, I. M. & S. Ry. Co. v. Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A. (N. S.) 317, 118 Am. St. Rep. 58; Di Giorgio I. & S. Co. v. Pennsylvania R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A. (N. S.) 108; Baker v. Boston & M. R. Co., 74 N. H. 100, 65 Atl. 386, 124 Am. St. Rep. 937, 12 Ann. Cas. 1072; People v. St. Louis, A. & T. H. R. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656; Forrester & Co. v. Southern Ry. Co., 147 N. C. 553, 61 S. E. 524, 18 L. R. A. (N. S.) 508, 15 Ann. Cas. 143; Loomis v. Lehigh Valley R. R. Co., 208 N. Y. 312, 101 N. E. 907; Hannibal R. R. Co. v. Swift, 12 Wall. 262, 20 L. Ed. 423; Hutchinson on Carriers (3d Ed.) §§ 505, 508; Elliott on Railroads, §§ 1474, 1475.

[4] Where articles of an extraordinary character are offered, a carrier is not bound to accept them or to provide facilities of a different kind from those usually furnished for transportation. For this reason a carrier may be excused from acceptance of explosives or of goods that are improperly packed. Nitro-Glycerine Case, 15 Wall. 524, 21 L. Ed. 206; Harp v. Choctaw, O. & G. R. Co., 125 Fed. 445, 61 C. C. A. 405; California Powder Works v. Atlantic & P. R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648; Union Express Co. v. Graham, 26 Ohio St. 595; Fitzgerald v. Adams Express Co., 24 Ind. 447, 87 Am. Dec. 341; Gulf, C. & S. F. Ry. Co. v. A. B. Frank Co. (Tex. Civ. App.) 48 S. W. 210.

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There are other limitations of the carrier's duty to accept goods, growing out of the usual course of business and the limitations of convenience. An express company that handles parcels is not bound to accept articles of great bulk, such as lumber and hay; nor are carriers bound to accept as baggage articles that, by reason of bulk or value transcend the carrier's customary limitations. Pfister v. C. P. R. R., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404; Elliott on Railroads, § 1466.

The ordinary freight cars of the railways, because of their dimensions, impose restrictions of length, width, and height to commodities that may be carried, and they are also unsuitable for the transportation of articles such as acids, oils and gases, which are not packed in containers. In the case of U. S. et al. v. Pennsylvania Railroad Co., 242 U. S. 208–231, 37 Sup. Ct. 95, 61 L. Ed. 251, the Supreme Court recognizes the fact that a tank car is not only a car but a package for the goods. If the producer of oil may demand of the carrier a specially constructed car suitable as a container of the article produced by him, no reason is perceived why the producers of the various forms of gases, liquids, and solids may not also require peculiar cars suitable for such unpacked products. In the case of In the Matter of Private Cars, 50 Interst. Com. Comn. R. 652, July 31, 1918, the Interstate Commerce Commission found that there are 59 varieties of liquids that are regularly transported in tank cars. It is there said:

"Cars used to transport the different liquids cannot be interchanged readily; that is to say, a tank car loaded with fuel oil with an asphalt base cannot be reloaded with refined oils, such as gasoline or kerosene, nor with edible oils, such as cottonseed or cocoanut, without thorough cleaning at an expense of from $5 to $35 per car. A car in which has been transported any of the petroleum oils cannot be used for molasses or other edible liquids, without thorough cleaning to remove every vestige of oil and odor. Some acids require peculiarly constructed cars. A car for tannic acid must be coated on the inside with acid-resisting material and all fittings must be of brass. Muriatic acid requires a wooden lined tank. Wine cars are mounted with a steel tank, lined on the inside with special enamel, surrounded on the outside with a wooden tank, with insulating material between it and the steel, to preserve the contents from deterioration during transportation; and casing head gasoline cars are insulated, so as to preserve a uniform temperature, and are fitted with special dome-head arrangements and safety appliances. A tank car for transportation of asphalt and other heavy oils requires heater coils, in order to liquefy the contents for unloading. Some tank cars are constructed with compartments, so that two or more grades of oil may be transported at a time. Special loading and unloading facilities are necessary for oil shipments. It is necessary to force some oils out of the cars by steam pressure, others by the use of pumps, and from still others the liquid flows out by gravity. * * *

"It is more economical and more efficient for the refiner to furnish a tank car, either owning it or leasing it from some concern, than for the railroad company to own it. A refiner, producing two kinds of oil, gasoline and residuum, requires two kinds of cars. Another refiner, producing all grades of oil, from the lighter oils down to coke, will require several kinds of cars. The cost of cleaning a car which has been used for fuel oil, in order to make it fit for handling gasoline, is very great. These and other reasons, which are given in detail and might be here repeated, if necessary, have led to the system of private ownership of tank cars throughout the country generally. * * *

"The refiner of oil or the meat packer could no more do business on an economical and efficient basis without his private cars than he could without

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his modern equipped refining or packing plant. The private car part of the business has grown with the rest. Doubtless in the beginning demands were made by these shippers that carriers should supply tank and meat cars; but it was quickly demonstrated that business could not be done in the most effective manner, were carriers to own or control cars of that kind. As a rule carriers have never furnished these cars, and it has come to be mutually understood that they should not do so. The oil refiner and meat packer demand an adequate supply of cars at all times. It is conceded by shippers that neither an adequate supply nor its efficient distribution can be afforded by carriers. The requirement has been that there shall be the most efficient use of tank and refrigerator cars, which has been one of the results of private ownership. While this has undoubtedly been of benefit to carriers, it has been of incalculable benefit to shippers as well."

It is also disclosed by the report of the Interstate Commission in that case that very few railroads in the United States furnish tank cars for the use of shippers (see, also, United States v. Penn. R. R. Co., 242 U. S. 208–231, 37 Sup. Ct. 95, 61 L. Ed. 251), and that railroad tariffs usually provide that the carriers assume no obligation to furnish tank cars. There is an economic waste in the use of tank cars, because such cars usually are returned empty from the places where their contents are discharged to the points of origin of shipment, and they are not adapted for general use. Under the rules of interchange of cars, a railway company may have a large supply of such cars, and yet have none of them immediately available on its own lines. To meet this difficulty a number in excess of the demands of shippers on its own lines must be provided. We think the rule is a reasonable one, that if the shipper wishes to compel the carrier to accept his goods he must properly prepare and pack his product to suit the cars that the carrier assumes to supply, and which are ordinarily furnished by carriers for such products, and that it is not the usual practice of railway companies to furnish tank cars for shippers. Questions of the proper rates to be given to shippers of liquids, or of discrimination between shippers who furnish their own tank cars and shippers of similar articles in barrels or otherwise, are not involved here.

[5] There is another reason why the railway company was not bound to furnish for the use of the refining company the cars in question. The railway company had published a tariff which announced its readiness to transport oil in tank cars, but this tariff did not purport to furnish the cars for this purpose. It had not held itself out as ready to furnish tank cars for shippers. The five cars in controversy had been leased by it for its own use in operating its railway, and had been but temporarily furnished for the use of the refining company until it should again have need for them. When the prolonged drought endangered its water supply, it was the right of the railway company to withdraw the cars from the use of the refining company, in order to supply its engines and roundhouses with water. The railway company owed a duty to the public to keep its trains in operation, and this duty was superior to the demand of the refining company for these tank cars, in addition to those it owned and operated. L. & N. R. Co. v. Queen City Coal Co., 99 Ky. 217, 35 S. W. 626; Harp v. Choctaw, O. & G. R. Co., supra.

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The order of the District Court will be reversed and set aside, with directions to dissolve the restraining order and to deny the application for temporary injunction.

PUGET SOUND ELECTRIC RY. et al. v. BENSON.

(Circuit Court of Appeals, Ninth Circuit. October 28, 1918.)

No. 3147.

1. STATUTES ⟸196—CONSTRUCTION—CANONS.
   A limiting clause is to be restrained to the last antecedent, unless the subject-matter requires a different construction.
2. STATUTES ⟸200—CONSTRUCTION—COMMAS.
   The use of commas is not controlling, where the meaning is otherwise clear.
3. MUNICIPAL CORPORATIONS ⟸703(1)—TRAFFIC ORDINANCES—FIRE DEPARTMENT.
   An ordinance declaring that apparatus of the fire department, etc., ambulances, responding to emergency calls, etc., should have right of way in use of streets, gives fire apparatus returning from a fire the right of way.
4. EVIDENCE ⟸595—"INFERENCE"—WHAT FOR.
   An "inference" is a permissible deduction, which the jury is entitled to draw from the evidence, and which has no probative effect, other than the jury is pleased to attribute to it.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inference.]
5. EVIDENCE ⟸53—"PRESUMPTIONS OF LAW."
   "Presumptions of law" are artificial rules, which have legal effect, independent of any belief, and stand in the place of proof until the contrary is shown.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Presumption of Law.]
6. STREET RAILROADS ⟸91—SPEED ORDINANCE VIOLATION—EFFECT.
   The violation of an ordinance limiting the speed of street cars is negligence per se, and it is proper for the court to announce the presumption of negligence.
7. MUNICIPAL CORPORATIONS ⟸122(2)—SPEED ORDINANCE—REASONABLENESS—BURDEN OF PROOF.
   An ordinance regulating the speed of street cars is prima facie reasonable, and the burden is on those attacking to show its unreasonableness.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by Harvey K. Benson against the Puget Sound Electric Railway, a corporation, and others. There was judgment for plaintiff, and defendants bring error. Affirmed.

James B. Howe and Hugh A. Tait, both of Seattle, Wash., for plaintiffs in error.

Griffin & Griffin, of Seattle, Wash., for defendant in error.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

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WOLVERTON, District Judge. This action is one to recover damages for personal injuries alleged to have been sustained by Benson, the defendant in error (plaintiff below), who was at the time in the employ of the fire department of the city of Seattle. While driving a motor-propelled apparatus, known as a "water tower," belonging to the fire department, easterly along Connecticut street, an electric street car collided with it at the junction of First avenue, which runs at right angles with the above-named street, whereby the plaintiff received the injuries of which he complains. The water tower was at the time returning from, and not going to, a fire.

[1-3] The court was requested at the trial to instruct the jury that Ordinance No. 24597 of the city of Seattle was without application. The request was denied, and error is assigned. The ordinance provides:

"The following vehicles in the order named, shall have the right of way in the use of all streets and public places, viz., apparatus of the fire department, police patrol wagons, ambulances, responding to emergency calls, emergency repair wagons of the street railway companies, and U. S. mail wagons."

The question involved is one of construction. It is insisted that the words "responding to emergency calls" qualify the phrase "apparatus of the fire department," as well as "ambulances," and therefore that it is only when the apparatus of the fire department is responding to an emergency call that it is accorded the right of way under the ordinance.

The application of one of the simplest canons of statutory construction, namely, that "a limiting clause is to be restrained to the last antecedent, unless the subject-matter requires a different construction" (Cushing v. Worrick, 9 Gray [Mass.] 382, and Endlich on the Interpretation of Statutes, § 414), would seem to be decisive of the question. The last antecedent is "ambulances," and under this rule the qualifying clause refers thereto, and not to the antecedents preceding that. Nor does the subject-matter require a different construction. All alarms of fire are emergency calls, and police patrol wagons are brought into service whenever their use is thought to be convenient. So that the supposed qualifying words "responding to emergency calls" would seem to be redundant and useless as applying to these antecedents. They have a peculiar fitness, however, when applied to ambulances. When acting under emergency, it is essential that ambulances move swiftly, until the call has been attended to, without reference to the direction in which they are required to travel, whether to or from; hence the need of according them the right of way upon the streets until the emergency has been met. Otherwise, ambulances are to be afforded no greater privileges upon the streets than other vehicles. On the other hand, fire and police protection may depend as well upon prompt action in housing the fire apparatus and having patrol wagons convenient for any emergency, so that, whether the fire department or the police department is responding to one call or making ready to meet the exigencies of another, it is an act required for rendering prompt and proper fire or police protection, which is the essential purpose of the ordinance. Upon the whole, in

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view of the context and of the grammatical construction and the plain purpose of the ordinance, it is clear that the clause "responding to emergency calls" was intended to qualify none of the antecedents except "ambulances." See, further, City of Traverse City v. Blair Twp., 190 Mich. 313, 322, 323, 157 N. W. 81. The use of commas is not controlling where the meaning is otherwise clear.

Whatever may be the true construction to be accorded rule 20, it does not affect the present inquiry. We agree, therefore, with the construction which the trial court gave to this ordinance.

A far more interesting and difficult question is one relating to the court's instruction respecting negligence, as it affected the defendants in the operation of the street car which collided with the water tower.

There is an ordinance which declares that it shall be lawful to operate cars upon street railways within the city limits at a rate of speed up to, but not in excess of, 20 miles per hour. As to the bearing of the ordinance, the court instructed as follows:

"Now, so far as those ordinances are concerned, ordinances of that character are not only for the convenience of the traveling public, but in part for their safety, and where a person violates an ordinance of the city, that is designed to render safe or more safe the lives and limbs of the traveling public, the person who violates such an ordinance is guilty of negligence. This instruction applies to both plaintiff and defendant in this particular case. * * * You understand that, so far as violating one of these ordinances, this ordinance regulating the rate of speed in the city is concerned, by violating that ordinance the city in effect says that it is negligent to run faster than 20 miles an hour, so you would not concern yourselves whether you think an ordinarily careful and prudent person would run faster than that in the city or not."

In connection with the instructions, the court advised the jury further that it was incumbent upon the plaintiff to "establish by a fair preponderance of the evidence that such negligence of the defendant was the proximate cause of his injury." It was left to the jury to say whether the car was being operated in excess of 20 miles per hour.

Thus is presented for our inquiry the question whether the operation of the street car in excess of the ordinance limitation as to speed, where it contributed as the proximate cause of the injury, was negligence per se. This, of course, assumes that the plaintiff was not himself guilty of contributory negligence.

It seems to be the opinion of counsel for the plaintiffs in error that the Supreme and federal courts of the United States are committed to a rule that the violation of a city ordinance regulating the speed of vehicles is evidence of negligence only, and does not constitute negligence as a matter of law. The only case cited that appears directly to support the rule as thus broadly stated is Erie R. Co. v. Farrell, 147 Fed. 220, 77 C. C. A. 446. In that case the trial court instructed the jury in effect to find upon the issue of negligence for the plaintiff, because the evidence was uncontradicted that the train of the defendant was moving in excess of the speed permitted by the city ordinance. The trial court also refused to instruct, at the request of the defendant:

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"That the defendant's failure to comply with the ordinance did not in itself constitute conclusive proof of negligence, and that it was for the jury to say, in view of the situation and surroundings in that part of the city and all the circumstances, whether the failure to comply was negligence."

The Court of Appeals held this to be error, saying:

"The rule established by the weight of authority is that the violation of the ordinance is not conclusive evidence of negligence, but is to be submitted to the jury as a circumstance from which negligence may be inferred."

Referring to the case of Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, the trial court instructed that by reason of the railroad train moving in excess of the rate of speed forbidden by a city ordinance the law authorized the jury to infer negligence, "as one of the facts established by the proof." The Supreme Court after premising that it has been held in many cases that the running of railroad trains within the limits of a city at a rate of speed greater than is allowed by ordinance is negligence per se, says:

"But perhaps the better and more generally accepted rule is that such an act on the part of the railroad company is always to be considered by the jury as at least a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence."

And, after citing authorities, concludes:

"At any rate, the charge of the court, in this particular, was not unfavorable to the defendant under the law."

It is plain that there was no decision on the direct question whether the running of a train in excess of the speed limitations of an ordinance was negligence per se. We have, however, an expression of the opinion of that court as to what is deemed the better rule. In Hayes v. Michigan Central R. R. Co., 111 U. S. 228, 240, 4 Sup. Ct. 369, 28 L. Ed. 410, the court distinctly holds that an action will lie for a breach of duty in failure to conform to the requirements of a city ordinance, and that such breach will be evidence of negligence. In this relation, the court further says:

"The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation and to an action for its recovery."

As it respects a law of Congress, and the effect of a violation of its provisions, the court has spoken in no uncertain language. Having reference to the Safety Appliance Act (Comp. St. 1916, § 8605 et seq.), in St. Louis, Iron Mountain & Southern Ry. v. Taylor, 210 U. S. 281, 295, 28 Sup. Ct. 616, 621 (52 L. Ed. 1061), it has declared that:

"The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

That the violation of such an act would constitute negligence per se can hardly be questioned. The only distinction that can be drawn

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between the effect of an act of Congress in that particular and the ordinance of a common council of a municipality is that the chances would be that, by reason of the larger experience of the members of Congress, Congress would promulgate more uniformly reasonable regulations. But presumptively the reasonableness of the regulations must obtain in either case until overcome by competent and pertinent inquiry. Thus we have about all there is of a rule of the federal courts as contended for by counsel.

When we turn to the state courts, we find their adjudications on the subject of discussion in hopeless discord. So that it is bootless to attempt to examine the accumulated mass of decisions pertaining thereto and deduce a rule by weight of authority. See the extended and exhaustive note to Sluder v. St. Louis Transit Co., 5 L. R. A. (N. S.) 187.

A more satisfactory result can be arrived at through examination of the subject on primary principles governing the effect of evidence.

[4] An inference is a permissible deduction which the jury is entitled to draw from the evidence. It has no legal probative effect other than the jury is pleased to attribute to it in a given case. Cogdell v. Railroad Co., 132 N. C. 852, 44 S. E. 618.

[5] Presumptions of law are artificial rules which have legal effect independent of any belief, and stand in the place of proof until the contrary is proven. Smith v. Asbell, 2 Strob. (N. C.) 141, 147.

Mr. Wigmore speaks of a presumption in its characteristic feature as—

"a rule of law laid down by the judge, and attaching to one evidentiary fact certain consequences as to the duty of the production of other evidence by the opponent." 4 Wigmore on Evidence, § 2491.

Later in the same section, the learned author says:

"Nevertheless, it must be kept in mind that the peculiar effect of a presumption 'of law' (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent."

Comparing the two, the court, in Cogdell v. Railroad Co., supra, says:

"The presumption has a technical force of weight and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption, but in the case of a mere inference there is no technical force attached to it. The jury, in the case of an inference, are at liberty to find the ultimate fact one way or the other as they may be impressed by the testimony. In the one case the law draws a conclusion from the state of the pleadings and evidence and in the other case the jury draw it. An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury."

[6, 7] Now, what should be the probative value of the circumstance of operating a street car in excess of a speed limit fixed by ordinance adopted for the benefit and protection of the public, where it is charged that the excessive operation of the car is an act of negligence causing injury to the person? Is the circumstance simply one from which, to be considered along with all the testimony in the case bearing upon the subject, the jury may or may not infer negligence,

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or is it one of positive probative value, that will, prima facie and without else, support the charge of negligence? If, as is declared by the Supreme Court in Hayes v. Michigan Central R. R. Co., supra, the duty imposed by the municipality is one due to the public, which is the case in the present controversy, and the individual is accorded a right of action against a street car company for a breach of the obligation imposed by the ordinance, why does it not logically and necessarily follow that, when the breach is established—that is, when it is shown that the company has exceeded the limitation of speed fixed by the ordinance—a prima facie case of negligence is made out, and the burden is hence imposed upon the company to overcome the prima facie case? We think there is no escape from the conclusion that it does. If it does, then the fact of a violation of the speed limitation renders the company presumptively negligent, and the presumption is one of law for the court to declare. Being one of law, the violation is per se negligence.

Of, course, the burden is upon the one who alleges it to establish the fact that the speed limitation has been violated, and that is a matter primarily for the jury. But when it is established to their satisfaction, the presumption of negligence follows because of a breach of the obligation imposed by the ordinance. This is negligence per se. To attribute to such a state of the case the probative value of a mere inference from which the jury might or might not deduce negligence would be to destroy the efficacy of the ordinance. The case would stand as if there were no ordinance regulating speed, and the whole question would be relegated, as one of fact for the jury to determine, whether the street car company had exercised reasonable care and precaution in the running of its cars. It would be of little or no value to tell the jury that they should take into consideration the fact that the company had exceeded the speed limitations of the ordinance along with the other facts and circumstances of the case. Besides, it would put into the hands of the jury the power of invalidating the ordinance without any inquiry whatever on that subject.

We have said that the fact of a violation of the speed ordinance is prima facie sufficient to establish negligence. This prima facie case would obtain until overcome by competent proof to the contrary. The issue then arising would be this: The ordinance having been adopted by legal and competent authority, its reasonableness must be taken for granted until the contrary is shown. This would involve an attack upon the ordinance, and the burden would be cast upon those attacking it to show its unreasonableness in the particular assigned, and that because of that fact the provision was one beyond the power of the common council in the performance of its legislative functions to adopt. This was the course pursued in Erie R. Co. v. Weber, 207 Fed. 293, 125 C. C. A. 37.

We hold, therefore, that where a municipal ordinance limits the rate of speed for operating street cars upon the public streets of a city, and such ordinance is adopted for the benefit and protection of the public, it is negligence per se to operate a street car in excess of

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such limitation as to speed. It follows that the court below did not err in giving the instructions complained of.

The only federal case that has been called to our attention really opposed to this view is Erie R. Co. v. Farrell, supra; but, with all deference to that able tribunal, we are persuaded that the rule here announced is the better and more logical.

Affirmed.

HAGAN v. McNIEL.

In re SULPHUR SPRINGS LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. July 18, 1918.)

No. 1615.

1. BANKRUPTCY ⟸467—REVIEW ON APPEAL—FINDINGS OF FACT.
A finding of fact by a referee, concurred in by the District Court, will not be reversed by the appellate court, unless clearly against the weight of evidence.

2. BANKRUPTCY ⟸165(4)—VALIDITY OF LIENS—PRESENT CONSIDERATION.
Where a creditor holding an unrecorded lien, but with the right of immediate possession, gave up such right and took a mortgage within four months prior to bankruptcy of the debtor, such mortgage was valid, and not preferential, to the extent of the new consideration, which was the value of the property subject to the prior lien, which was surrendered.

Woods, Circuit Judge, dissenting.

Cross-appeals from the District Court of the United States for the Western District of Virginia; Henry Clay McDowell, Judge.

In the matter of the Sulphur Springs Lumber Company, bankrupt. Claim by Charles F. Hagan, trustee, opposed by W. D. McNiel, trustee in bankruptcy. Cross-appeals from order of District Court allowing claim in part as secured claim. Affirmed in part, and reversed in part.

C. V. Meredith, of Richmond, Va. (Pennington & Handy, of Bristol, Va., on the brief), for appellant and cross-appellee.

W. H. Bond, of Wise, Va. (Bond & Bruce, of Wise, Va., on the brief), for appellee and cross-appellant.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

SMITH, District Judge. This case comes up on two appeals from an order of the District Court made November 22, 1917. It appears that on the 10th of April, 1914, Charles F. Hagan, trustee, the appellant, sold and conveyed to Grover B. Bickley and R. Willard Cox all of the merchantable timber belting 36 inches and up in circumference 3 feet from the ground on certain tracts of land in Hunter's Valley, Va. The price of the timber, other than maple, beech, and gum, was $4 per thousand feet board measure, with lower prices for maple, beech, and gum. The purchase money was to be paid on each thousand feet as the same was sold, shipped, or disposed of. If the pur-

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chasers failed to make payments for the lumber as sold or shipped, they were to have their customers make payments of the purchase money of the timber to People's National Bank of Gate City, out of which the bank should first pay the amounts due for the stumpage. The lumber was to be manufactured and stacked upon the grounds of Hagan, trustee, the appellant herein, which were to be furnished by him free of charge, and the purchasers agreed and bound themselves to keep sufficient lumber on the mill yard itself at all times to pay any arrears that might be due on the stumpage, and a lien was expressly retained on all the lumber manufactured sufficient to cover any amount which might become due to the said Hagan, trustee. The lumber yards were to be kept insured and the insurance made payable to Hagan, trustee. This contract of sale was not recorded. Bickley and Cox, the purchasers, put in a mill and railroad on the property of Hagan, and operated it under the name of Sulphur Springs Lumber Company. The purchasers failed to perform the contract, by failing to pay for much of the lumber the Sulphur Springs Lumber Company had shipped at the time of the shipment, and failed to have their customers turn over the purchase money, as had been agreed to the People's National Bank of Gate City. The purchasers being considerably in arrears on their payments, Hagan, trustee, took action to collect the amount due him, and orders were given to the Sulphur Springs Lumber Company, through Hagan's agents, that no further shipments of lumber would be permitted until settlement was made for the past-due payments, and threatened proceedings to enforce the lien and for a receiver. The lumber company thereupon suspended shipments, but tried to induce Hagan to forego the provisions of the contract.

After considerable negotiation between the attorneys of Hagan and Bickley and Cox a deed of trust was executed on October 9, 1916, which was so drawn as to secure whatever was already due and which might become due under the contract of 10th of April, 1914. This last deed of trust or mortgage was thereafter recorded. Three days before the expiration of four months from the time of the execution of this deed of trust certain creditors of the Sulphur Springs Lumber Company filed a petition for and obtained an adjudication in bankruptcy against the Sulphur Springs Lumber Company, a partnership composed of R. W. Cox and C. B. Bickley. Hagan, trustee, elected to file his claim in the proceeding, and surrendered whatever possession he had of the lumber in the hands of the Sulphur Springs Lumber Company at the time of the adjudication to the trustee in bankruptcy, and filed his claim in this matter as a secured claim against the lumber on the yards and the property embraced in the deed of trust of 9th of October, 1916. Thereupon objections were made to the allowance of the claim as a secured claim, both as to the lumber on the yards and as to the property conveyed by the deed of trust.

The referee held that the deed of trust executed on the 9th day of October, 1916, was ineffectual to give valid liens to the debts attempted to be secured, as having been executed within four months prior to the adjudication in bankruptcy; it being evident that the parties executing the deed of trust were insolvent at the time the deed of trust

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was executed, and that Charles F. Hagan, trustee, and his attorney, had sufficient knowledge of such insolvency, and that the deed of trust would create a preference, to put them upon inquiry. The referee, however, held further that so much of the claim of Hagan, trustee, as was actually due and unpaid for the purchase price of the timber was good as a secured claim against the lumber and timber that actually went into the hands of the trustee in bankruptcy, upon the ground that this lumber was in the constructive, if not the actual, possession of the claimant, Charles F. Hagan, trustee, and that the lien reserved to him in the unrecorded deed of the 10th of April, 1914, was good as against the trustee in bankruptcy and the creditors of the bankrupts. Upon petition to the District Court in bankruptcy for the review of this finding of the referee, that court on the 22d of November, 1917, filed its order affirming the order and finding of the referee in bankruptcy.

The assignments of error in the appeal and cross-appeal practically raise three questions: First. Was there any sufficient knowledge of the insolvency of Bickley and Cox on the 9th day of October, 1916, in Charles F. Hagan, trustee, or his attorneys, as would render that deed of trust invalid as a preference under the terms of the bankruptcy statute? Second. Was there any new consideration, and, if so, how much, emanating from Charles F. Hagan, trustee, as consideration for the deed of trust or mortgage of the 9th of October, 1916, which would operate pro tanto as new valuable consideration and good and secured under that instrument? Third. If the deed of trust of the 9th of October, 1916, was invalid as a preference, and there was no new consideration emanating from Hagan, trustee, which would operate to make it valid pro tanto, was Hagan, trustee, entitled as in possession of the lumber and timber stacked on the premises to assert a lien or claim thereon under the terms of the unrecorded contract of sale dated 10th of April, 1914?

[1] The referee has found upon the testimony that Bickley and Cox were insolvent at the time of the execution of the deed of trust of the 9th of October, 1916, and has further found under the testimony that both Charles P. Hagan, trustee, and his attorney had sufficient knowledge of the insolvency and that the deed of trust would create a preference to put them on inquiry at that date. This conclusion of fact has been concurred in by the District Judge. This court does not find that such conclusion is clearly against the weight of the evidence, but, on the contrary, it appears that there is sufficient evidence to sustain it, and it should not therefore be disturbed.

[2] The second question involves a more serious question of law. Under the agreement of 10th of April, 1914, Hagan, trustee, was to be paid for the timber as each 1,000 feet was sold, shipped, or disposed of, and the purchasers agreed also to keep sufficient lumber on the mill yard at all times to pay any arrears that might be due on the stumpage, and that the vendor, Hagan, trustee, should retain a lien on any and all lumber manufactured sufficient to cover any amount which might be due him. In October, 1916, there was a large amount due Hagan for timber shipped and disposed of, and

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Hagan was about to institute proceedings for a receivership and to procure payment of it. If Hagan, trustee, had instituted his proceedings then and seized, he could have taken possession at once, under the terms of his contract, of all the lumber that was in the yards. Under the urgency of the bankrupts not to take proceedings, but to give them more time, Hagan, trustee, forebore this right of his, and gave up the immediate rights against the lumber then stacked in the yards, in consideration of receiving the deed of trust or mortgage of 9th of October, 1916. Under subsection 67d of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564 [Comp. St. 1916, § 9651]), where a lien is given and accepted in good faith for a present consideration under a deed which would operate as a preference under other circumstances, it is not affected as being invalid as a preference to the extent of such present consideration.

The question, therefore, is whether the giving up of this present right of procedure and enforcing payment which was then possessed by Hagan, trustee, in order to enable the bankrupts to continue on, constituted such a present consideration as pro tanto would be valid. The general rule is that a present consideration does not necessarily consist of money. It may consist of the substitution of one security for another, or the giving up of value which could have been secured at the time for a postponement. If Hagan had enforced his debt at the time, there is nothing in the evidence to show that he could not at once have seized, sold, and realized upon the lumber on the yards to pay the past debt for stumpage due him. This constituted a liquid or easily realizable asset which he had the then present right of realizing upon. This present right of enforcement he gave up, and accepted notes which postponed his right of present payment to practically five months after the date of the mortgage. Under these circumstances it would appear that there was a present consideration for the mortgage or deed of trust dated 9th of October, 1916, to the extent of $12,552.87, which appears from the testimony to have been the value of the lumber on the yards on 9th of October, 1916, and which Hagan, trustee, relying upon the substituted security of the deed of the 9th of October, 1916, allowed to be shipped away and the proceeds used by Bickley and Cox or the Sulphur Springs Lumber Company.

With regard to the manufactured lumber on hand at the time of the appointment of the trustee, the referee below found that the lumber on hand at the time of the appointment of the trustee in bankruptcy and the filing of the petition in bankruptcy herein was in fact manufactured and stacked on the lands of Charles F. Hagan, trustee, and that under the law of Virginia, where a lien is given on personal property and possession of the property is delivered to or acquired by the lienholder, the lien is good and can be enforced against other creditors, even though the instrument creating the lien was not recorded.

The referee finds that the lumber had been placed at least in the constructive, if not the actual, possession of Charles F. Hagan, trustee, and therefore the lien given in the contract of April 10, 1914,

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was good against the trustee in bankruptcy and the creditors, even though the same was not recorded. This finding of the referee has been affirmed by the presiding judge below, and depends substantially upon the question of whether or not the lumber stacked was in the possession of Charles F. Hagan, trustee; and this conclusion of fact having been found by the referee and the District Judge below, this court sees no reason in the testimony for disturbing it. In the opinion of the court, therefore, the learned District Judge below erred in not finding that there was present consideration at the time of the execution of the deed of trust of 9th of October, 1916, to the extent of the value of the lumber then on the land which could have been seized and sold by the appellant, Charles F. Hagan, trustee, and that in all other respects the decree below should be affirmed.

Modified.

WOODS, Circuit Judge (dissenting). Having a strong conviction that the deed of trust given by the bankrupts, Bickley & Cox, copartners doing business as Sulphur Springs Lumber Company, to Hagan, trustee, was invalid under the bankrupt statute, I am constrained to dissent on that point. On April 10, 1914, Hagan, trustee, sold to Sulphur Springs Lumber Company the merchantable timber on the tract of land described in the contract. The purchase money, represented by a fixed price per thousand feet as the lumber was manufactured, was to be paid on each thousand feet as it was sold. If the purchaser failed to pay as the lumber was sold or disposed of, it was to have the persons to whom it sold to pay the purchase money to a bank, and out of such payments the bank was to first pay the amounts due Hagan, trustee. The lumber was to be manufactured and stacked upon the ground of Hagan, trustee, and lumber of sufficient value was to be kept there to pay any arrears due to Hagan. A lien was retained on all the manufactured lumber sufficient to cover any amount which might become due to Hagan. The purchaser, Sulphur Springs Lumber Company, failed to pay for much of the lumber as it was shipped, and failed to have the purchasers from it turn over the purchase money to the bank as agreed. Thereupon Hagan, trustee, forbade the further shipments until settlement should be made for the amounts due, and threatened to take proceedings to enforce his lien and have a receiver appointed. To relieve its embarrassment, the Sulphur Springs Lumber Company gave to Hagan, trustee, the deed of trust here involved to secure all arrears under the contract and such sums as might thereafter become due. Within four months thereafter the Sulphur Springs Lumber Company was thrown into bankruptcy. The District Court held that Hagan had notice of its impending insolvency when the deed of trust was taken, and that, therefore, it was invalid as a preference under the Bankruptcy Act.

The majority of this court, while agreeing that the deed of trust was taken by Hagan with notice of the insolvency of the debtors, nevertheless holds that there was a present valuable consideration for the deed of trust, and that therefore it constituted a valid lien upon the property which it covered. This present consideration, as stated

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by the majority, was the giving up by Hagan, trustee, of the right to seize the lumber then in the yard, and the giving to the debtor additional time in which to make payment. No case has been cited, and I think none can be found, in which the mere extension of an antecedent debt has been held to be such a present consideration as to make a preference valid. The statement that Hagan, trustee, surrendered his right to seize the lumber then on the yard is based entirely upon his oral testimony to the effect that he agreed to allow the Sulphur Springs Lumber Company to ship the lumber without making the payments in accordance with the original contract of sale. This statement of his agreement is in square contradiction of the following provision of the deed of trust:

"It is further expressly agreed and understood that this deed of trust shall in no way affect the rights of the said Charles F. Hagan, trustee, under said contract of April 10, 1914, and the provisions contained therein, and the lien given thereby upon the manufactured lumber, nor is it intended in any way to modify the provisions of said contract, but only to give additional security to the said Hagan for said debt, and all the provisions and obligations contained in said contract and the rights of said Hagan thereunder shall remain the same as if this contract had not been entered into, nor shall the execution of notes for any stumpage due at any time, and time extended for payment, affect the rights of said Hagan or be treated as a novation of said debt for stumpage, nor the right to enforce payment if said contract is violated by failure to keep sufficient lumber on hand to secure said Hagan as provided in said contract or for any other cause."

It is true that a consideration in addition to that expressed in a deed may be proved by parol. That, however, is not the question, nor the difficulty which confronts the creditor. Had nothing more appeared than that a trust deed of land was taken expressing merely that it was taken as additional security, and the creditor had testified that as an additional consideration he had agreed in writing to release the lumber held under his previous contract, there would be no legal difficulty in holding the parol evidence sufficient to prove an agreement to release the lumber. But here the parol evidence is completely destroyed by the express terms of the deed of trust itself. The parol testimony is that the debtor, in consideration of the trust deed, was released from the obligation to keep sufficient lumber on hand to pay the debt. The trust deed expressly stipulated that it should not have that effect, that it should be only an additional security, that the original contract should remain in full force, that the rights of the creditor to enforce it should remain as if the trust deed had not been executed, and that the failure to keep sufficient lumber on hand to secure the creditor would be a violation of it. To allow the creditor, after disaster comes, to destroy the effect of a clear and express provision of the contract by merely testifying that the real contract was exactly the contrary of that explicitly expressed in the writing, is, in effect, to erase from the deed of trust one of its stipulations in favor of the creditor and to substitute in its stead the creditor's parol evidence of what he agreed to.

The fact that the creditor afterwards chose to waive his rights under either or both the written contracts could not relate back, and give either of them an effect contrary to its terms. I think the decree of the District Court should be affirmed.

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In re GERMAN SAVINGS & LOAN ASS'N.

NATIONAL BANK OF KENTUCKY v. REEDER.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1918.)

Nos. 2380–2384, 2386, 2392.

1. CORPORATIONS ⟸370(3)—POWERS—AUTHORITY.
A corporation has only those powers that are expressly given and such others as are necessary to the exercise of the named powers.

2. BUILDING AND LOAN ASSOCIATIONS ⟸24—NEGOTIABLE SECURITY—ISSUANCE.
While a building and loan association, which may be characterized as a corporate partnership, may incur debts to carry out its express powers, and of course may give a written acknowledgment thereof, such an association is not authorized, as in the case of other corporations, to issue negotiable bonds, etc.

3. BANKRUPTCY ⟸340—CLAIMS—FRAUD.
A claimant, relying on certificates of indebtedness issued by a building and loan association, must show that he was a purchaser in good faith for value, in order to have his claim allowed; it appearing that the certificates were fraudulently issued and the association received no consideration.

4. BANKRUPTCY ⟸340—CLAIMS—EVIDENCE.
Mere proof of possession of certificates of indebtedness of a building and loan association, which were fraudulently issued and for which the association received no consideration, is not sufficient to show that claimants were good-faith purchasers for value.

5. BUILDING AND LOAN ASSOCIATIONS ⟸40—CERTIFICATES OF INDEBTEDNESS—GOOD-FAITH PURCHASERS.
Where the secretary and general manager of a building and loan association delivered certificates of indebtedness of the association payable to bearer to secure his personal debts, *held*, that persons so receiving them could not be deemed good-faith purchasers for value.

Appeals from the District Court of the United States for the District of Indiana.

In the matter of the bankruptcy of the German Savings & Loan Association. The claims of the National Bank of Kentucky and others were disallowed on objection of Levi N. Reeder, trustee in bankruptcy, and claimants appeal. Affirmed.

William W. Crawford and Keith L. Bullitt, both of Louisville, Ky., for appellants.

Evan B. Stotsenburg, of New Albany, Ind., and Henry Hornbrook, of Indianapolis, Ind., for appellee.

Before BAKER, MACK, and EVANS, Circuit Judges.

BAKER, Circuit Judge. For many years the bankrupt, organized as a building and loan association under a statute of Indiana, conducted its affairs in the usual and prescribed way. Later, under a resolution of the board of directors, certificates of indebtedness, having the face characteristics of general corporation negotiable bonds, payable to bearer ten years after date, were directed to be signed by the president and

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the secretary and to be issued at par by the secretary as the managing officer.

In the bankruptcy court all claims that were based on such certificates, wherein the money had reached the bankrupt, were allowed. No money ever came to the bankrupt from the certificates presented by appellants, and their claims were disallowed. In all these appeals but one the certificates were received by the holders from the hands of the secretary as collateral security for his alleged debts, and in that one the manner of obtaining possession is not shown. The secretary had simply embezzled these certificates and applied them to his own use.

[1, 2] 1. When the bankrupt was organized, the Indiana statute gave building and loan associations only the powers that are commonly known as characteristic of enterprises of that class: To have members who severally take one or more shares of "stock" of a fixed face value; to collect small monthly payments on the stock during a term of years; to levy fines for failure to pay promptly; to loan to members, as moneys accumulate, sums equal to the face of the borrowers' shares; to charge interest that would be usurious between strangers; to charge premiums in addition to interest on the loans; to apportion the net earnings to the stock; to cancel the principal of a borrowing member's indebtedness, the interest and premium charges having been kept up, by canceling his stock when his monthly payments on stock, together with his apportionment of earnings, equal the face value of his stock; and to pay or incur the expenses of conducting that business. Money was to come in only from members in the way of dues, fines, interest, and premiums; was to go out, except for operating expenses, only to members in the form of loans.

If a corporation is to be treated as having a natural person's freedom of action in all directions except those prohibited, it would be senseless for a Legislature to enumerate granted powers; it would be necessary only to list the prohibitions. But the fundamental principle is the converse. A corporation has only the powers that are expressly named and such others as are necessary to the exercise of the named powers. Silence is itself a prohibition. For if a particular power is necessary to the exercise of a named power, it by that necessity becomes itself a named power.

Indiana had various separate incorporation statutes, railroad, mining, manufacturing, commercial, etc. These corporations as a rule were given express authority to bundle up their credits in the form of negotiable bonds and sell them in the money markets. But building and loan associations were not; and the members of this bankrupt association did not themselves undertake to exercise the ungranted power. Are they and the creditors whose money or property actually went into the association bound by the recited actions of the directors and officers? Not unless the power to sell the association's credit by floating negotiable bonds was necessary to the exercise of some granted power.

Building and loan associations have been well characterized as "corporate partnerships." Towle v. American B. & L. Society (C. C.) 61 Fed. 446; Security Ass'n v. Elbert, 153 Ind. 198, 54 N. E. 753. Because the business of such a corporate partnership is confined to its

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own members, because a borrowing member is also a lender, interest and premium charges are allowed which would be unlawful between strangers. The dual character of a member eliminates the matter of usury, because until his "stock" matures no one can figure what his loan has cost him. As a matter of common information we know that stocks and bonds of such corporations are not issued, listed, and bought and sold in the exchanges and money markets. To raise capital by floating negotiable securities is counter to the genius of these mutual associations.

Undoubtedly a building and loan association has the implied power to use its credit to the extent necessary to carry out its express powers. It may incur debts for furniture, office supplies, rent, wages, and salaries of employés, and the like. Having incurred a debt, it may of course give a written acknowledgment and promise to pay. But the recovery in such a case should be limited to the debt, and not be based upon the negotiable form of the promise to pay. Towle v. American B. & L. Ass'n (C. C.) 78 Fed. 688; Standard Savings & L. Ass'n v. Aldrich, 163 Fed. 216, 89 C. C. A. 646, 20 L. R. A. (N. S.) 393; Marion Trust Co. v. Crescent Loan Co., 27 Ind. App. 451, 61 N. E. 688, 87 Am. St. Rep. 257; North Hudson Loan Ass'n v. Hudson First National Bank, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845.

[3, 4] 2. By the trustee's pleaded and proven objections to the allowance of the claims on the ground that the issuance of the certificates to the claimants originated in fraud and that the bankrupt had received no consideration therefor, the burden was cast upon the claimants to prove that they were good-faith purchasers for value. They merely proved possession of the certificates. That was not enough. Smith v. Sac County, 78 U. S. (11 Wall.) 139, 20 L. Ed. 102; Stewart v. Lansing, 104 U. S. 505, 26 L. Ed. 866; Thompson v. Sioux Falls National Bank, 150 U. S. 231, 14 Sup. Ct. 94, 37 L. Ed. 1063; Mills v. Keep (D. C.) 197 Fed. 360; McNight v. Parsons, 136 Iowa, 395, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265, 15 Ann. Cas. 665.

[5] 3. What evidence there is tends to prove that the claimants were not good-faith purchasers. Pfau, secretary and general manager of the bankrupt, went to the various places of business of the claimants and offered them the bankrupt's certificates, payable to bearer, as security for his personal debts. True, Pfau was the bearer; but each certificate was itself also a bearer—bearer of information that Pfau was the agent to act in the bankrupt's interest. It was not to the bankrupt's interest to pay or secure Pfau's debts. This self-evident collision of Pfau's personal interest with his official duty should have put the claimants on guard. West St. Louis Bank v. Shawnee Co. Bank, 95 U. S. 557, 24 L. Ed. 490; Moores v. Citizens' National Bank, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385; Western Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. 572, 38 L. Ed. 470; Germania Vault & Trust Co. v. Boynton, 71 Fed. 797, 19 C. C. A. 118; Park Hotel Co. v. Fourth National Bank, 86 Fed. 742, 30 C. C. A. 409; Lamson v. Beard, 94 Fed. 30, 36 C. C. A. 56, 45 L. R. A. 822; Board

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of Education v. Sinton, 41 Ohio St. 504; Garrard v. Pittsburgh, etc. Ry. Co., 29 Pa. 154.

In each case the decree is affirmed.

RAWLS v. PENN MUT. LIFE INS. CO. OF PHILADELPHIA.*

(Circuit Court of Appeals, Fifth Circuit. October 21, 1918.)

No. 3072.

1. INSURANCE ⟸586—LIFE INSURANCE—VESTED RIGHTS OF BENEFICIARY.
Where a life policy reserved to insured right to change beneficiary, and insured, having defaulted, secured a loan on the policies to pay premiums, with the result, on the subsequent default, the automatic extended term insurance, to which the reserve was devoted, expired before the insured's death, the beneficiary cannot recover, on the theory her rights were vested, etc., for, if the insured could wholly destroy such rights by changing beneficiaries, he might do so indirectly.

2. BANKRUPTCY ⟸143(12)—INSURANCE POLICIES.
Where life policy reserved to insured right to change beneficiary, his creditors, on bankruptcy, may claim the cash surrender value.

Batts, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Suit by Edna M. Rawls against the Penn Mutual Life Insurance Company of Philadelphia on two life insurance policies. From a judgment rejecting her demands, she prosecutes this writ of error. Affirmed.

John S. Maxwell and Geo. C. Bedell, both of Jacksonville, Fla., for plaintiff in error.

W. M. Bostwick, Jr., Lake Jones, and Maynard Ramsey, all of Jacksonville, Fla., for defendant in error.

Before BATTS, Circuit Judge, and JACK and EVANS, District Judges.

JACK, District Judge. The plaintiff in error, as beneficiary, sued the defendant on two policies of insurance, for $7,000 and $3,000, respectively, issued on the life of her husband.

The premiums due for the year 1910 were not paid, and the insured failed to exercise within the time limit any of the options provided in such event, and the policies consequently lapsed. Several months later, however, without any new examination, the policies were reinstated and the premiums receipted for. The premiums were not paid in cash, but in two separate certificates executed by the insured, in each of which he acknowledged a loan and stipulated a lien on the respective policies to cover same. The amount borrowed on the $3,000 policy was just sufficient to pay the premium due. The amount borrowed on the $7,000 policy was sufficient to pay the premium due on the policy and that due on another policy not involved in this litigation.

The following year the insured paid neither the loans nor the new

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*Rehearing denied February 1, 1919.

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premiums, and again the policies lapsed. Under the terms of the contract, the company deducted from the cash surrender value of the policies the amount of the indebtedness against each, and with the remainder purchased for him term insurance, as provided in both policies. This term insurance, or period of extension, as to each, expired long prior to the date of the death of the insured. Had the insured paid the 1910 premiums in cash, instead of executing this certificate of indebtedness on the policies to cover the premiums, the cash surrender value when the 1911 premiums fell due would have purchased paid-up term insurance for a period of time extending beyond the date of the death of the insured, or had he not paid the premiums or executed the certificates and liens in 1910, but allowed the policies then to remain lapsed, the cash value at that time would still have purchased term insurance extending beyond the date of the death of the insured. This is what the plaintiff claimed should have been done.

She denies the right of the insured to assign or incumber with any lien the policies without her consent, she being the beneficiary, claiming a vested right, and she contends that, when the policies lapsed in 1910 and the insured failed to exercise any of the options granted him under the terms of the policies, she automatically acquired such paid-up term insurance.

[1, 2] These contentions might have been sound, had the policies been ordinary life contracts; but it was plainly stated in the policies that the insured reserved the right to change the beneficiary. Thus, as was held by this court in the case of Malone v. Cohn, 236 Fed. 882, 150 C. C. A. 144, the beneficiary acquired only a contingent interest, subject to be extinguished at any time by the insured.

While admitting the right of the insured to change at will the beneficiary, she denies his right to create a lien on the policies without her consent. It would seem that the greater right included the lesser. If the insured could have changed the beneficiary to another person, or even to his own estate, he could have assigned or incumbered the policies to secure a loan. An assignment, in fact, to secure a debt greater than the face of the policies, would have been, in effect, a change in the beneficiary, which the policies specifically give the insured the right to make. The beneficiary could not complain if her rights had been entirely blotted out by such an assignment, and she should not be heard to complain when her rights are only partially affected by the act of the insured. Certainly she had little cause to complain when the very purpose of the loans was to prevent the lapsing of the policies, and thus preserve her rights, and the case is not affected by the remarkable circumstance that the policies would have been in force under the automatic term extension insurance clause of the contracts at the time of her husband's death, had he not borrowed the money to pay the premiums and prevented their lapse in 1910.

The cash surrender value of the policies at the time of the default in payment of the premiums in 1910, or at the time of the second default in 1911, could have been claimed by the creditors of the insured, had he then been in bankruptcy. Malone v. Cohn, 236 Fed. 882, 150 C. C. A. 144; In re Bonvillain (D. C.) 232 Fed. 370; Bonvillain v.

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Howell, 237 Fed. 1015, 150 C. C. A. 660; In re Herr (D. C.) 182 Fed. 716; In re Jamison Bros. & Co. (D. C.) 222 Fed. 92; In re Shoemaker (D. C.) 225 Fed. 329. Consequently he could voluntarily have assigned the policies to his creditors, and, if he could have assigned the policies to all of his creditors through a trustee in bankruptcy, there is no good reason why he could not have assigned them to one particular creditor, the insurance company itself.

The insured at all times prior to his death had complete domination and control of the policies by reason of his reserved right at any time to change the beneficiary. As was well said by the Court of Appeals, Sixth Circuit, in the case of Mutual Ben. Life Ins. Co. v. Swett, 222 Fed. 204, 137 C. C. A. 644, Ann. Cas. 1917B, 298:

"As the policy to Swett stipulated that he might, on his written request of the company for its appropriate indorsement on the policy, change the beneficiary, his wife did not acquire a permanent or vested interest in it. The existence of such an interest during her husband's lifetime was made impossible by the control over the contract of insurance given to him, independent of her will. Her right was inchoate, a mere expectancy during his lifetime, dependent on the will and pleasure of her husband as holder of the policy, and could not vest until his death happened with the policy unchanged. His control over the policy was, subject to its items, as complete as if he himself had been the beneficiary."

The insured clearly might have changed the beneficiary to himself, or to his estate, without the consent of, or even notice to, the beneficiary, and might then have made the assignment, or granted the lien to the company, and thereafter reinstated his wife as beneficiary. Had he gone through this circumlocution, her interest would undoubtedly thereby have been made subject to the assignment. What he might have done by indirection and circumlocution, he had the right to do by direct action.

The judgment is affirmed, with costs.

BATTS, Circuit Judge (dissenting). I cannot concur in the conclusion reached by my Brethren.

Under the policy the insured had the right to change the beneficiary in the way and under the conditions named by the policy. He also had the right, upon a proper assignment of the policy, to receive a loan. If the beneficiary, his wife, had an interest in the policy, the policy was not assigned, because that interest was not assigned. The interest of the wife was the same as in an ordinary policy, except that it was subject to be defeated by the act of the husband in making a change of beneficiary under the conditions and in the manner provided by the policy. This power was not exercised by the husband, and his execution of an instrument declaring a lien on the policy did not affect the rights of the wife.

These views are sustained by the courts of a number of the states: South Carolina: Deal v. Deal, 87 S. C. 395, 69 S. E. 886, Ann. Cas. 1912B, 1142; Indiana: Indiana Life Ins. Co. v. McGinnis, 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192; Massachusetts: Tyler v. Treas., etc., 226 Mass. 306, 115 N. E. 300, L. R. A. 1917D, 633; New Jersey: Sullivan v. Maroney, 76 N. J. Eq. 104, 73 Atl. 842; Colorado:

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Johnson v. Insurance Co., 56 Colo. 178, 138 Pac. 414, L. R. A. 1916A 868. Cases from Kentucky and Texas are apparently to the contrary. There are also cited as in conflict, cases with reference to certificates of benefit societies, where the rights of the parties are regulated by the rules of the societies, and bankruptcy cases, where the policy is treated as a part of the estate, because the bankrupt is in position to make the cash value of the policy available for his creditors.

GREENBURG et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. August 29, 1918. Rehearing Denied November 1, 1918.)

No. 2563.

1. CRIMINAL LAW ⟸1167(2)—AFFIRMANCE—INDICTMENTS.
A general conviction on several counts will not be disturbed, because of defects in some of the counts, where there is one good count.

2. BURGLARY ⟸18—THEFTS OF INTERSTATE FREIGHT—INDICTMENT.
An indictment charging that defendants, in violation of Comp. St. 1916, § 8603, unlawfully broke the seals on a car containing an interstate shipment, in transit from North Carolina to Peoria, in Illinois, etc., and Kansas City, in Missouri, which car was then and there in the possession of the Southern Railway Company, etc., is not defective; the use of the word "there," in connection with the railroad company, not rendering the indictment a mere charge of theft from a car in Kansas City, Mo.

3. CRIMINAL LAW ⟸878(4)—VERDICT—REPUGNANCY.
Where defendants were convicted of violating Comp. St. 1916, § 8603, under indictments charging, in various counts, that they broke the seal of a box car containing an interstate shipment, that they entered the car, that they stole therefrom, and that they had possession of the stolen property, the verdict was not repugnant, on the theory that a conviction on the last count was inconsistent with conviction on the other counts.

4. BURGLARY ⟸41(1)—THEFT FROM INTERSTATE CARS.
In a prosecution under Comp. St. 1916, § 8603, for breaking the seal of a car containing interstate shipments and entering and stealing therefrom, etc., evidence *held* to support the conviction.

In Error to the District Court of the United States for the Eastern District of Illinois.

Max Greenburg and others were convicted of violating Comp. St. 1916, § 8603, and they bring error. Affirmed.

Plaintiffs in error were tried and convicted on eight counts of an indictment charging violations of section 8603, U. S. Comp. St. 1916. Each was sentenced to serve five years in the penitentiary, and to pay the costs of prosecution.

William S. Forrest, of Chicago, Ill., and R. Allan Stephens, of Danville, Ill., for plaintiffs in error.

Charles A. Karch, of E. St. Louis, Ill., and McCauley Baird, of Olney, Ill., for defendant in error.

Before KOHLSAAT and EVANS, Circuit Judges, and LANDIS, District Judge.

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EVAN A. EVANS, Circuit Judge. [1] The conviction on the first four counts of the indictment is especially attacked because the evidence fails to support the charge. While not admitting the correctness of this position, the government, relying on Powers v. United States, 223 U. S. 303, 32 Sup. Ct. 281, 56 L. Ed. 448 (holding that one good count is sufficient to warrant affirmance, where the conviction is a general one, as here), asserts that the last four counts are free from successful attack, and each of them affords support for the judgment pronounced in this case. Our attention can therefore be directed to the last four counts, one of which, No. 5, is herewith set forth (paragraphing and italics taken from brief of plaintiffs in error).

Barring allegations which set forth the names of the plaintiffs in error and the time of the offense, the indictment proceeds:

Count 5.

Par.

1 in the county of St. Clair, in the state of Illinois, in the Eastern District aforesaid and within the jurisdiction of said court,

2 did unlawfully and feloniously break the seal of a certain railroad car then and *there* bearing the name and number, to wit: "Southern 38005."

3 which said car then and *there* contained an interstate shipment of freight, to wit: A large quantity of cigarettes,

4 then and *there* consigned and in transit from Winston-Salem, in the state of North Carolina, to Paris, and Peoria, in the state of Illinois, and Bagnell, Saint Louis, and Kansas City, in State of Missouri,

5 which said railroad car was then and *there* in the possession of the Southern Railway Company, a corporation and common carrier then and there being,

6 with the unlawful and felonious intent then and *there* in them, the said [here naming all the defendants] and each of them, to then and *there* commit larceny in said car.

As to the last four counts of the indictment, plaintiffs in error contend: (a) That each count of the indictment fails to state an offense of which the court had jurisdiction. (b) That the evidence fails to support a conviction on any one of said counts. (c) That the court erred in its charge to the jury. (d) That the verdict is repugnant due to the fact that the plaintiffs in error are found guilty on each of the counts in the indictment, whereas the eighth count is repugnant to each of the other counts.

[2] The attack upon the sufficiency of the indictment to set forth a crime arises out of the use of the word "there" in the fifth paragraph quoted above, it being plaintiff's contention that this word refers to Kansas City, Mo. In other words, it is claimed that the government charged the plaintiffs in error with having stolen a large quantity of cigarettes from a box car in Kansas City, Mo.

As we construe this count and the others similarly worded, so far as the use of the word "there" is concerned, we unhesitatingly conclude that the government charged the plaintiffs in error with unlawfully breaking the seal of a box car located in the county of St. Clair, state of Illinois; that paragraphs 3 and 5 refer back to paragraphs 1 and 2, and contain descriptive clauses modifying the car referred to in paragraph 2. So construed, the indictment is sufficient.

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[3] The contention that the verdict is repugnant for the reason that a conviction on count 8 is necessarily inconsistent with a conviction on counts 5, 6, and 7, must fail for want of support in fact. Count 5 charges plaintiffs in error with breaking the seal of a box car; count 6 charges these same parties with entering the box car with intent to steal; while count 7 charges them with having stolen cigarettes from the box car. Count 8, which it is claimed is inconsistent with the other three, charges plaintiffs in error with having in their possession a large quantity of cigarettes. It is quite apparent to us that count 8 is in no way inconsistent with either count 5 or count 6, and it is therefore not even necessary to consider the asserted repugnancy between counts 8 and 7. There being two perfectly good counts, either one of which is sufficient to support the sentence, this assignment of error must be overruled.

We conclude the evidence supports the verdict.

[4] Plaintiffs in error did not testify in their own behalf. The testimony introduced by the government clearly justified the jury in finding: That there was a shipment of cigarettes of the Camel brand from North Carolina to Peoria, Ill.; that the car containing such shipment arrived in East St. Louis on June 9, 1917, seal intact, was there duly checked and found undisturbed; that such car remained in East St. Louis until June 16, 1917, when a new check was made, disclosing a cut seal and a shortage of same 32 cases of cigarettes; that on the night of June 9th or 10th, plaintiffs in error, who made a practice of breaking into box cars and stealing therefrom, selling the loot, and dividing the spoils, broke into several box cars in the yards wherein the car in question was located, and took therefrom many cases of cigarettes, also of the Camel brand, which were later sold to a retailer.

It further appears from the record that this car seal was identified as $\frac{R\ J\ R}{6}$, while the witness who testified against his co-conspirators described the seal of the car that was entered as being $\frac{R\ J.}{6}$ This discrepancy in the identification of the seal hardly justifies the argument of the counsel that the testimony affirmatively and conclusively establishes the innocence of his clients. The similarity in the identification marks suggests a corroboration of the witness' other testimony rather than a negation thereof. Taken altogether, the evidence presented a jury question.

The contention that the evidence fails to show the car was routed as shown in count 5 must also be rejected. The undisputed facts, and such inferences as legitimately flow therefrom, amply justified the jury in finding the car traveled the route charged in the indictment.

The criticism of the charge to the jury is predicated upon a false assumption of fact.

Our failure to consider the first four counts of the indictment should not be construed as indicative of an opinion that the plaintiffs in error were not guilty of the crimes therein charged. Likewise it should not be assumed that we consider a conviction on count 8 as repugnant to

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a finding of guilty on count 7. It is simply unnecessary to consider these questions in order to affirm the judgment.

The judgment is affirmed.

BRIDGETON NAT. BANK v. WAY.

In re SEELEY.

(Circuit Court of Appeals, Fourth Circuit. October 1, 1918.)

No. 1651.

1. BANKRUPTCY ⊂⊃440—REVIEW—APPEALS.
Appeal is the proper remedy to review an order in bankruptcy, setting aside a deed as a voidable preference.

2. BANKRUPTCY ⊂⊃173—CASHIER—KNOWLEDGE.
Though the president and cashier of a national bank were officers of a corporation holding notes of the bankrupt secured by a deed of trust, which was found voidable as a preference, *held*, that the evidence was insufficient to charge the bank, which discounted the notes before bankruptcy, with knowledge of the bankrupt's insolvency.

3. BANKRUPTCY ⊂⊃173—HOLDER FOR VALUE—DISCOUNTING BANK.
A bank, which discounted for a customer notes secured by a deed of trust before the maker's bankruptcy, *held* not a holder for value, entitled to enforce the deed of trust, which was voidable between the parties as a preference.

4. BANKRUPTCY ⊂⊃11—COURTS OF—COURTS OF EQUITY.
A court of bankruptcy is a court of equity.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk, in bankruptcy; Edmund Waddill, Jr., Judge.

In the matter of the bankruptcy of August Scriber Seeley. Petition by the Norfolk Manure Company, in which Luther B. Way, trustee in bankruptcy, joined, praying that a deed of trust be declared a voidable preference. The referee having set aside the deed of trust, the Bridgeton National Bank filed a petition for review, and the matter was sent back to the referee. A second order setting aside the deed of trust was affirmed on review, and the Bank appeals. Affirmed.

See, also, 253 Fed. 41, —— C. C. A. ——.

G. R. Swink, of Norfolk, Va., for appellant.

J. D. Hank, Jr., of Richmond, Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. On December 5, 1916, less than four months prior to his voluntary adjudication, the bankrupt executed a deed of trust on certain personal property to secure notes amounting to $1,500 given by him about that time to one of his creditors, the Kiltone Company, for an antecedent debt. A few days after the adjudication, the receiver of the Norfolk Manure Company filed a petition with the referee, alleging in substance that the property in question belonged to that company, but, if held to belong to the bankrupt's

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estate, that the deed of trust should be set aside as a voidable preference. The trustee set up in answer that the property came to him from the bankrupt, who had been in possession of it under the terms of the trust deed, and that it belonged to the bankrupt's estate; but he joined with the receiver in asking that the deed of trust be declared a voidable preference. By consent of all parties the property was sold and the proceeds brought into court. In the bankrupt's schedules the Kiltone Company was listed as a creditor for $1,500, evidenced by two notes secured by deed of trust, and that company appears to have been represented at the first hearing on the receiver's petition. The referee's order set aside the deed of trust, and directed the trustee to administer the proceeds of the property as assets of the bankkrupt's estate.

Thereupon the appellant, Bridgeton National Bank, which had not before appeared in the proceeding, filed a petition for review, alleging that it was the holder for value and without notice of the notes given to the Kiltone Company. The District Court sent the matter back to the referee, with instructions to allow the bank to answer the receiver's petition, and to then rehear the case. In its answer the bank alleges that it became the holder of the notes in question on the 21st of December, 1916, in the usual course of business and without notice; that the notes purported to be secured by the deed of trust mentioned; and that when the same were taken the Kiltone Company had no knowledge or information that the enforcement of the security would effect a preference or enable the holder of the notes to obtain a greater percentage of its debt than other creditors. Payment of the notes and interest from the proceeds of the property was demanded. On this answer there was a rehearing, at which considerable testimony was taken, and the referee again held and decided that the deed of trust was a voidable preference, but allowed the bank to prove the notes as an unsecured claim. Upon review by the court below the order of the referee was affirmed, and the bank appeals.

[1] 1. It is earnestly argued that the appeal should be dismissed, because the case presented is not "a controversy arising in bankruptcy proceedings," but rather and merely a "proceeding in bankruptcy," which is reviewable only by petition to superintend and revise. It would be a waste of time to review the decisions upon this vexatious question, or to attempt its further discussion, and we therefore content ourselves with expressing the opinion that the case at bar was properly brought here by appeal, upon the authority of Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; Moody v. Century Bank, 239 U. S. 374, 377, 36 Sup. Ct. 111, 60 L. Ed. 336; Barnes v. Pampel, 192 Fed. 525, 113 C. C. A. 81; Rison v. Parham, 219 Fed. 176, 134 C. C. A. 550; Emerson v. Castor, 236 Fed. 29, 149 C. C. A. 239; Wuerpel v. Commercial Germania T. & S. Bank, 238 Fed. 269, 151 C. C. A. 285; In re Creech Bros. Lumber Co., 240 Fed. 8, 153 C. C. A. 44; and Jones v. Blair, 242 Fed. 783, 155 C. C. A. 371.

The motion to dismiss is denied.

2. Upon conflicting testimony the referee found in effect that the Kiltone Company, when it took the notes and deed of trust, had rea-

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sonable cause to believe that Seeley was insolvent, and that the enforcement of the security would give it a preference over other creditors. This finding was affirmed by the learned District Judge, and careful examination satisfies us that it should not be disturbed. It follows that in the hands of the original creditor the deed of trust was invalid and unenforceable as against the trustee in bankruptcy.

[2] 3. Is the bank in any better position? The trustee says it is not, because it is neither a holder without notice nor a purchaser for value. The first contention is based on the fact that the president of the Kiltone Company is the president of the bank, its secretary is the cashier of the bank, and the two concerns have several common directors. Whatever suspicion this close relationship might create, we are not prepared to hold, in view of the cashier's positive testimony, that it was sufficient to charge the bank with knowledge of Seeley's insolvency, and this contention must be overruled.

[3] The other is much more serious. The Kiltone Company, then and now abundantly solvent, kept a checking account with the bank, and was one of its regular customers. When the notes were discounted for the payee, less than a month before the bankruptcy of the maker, the bank advanced no money to the company, but simply placed the proceeds to its credit. There is no evidence or claim that this credit has been drawn upon, or even that the prior balance of the company has been reduced. If the notes had matured without payment, they would have been charged to the indorser's account in the ordinary course of business, and for aught that appears the bank could at any time return them to the company and cancel the credit. In short, whilst the bank is the holder of the notes, which represent a debt of the bankrupt maker to the payee, and may prove them as a claim against the bankrupt's estate, it is clearly not a holder for value, because it parted with nothing when it got them, and must be presumed to have paid nothing since, as it has not attempted to show—and the burden was upon it—that any part of the amount credited has been withdrawn. Dresser v. M. & I. R. C. Co., 93 U. S. 92, 23 L. Ed. 815; Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231, 244, 14 Sup. Ct. 94, 37 L. Ed. 1063; Citizens' Bank v. Cowles, 180 N. Y. 346, 73 N. E. 33, 105 Am. St. Rep. 765; Miller v. Norton. 114 Va. 609, 77 S. E. 452; Third Nat. Bank v. Exum (N. C.) 79 S. E. 498; Union Nat. Bank v. Winsor, 101 Minn. 470, 112 N. W. 999; Code of Virginia, § 2841a, subsec. 59 (2 Pollard's Code, 1469).

[4] In view of this settled rule of law, it seems plain to us that the bank's claim to the fund in question is no better than that of the Kiltone Company. The bankruptcy court is a court of equity, and it would be manifestly unjust, under the facts here disclosed, to allow this bank, which is not a holder for value, and which in any event is protected by a solvent indorser, to enforce an invalid security. The basic purpose of the bankrupt law, the equal distribution of assets, is not to be thus defeated.

Affirmed.

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CHESAPEAKE & O. RY. CO. v. PEYTON.

(Circuit Court of Appeals, Fourth Circuit. October 1, 1918.)

No. 1639.

1. MASTER AND SERVANT ⊂⊃150(5)—DUTY TO WARN—CHANGE IN CONDITIONS.
While, if motorcars ran on defendant's coal pier at intervals of two to four minutes, an employé injured in crossing could not recover on the ground that no notice by bell or whistle was given of the approach of the motor, he might have a cause of action if the track on which the motor ran was changed without notice.

2. MASTER AND SERVANT ⊂⊃286(40)—INJURIES TO SERVANT—EVIDENCE.
In action by employé on a coal pier, run down by a motor used on the pier to transport coal, the question whether the master was negligent in changing the motor from one track to another without notice, etc., *held*, under the evidence, for the jury.

3. MASTER AND SERVANT ⊂⊃265(14)—PRESUMPTIONS—AVOIDANCE OF DANGER.
There is a presumption that an employé on a coal pier, who knew a motor was running every few minutes, would, when about to cross the tracks, look and listen for the motor in the direction from which he had reason to expect it.

4. MASTER AND SERVANT ⊂⊃293(18)—INJURIES TO SERVANT—INSTRUCTIONS.
In an action by an employé on a coal pier, who was struck by a motor used to carry coal to various parts of the pier, instructions on the duty of the master, etc., *held* correct.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Action by Frank Peyton against the Chesapeake & Ohio Railway Company. There was judgment for plaintiff, and defendant brings error. Affirmed.

William Leigh Williams, of Norfolk, Va., for plaintiff in error.

Daniel Coleman, of Norfolk, Va. (Berry D. Willis, of Norfolk, Va., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

WOODS, Circuit Judge. In receiving coal at Newport News, Va., from the Virginia and West Virginia coal fields, and loading it on vessels, the defendant dumps the coal from an ordinary coal car into a motorcar and raises the loaded motorcar by an elevator to the coal pier. On the pier, which is about 1,200 feet long, are laid two tracks from the elevator to the coal chutes through which vessels are loaded. These tracks cross each other in the form of an X, and the motor runs on either the north or the south track as the work requires. A large number of men are constantly employed on the pier, who have to cross the tracks many times every day in their work. The pier is well lighted by electricity, and the motorcars carry electric headlights. The distance from the elevator to the point of intersection of the two tracks is about 150 feet. The motors run at a speed of about 15 miles an hour, and make the trip from elevator to pier every four minutes, sometimes every two minutes. There is no signal bell on the motor, and it is not customary to give warning of its approach.

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[1] From this statement of the method of operation, which is not disputed, it is obvious that the running of the motor from the elevator to the chutes at intervals of only two to four minutes would be notice to every employé on the pier to be always on the lookout in crossing the track on which the motor runs, and therefore an employé injured in crossing that track could not recover, on the ground that no notice by bell or whistle was given of the approach of the motor. Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758. It is equally evident, however, that an employé might have a cause of action, if injured while crossing the track in the course of his work by the motor coming up on the south track without signals, when he had been misled by the defendant, so that he expected and looked out for the motor on the north track. C. & O. Ry. Co. v. Proffitt, 241 U. S. 462, 36 Sup. Ct. 620, 60 L. Ed. 1102; Great Northern Ry. Co. v. Mustell, 222 Fed. 879, 138 C. C. A. 305; So. Ry. Co. v. Smith, 205 Fed. 360, 123 C. C. A. 488; Richmond & D. R. Co. v. Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827.

[2, 3] Plaintiff's evidence on this point was substantially as follows: On the night of the accident, there was a rush of work, and plaintiff was aiding in loading a government collier. Needing oil for his lamp, he started to a shanty across the track to get it. The motor had been running on the north track, and it was the custom of the defendant to give employés notice before changing the motor from one track to the other. No notice of change had been given. Plaintiff, before undertaking to cross at the intersection of the tracks, looked for the motor only on the north track. As he stepped on the track, the motor running on the south track struck him in the back. The evidence on behalf of the defendant was to the effect that the motor ran on either track as occasion required, and that there was no custom of giving notice to employés of the change. Thus a sharp issue was made whether the accident was due to the negligence of the defendant in not giving notice of changing the motor from one track to the other, and not signaling its approach, so as to protect employés crossing the track, or to negligence of the plaintiff in not looking out for the motor on both tracks. On this issue the case of the plaintiff was strengthened by the presumption that one about to cross the track would look and listen for the motor in the direction from which he had reason to expect it. Texas, etc., Ry. Co. v. Gentry, 163 U. S. 357, 16 Sup. Ct. 1104, 41 L. Ed. 186; Baltimore, etc., R. R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262; Central Vermont Ry. Co. v. White, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252; Pocahontas C. C. Co. v. Johnson, 244 Fed. 368, 156 C. C. A. 654. It follows that there was no error in refusing to direct a verdict for the defendant.

[4] The instructions to the jury on the points really in issue were in strict conformity to the law as we have stated it, and were not inconsistent with each other. In brief, they were as follows: The defendant was under no duty to warn its employés on the pier by bell or whistle of dangers known to them, or to keep a lookout to protect them against such dangers; but the jury might find negligence from failure to give warning or keep a lookout to protect employés from per-

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ils brought upon them by unusual and unexpected action of defendant. Applied to the issues of fact made by the evidence, this meant that, if the plaintiff went on the track with knowledge that the motor might come at any time on either track at intervals of two to four minutes, there was no duty on the defendant to warn or keep a lookout; but if he went on the track, having reason to expect and to look out for the motor on one track, and the defendant without notice ran the car on the other track, then the jury might infer negligence from failure to give signals of the unexpected approach, and from failure to keep a lookout for employés. This, as we have indicated, was a correct statement of the law applicable to the issues.

Affirmed.

SOUTHERN RY. CO. v. PITCHFORD.

(Circuit Court of Appeals, Fourth Circuit. October 1, 1918.)

No. 1623.

COMMERCE ⟸27(5)—FEDERAL EMPLOYERS' LIABILITY ACT—SERVANT ENGAGED IN "INTERSTATE COMMERCE."

A railroad employé, who cleaned and iced intrastate and interstate cars, and who was proceeding to get the ice when injured, was not engaged in interstate commerce, authorizing suit under the federal Employers' Liability Act (Comp. St. 1916, §§ 8657–8665), for he was not so employed in interstate commerce as to be practically a part of it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Pritchard, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Action by George W. Pitchford against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Thomas B. Gay, of Richmond, Va. (Munford, Hunton, Williams & Anderson, of Richmond, Va., on the brief), for plaintiff in error.

H. M. Smith, Jr., of Richmond, Va. (Smith & Gordon, of Richmond, Va., on the brief), for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges, and CONNOR, District Judge.

WOODS, Circuit Judge. In this action, brought under the federal Employers' Liability Statute (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]), George W. Pitchford recovered a judgment against Southern Railway Company for injuries received in its yard at Richmond. Refusing to direct a verdict in favor of defendant, the District Court submitted to the jury the two questions: Whether the plaintiff was employed in interstate commerce at the time of the injury; and whether the injury was due to any negligence of the defendant. The action having been brought under the federal statute, it is conceded that, if the evidence excluded the inference that

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the plaintiff was employed in interstate commerce at the time of the injury, the jury should have been instructed to find for the defendant, without respect to the issue of negligence.

Cars of the defendant, taken from both interstate and intrastate trains, were carried into the defendant's Richmond yard, and there kept until needed. Plaintiff was a regular employé on the yard, known as a car cleaner, his duties being to clear the yard of papers and other refuse, and clean and ice cars, both interstate and intrastate. Every morning a delivery of several thousand pounds of ice was made at the yard. When the ice wagon arrived in response to the call "ice," the plaintiff and other yard employés were required to go to the chute through which the ice came from the wagons to the yard. Their duty was to put a push car on the track, put the ice on, push it to an ice box, and place the ice in the box. It was from this box that plaintiff in the course of his employment took the ice and put it on the cars as it was needed.

On May 21, 1915, plaintiff had finished cleaning a car, and had started on the work of cleaning up the yard, when he heard the call, "Pitchford, the ice is here." In response to the call, he went to the push car to aid in putting it on the track. While waiting by the belt line track for other employés to arrive, he turned to look at an engine approaching on the main track. At that instant, he was struck by a switch engine running rapidly on the belt line track.

But for the accident, the plaintiff with other employés, would have placed the push car on the track, received the ice from the wagons through the chute, pushed the car to the ice box, and removed the ice from the car to the box. After this the plaintiff in the usual course of his employment would have iced from the box cars to be attached to both interstate and intrastate trains. The cars that he would in due course have first iced would have been cars to be used in interstate transportation. Application to these facts of the decisions of the Supreme Court leaves no escape from the conclusion that the plaintiff was not engaged in interstate commerce at the time of the injury, and therefore could not recover under the federal statute.

The familiar test is: Was the employé at the time of injury employed in interstate transportation, or in a work so closely related to it as to be practically a part of it? Shanks v. Delaware, L. & W. R., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797.

It is immaterial that the plaintiff's last previous work may have been cleaning an interstate car, or that his next work would certainly have been icing an interstate car from the ice box. Illinois Cent. R. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; Erie R. Co. v. Welsh, 242 U. S. 303, 37 Sup. Ct. 116, 61 L. Ed. 319; Delaware, L. & W. R. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397. He had entered upon the work of receiving ice from the chute and transporting it to an ice box. This work was too remote from interstate commerce to be regarded a part of it. Chicago, B. & Q. R. R. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941. The only difference between the case before

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us and the case last cited is that Pitchford was engaged in the transportation of ice and Harrington in the transportation of coal.

The District Court should have directed a verdict for the defendant, on the ground that the evidence conclusively proved that the plaintiff was not engaged in interstate commerce at the time of the injury, and therefore could not recover under the federal statute. This conclusion makes the consideration of the issue of negligence and other questions unnecessary.

Reversed.

PRITCHARD, Circuit Judge, dissents.

FAIR & CARNIVAL SUPPLY CO., Inc., v. SHAPIRO et al.

(Circuit Court of Appeals, Third Circuit. December 5, 1918.)

No. 2394.

TRADE-MARKS AND TRADE-NAMES ⊂⇒95(1)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

The refusal of a preliminary injunction in a suit for infringement of trade-marks and unfair competition *held* within the discretion of the court.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit by the Fair & Carnival Supply Company, Incorporated, against Max Shapiro and Nathan Karr, doing business under the firm name of Shapiro & Karr. From an order denying a preliminary injunction, complainant appeals. Appeal dismissed.

Stephen J. Cox, of New York City (Wiedersheim & Fairbanks and J. Bonsall Taylor, all of Philadelphia, Pa., of counsel), for appellant.

Jacob I. Weinstein and Alfred Aarons, both of Philadelphia, Pa., for appellees.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

PER CURIAM. In the court below the plaintiffs, the makers of dolls, to which it had given the name "Bewtie Dolls" and of which it had sold large numbers, filed its bill charging the defendants with unfair competition and violation of plaintiff's trade-mark, in the sale of a doll of similar appearance under the trade-name of "the Beauty Doll." The plaintiff's application for a preliminary injunction was heard by the court on affidavits and refused. Thereupon the plaintiff appeals to this court.

Without entering upon a discussion of the pertinent facts, we may say the affidavits satisfy us the case was one where there was a considerable range of discretion as to whether a court should decide the question of injunction on preliminary or final hearing. In the exercise of that discretion, the court followed the latter course. Without, as we have said here, discussing the facts and expressing no conclusion there-

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on, we may say they disclose no such situation as made the refusal of the injunction at this stage of the case error, instead of a reasonable exercise of the court's discretionary powers in declining present injunctive relief and allowing the case to go to final hearing.

The appeal is therefore dismissed.

J. E. BAKER CO. v. KENNEDY REFRACTORIES CO. et al.

(Circuit Court of Appeals, Third Circuit. November 30, 1918.)

No. 2389.

1. PATENTS ⟸328—CONSTRUCTION—VALIDITY.
The Baker patent No. 1,063,102, for a material for use in making up, repairing, and replacing linings, etc., of metallurgical furnaces, which consisted of a specially burned dolomite, *held* valid, showing invention.

2. PATENTS ⟸250—INFRINGEMENT—PRODUCT PATENT—IDENTITY.
Where the issue of infringement arises on a product patent, the processes are immaterial, except as they show characteristics of the two products that are either identical or different.

3. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The Baker patent, No. 1,063,102, for a material for use in making up, etc., linings, etc., of metallurgical furnaces, which consisted of specially burned dolomite, *held* not infringed by defendant's product, which also had a dolomite base; the two products being essentially different.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit by the J. E. Baker Company against the Kennedy Refractories Company and H. A. Kennedy. From a decree for defendants (244 Fed. 812), complainant appeals. Modified and affirmed.

Frederick P. Fish and J. L. Stackpole, both of Boston, Mass., and Cyrus N. Anderson, of Philadelphia, Pa., for appellant.

J. H. Brickenstein, of Washington, D. C., and Joseph C. Fraley, of Philadelphia, Pa. (Fraley & Paul, of Philadelphia, Pa., on the brief), for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This suit is on Letters Patent No. 1,063,102 for "Material for Use in Making Up, Repairing, and Replacing Linings, etc., of Metallurgical Furnaces," issued May 27, 1913, to John E. Baker. The claims involved are 2, 3, 4 and 5; the issues, validity and infringement. The District Court found the claims invalid, and indicated in its opinion, that, if valid, they are not infringed. 244 Fed. 812. The plaintiff appealed.

The succinct statement of the prior art and of the invention appearing in the patent specification, and the thorough discussion of both in the court's opinion, make an extended presentation of the case unnecessary.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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[1] For linings of metallurgical furnaces and particularly of basic open hearth steel furnaces, a material that is both basic and refractory is required. The basic quality of the material enhances metallurgical reactions; the refractory quality sustains the furnace lining and prolongs its life. Prior to the patent, various kinds of basic and refractory products were used. They were calcined or burned minerals containing magnesia, lime, alumina, silica, and iron. Of these substances, magnesia is the most basic; it is also intensely refractory. Its purest form occurs in magnesite. The best grade of this mineral is found in Austria.

Magnesite contains a large percentage of magnesia and very little lime. In preparing it for use as a furnace lining, it is subjected to a temperature equal at least to the temperature of the furnace in which it is to be placed, in order to expel all volatiles and consume all combustible ingredients. Before the patent, Austrian magnesite was the only satisfactory material used for lining bottoms of basic open hearth steel furnaces.

In addition to foreign magnesites, a rock found in the United States and known commercially and chemically as dolomite is used in repairing furnace linings. Dolomite is a magnesian limestone, containing in varying proportions the same chemical ingredients as magnesite, but differing radically from magnesite in the preponderance of the relatively low basic element of lime over the high basic element of magnesia. The principal objection to a lime base is its tendency to absorb atmospheric moisture, and in consequence to slack, thereby interfering with its proper behavior in the open hearth furnace.

Dolomite, either in its raw state or burned, has long been used for repairing and patching furnace linings under certain conditions, but, being open to objections arising from its lime base, it never has been regarded even remotely as a substitute for Austrian magnesite.

Dolomite, like all furnace lining materials, must be burned before it is used. Prior to the patent, dolomite was burned by two methods, a cupola method and a rotary kiln method. In the cupola method the furnace was charged with alternate layers of coke and raw dolomite rock. After the heat had driven off the moisture, carbonic acid gas, and other volatiles, the material was taken from the furnace and reduced by grinding to the desired granular size. This method was imperfect because it left in the product powdered material, coke brees, cinder, ash, and a small quantity of volatiles. The results were that the product absorbed moisture readily and slacked quickly and combustion of the unconsumed ingredients continued after it was placed in the furnace lining.

Burning in a rotary roasting kiln likewise failed to expel all volatiles from the rock and likewise left the product readily pervious to moisture and consequent slacking. For these reasons, dolomite, burned by one or the other of the trade methods, contained such objectionable features that it was not considered in the same class with Austrian magnesite, either chemically or commercially. The way the art regarded their relative values is shown by the prices it paid for them. Burned dolomite sold for about $4.00 a ton, while Austrian magnesite sold for about $30.00 a ton.

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Baker conceived a new method of burning dolomite. Its novelty consisted, not in disregarding and breaking away from either of the old methods, but in employing both of them. On first view this would seem a simple and a natural expedient, whereby the advantages of each method are aggregated in a thoroughly burned product. The result, however, was more than this; it was startling and revolutionary.

In making the product of the patent by his method, Baker first ground the rock to the size of railroad ballast and burned it by the cupola method. He got a product lacking uniformity in the expulsion of volatiles and containing the objectionable ingredients of ash and cinder. This product he ground to the proper size for use in the furnace and then burned it by the rotary kiln method. The double burning produced several novel and highly valuable results. It uniformly condensed the product, uniformly expelled all volatiles, completely eliminated combustible ingredients, and coated at least the surface of its condensed grains or particles by reaction of its chemical constituents in a manner that made them resistent to moisture for a longer time than single burned dolomite and made them correspondingly slow to slack. By the apparently simple expedient of double burning, the patentee got a product chemically and commercially unlike any dolomite product theretofore known, which the metallurgical art, notwithstanding the predominating lime base of the product, accepted at once as the equal of and a fair substitute for Austrian magnesite with its magnesia base. It is manufactured and sold under the trade-name of "magdolite."

The patent in issue being a product patent, we are not concerned with the process by which the product is produced; that forms the subject of another patent to Baker (No. 1,063,013). The first question, therefore, is: Does this product involve patentable invention?

The claims in issue describe the patented product in the following terms, differences in the claims being indicated by the bracketed portions:

As a new article of manufacture, burned dolomite in the form of a granulated mass, the particles (or substantially all of the particles) of which are uniformly substantially free from volatiles (and cinder) and are uniformly condensed (having a substantially uniformly condensed surface part) and (being of a uniform physical character) rendering the same slow to absorb moisture.

The defendant challenged the validity of the claims on two grounds: First, that the patented product is an improvement upon the old article only in degree and excellence; and, second, that the qualities claimed for it are the natural results of thorough burning, and, in consequence, are the mere results of the operation of natural causes. It was on the latter ground that the claims were held invalid. In reaching this decision the learned trial judge realized, and very frankly said, that the issue of invention is so evenly balanced that he yielded with some hesitation to his inclination that invention is wanting. We also realize that in some aspects the issue is close; but after giving the case very full and deliberate consideration we are inclined to the opposite view.

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Being of opinion that the product of the patent involves invention and that the claims in issue are valid, it is not necessary to state the grounds of our opinion with the elaboration of which the subject is capable. It is sufficient to say, that, though nothing is added to dolomite rock when it is manufactured into magdolite, so much is taken from it that it is freed of its objectionable features, and it is so transformed that new characteristics, both physical and chemical, are given it, with the result that the product is raised from the low level in which dolomite was regarded by the art as a material for repairing furnace linings to the high level of equality with Austrian magnesite, admittedly the best furnace lining known. We regard magdolite as "a new article of manufacture" in the sense at least of being wholly different from any article previously manufactured and from anything existing in nature, containing elements of novelty and utility in such a degree that its effect upon the arts to which it directly and indirectly relates was immediate and immensely beneficial. While the chemical and commercial values of magdolite were established by its introduction and use as a substitute for Austrian magnesite before the war, its use as a substitute since Austrian magnesite has become unobtainable, has contributed, it may safely be said, in no small measure to the ability of the steel industry of this country to meet the demands which the war has made upon it.

[2, 3] The claims of the patent in issue being valid, the remaining question is one of infringement.

The alleged infringing product is made by the defendant under a patent with which we are not here concerned. It is sold in competition with the product of the patent under the trade-name of "Kendymag" and is offered to the metallurgical art for the same uses, under representations and warranties that it is the equal of Austrian magnesite.

So different are the processes of the two products that they bear no resemblance to each other. As the issue of infringement arises on a product patent, the processes are of course not material, except as they show characteristics of the two products that are either identical or different and that bear accordingly on the issue of infringement.

Kendymag like magdolite is made from dolomite. The rock used is not the run of the quarry but is selected with a regard to its chemical composition. It is then ground to an impalpable powder. During the pulverization process there is added a definite and substantial amount of iron oxide usually in the form of rolling mill scale. The pulverized mass is then fed into an inclined rotary kiln, such as is used in the cement art, and is subjected to a temperature equal to that of an open hearth furnace. The pulverized materials travel down the kiln through progressively increasing temperatures and become aggregated by fusion and chemical reaction into nodules of increasing size until they are discharged. The nodules are then ground to commercial size and the process ends.

For proof of infringement, the plaintiff relies on the identity of the characteristics of the two products. It claims broadly, that in both magdolite and Kendymag the same ingredients, in whatever condition

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they are, make up a material that has the same character of an artificial substitute for Austrian magnesite. This contention, though true, obviously cannot alone sustain the charge of infringement, for it does not follow that invention of the first substitute for Austrian magnesite confers upon the inventor a monopoly over all substitutes subsequently invented, without regard to considerations of their distinguishing characteristics of composition and performance.

The plaintiff goes further, however, and claims identity of characteristics specifically, in that both products are used for the same purposes and accomplish the same results; each is made by burning the same kind of rock, whereby each is condensed, made uniformly free from volatiles and uniformly non-hydroscopic.

Referring generally to the plaintiff's claims of identity, it is true that the two products are made from the same rock and are used for the same purposes, but we are persuaded that they do not accomplish just the same results. Kendymag accomplishes more results. While each is "uniformly free" from volatiles when made, that is, while all parts of the same material are uniformly free from volatiles, each material as compared with the other does not remain equally free from volatiles. Kendymag maintains a greater freedom from volatiles for a longer time. Each is not uniformly condensed when in the form in which it is intended to be used. Kendymag is not condensed at all; it is enlarged. While each is uniformly non-hydroscopic, in the sense of uniformity in its own parts, the two products are not equally non-hydroscopic. In differences arising from the lack of equality in essential characteristics, we discern lack of identity.

In considering the defendant's contention that its product differs in structure and physical characteristics from that of the plaintiff, we find differences that are obvious. Magdolite retains substantially the solid crystalline structure of its initial dolomitic rock; but Kendymag loses the crystallization of the initial dolomite in the process of burning and is transformed into a material that is amorphous and porous. Its substance is composed not of the original rock crystallization, but of clinkers built into nodulose masses, the particles of which are aggregated by chemical reactions, in which, not only each nodule but every grain or particle of each nodule is made resistent to moisture, not temporarily as in magdolite, but almost permanently so. This difference goes directly to the qualities of the products as articles of commerce to be transported and stored and to the manner of their performance as furnace linings.

Incident to its crystalline structure, a characteristic of magdolite claimed by the patent is that it—

"is much heavier, volume for volume, than any manufactured dolomite heretofore produced, which has rendered the product available for purposes for which it has heretofore been thought impossible to use dolomite."

This characteristic is obtained by condensing the rock when volatiles are expelled. But the defendant's product, instead of being condensed in the process, is enlarged into a porous structure, with the result that, instead of its weight being increased, it is decreased, and, volume for volume, it is about 28 per cent. lighter than the patented product. It

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was shown, however, that when both products are finely ground they are of the same specific gravity. But the metallurgical art does not use the products in a ground state. Grinding or pulverization is the very thing the art desires to avoid. On an issue of infringement, we are concerned only with identity of characteristics of two products in the form in which they are intended for use.

We incline also to the contention of the defendant that there is a difference in the chemical composition of the two products.

It is not clear just what chemical reactions take place in the processes of burning. It is known that certain of the constituent chemicals—silica, alumina, iron—are fluxes, and, in their fusion, cause chemical reactions which transform the rock in some unexplained way into moisture resistent and refractory products. In the magdolite process, the patentee first relied solely on the natural fluxing contents of the rock for chemical reactions, seeking, however, to keep the silica content at a low level of from 4 to 6 per cent. Acting on an opposite theory, the defendant in producing Kendymag seeks a high silica content running from 12 to 14 per cent. and to the natural iron content of less than 1 per cent. adds about 4½ per cent. of iron, whereby it is claimed that ferrates of lime and magnesia are formed which cover the myriads of clinkers and give to its product the characteristic of persistent resistance to the action of moisture. This characteristic admittedly it contains, and by it there is eliminated almost permanently the highly objectionable feature of slacking, which occurs promptly in single burned dolomite, and which occurs after a time in the double burned dolomite of the patent.

Although the chemistry of this subject justified the elaborate discussion in the evidence and briefs, its repetition in this opinion is not necessary to the decision. We are inclined to the opinion that the iron added to the defendant's product, and added after the invention to a portion of the plaintiff's product—the main controversial point in the chemistry of the case—performs an important chemical function in aiding the formation of nodules in the defendant's product and in facilitating in both the chemical reaction that takes place between lime and silica. Iron is a flux, and it is a flux which very certainly tends to regulate and equalize the other fluxes. We are of opinion that the chemical composition of the two products is not identical.

Considering the question of identity a step further, it is to be observed that the defendant's process for making its product was taken evidently from the cement art. Kendymag is not dolomite, unless it can be said that Portland cement is limestone, or is blast-furnace slag. Here as there, one thing is the product of the other. They are not the same thing. The material out of which Kendymag is made is dolomite, but in the process of making it dolomite with its rocklike and crystalline characteristic is destroyed and a new product is obtained having no resemblance to the original. Though radically transformed in its making, magdolite still is dolomite; it is described as such throughout the specifications and the claims of the patent, where it is referred to as "manufactured dolomite," "burned dolomite," "double burned dolomite." If Kendymag is not dolomite, it cannot infringe the patented

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product, which is dolomite. If, however, it should be that the defendant's material because initially dolomite remains dolomite in its ultimate form, and, in consequence, both materials are dolomite, then, in our opinion, the distinguishing characteristics of the two dolomitic materials in their structure, physical properties and chemical composition are such as preclude infringement.

The decree below, when modified in accordance with this opinion, is affirmed.

DUDLO MFG. CO. v. VARLEY DUPLEX MAGNET CO. (two cases).

(Circuit Court of Appeals, Seventh Circuit. October 1, 1918.)

Nos. 2487, 2488.

1. CORPORATIONS ⟸30(6)—ACTS OF CORPORATORS—ESTOPPEL.
Where a corporation was organized to take over the business of a partnership, which by contract acknowledged patent infringement and agreed to cease, *held*, that any estoppel arising from the contract was effective against the corporation, and as it continued the old-method manufacture it was estopped to deny infringement.

2. PATENTS ⟸328—INFRINGEMENT.
The Anderson patent, No. 644,311, for winding coils or helices for electrical apparatus, claims 1, 2, and 3, *held* infringed; it appearing defendant used a single core, etc.

3. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The Anderson patent, No. 644,312, for an electric helix, *held* infringed, when defendant manufactured special coils in a stick, etc., which were not cut until the entire stick was wound, etc.

4. PATENTS ⟸177—EXTENT OF MONOPOLY.
A patentee cannot monopolize all means of effectuating a function, whether it be that of the entire combination or of any element thereof.

5. PATENTS ⟸26(1), 245—CONSTRUCTION.
A machine which requires the mediation of an operator for coaction between the elements may be no less a true combination than one securing coaction automatically; and while in a primary patent substitution may not avoid infringement, yet where the invention is in a specific mechanism substitution will avoid infringement.

6. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The Anderson patent, No. 654,583, claims 8 and 46, for a machine for winding helices for electrical purposes, *held*, in view of the prior art, limited to the special mechanism, and not infringed.

Appeals from the District Court of the United States for the District of Indiana.

Two suits by the Varley Duplex Magnet Company against the Dudlo Manufacturing Company. From decrees for complainant, defendant appeals. First decree affirmed, and second reversed, and cause remanded, with directions to dismiss the bill.

Edward Rector, of Chicago, Ill., for appellant.

James K. Bakewell, of Pittsburgh, Pa., and M. A. Keller, of New York City, for appellee.

Before BAKER, MACK, and EVANS, Circuit Judges.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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MACK, Circuit Judge. The two cases were heard together in the District Court and the appeals were argued together in this court. No. 2487 involves letters patents Nos. 644,311 and 644,312, and No. 2488. letters patent No. 654,583, all granted to one Anderson and assigned to appellee.

Letters patent No. 644,311, for a method of winding coils or helices for electrical purposes, and letters patent No. 644,312, for an electrical helix, were held valid and infringed by defendant as to all of the claims. Claim 2 of No. 644,311 reads as follows:

"The method of winding helices for electrical purposes consisting in simultaneously winding a plurality of helices upon separated zones of a single core, inserting sheets of insulating material between the superposed layers of the helices; each sheet being common to all the helices, and then separating the helices by transversely severing said sheets and core between the adjacent helices."

Claim 1 omits the last element as to separation of the helices; claim 3 specifies in detail that each layer of helix is followed by the insulating material. The claims of No. 644,312 are:

"1. An article of manufacture consisting of a plurality of helices for electrical purposes, wound in layers on a single core, in combination with individual sheets of insulating material inserted between the layers and extending throughout all the helices, substantially as described.

"2. An article of manufacture consisting of a plurality of helices for electrical purposes, wound in layers on separated zones of a single core, in combination with layers of insulating material alternating with the layers of the helices and being common to all the helices, substantially as described."

Plaintiff was a pioneer in the manufacture of helices in series, instead of, as theretofore, in units. It thereby secured a greater uniformity of product and a saving in the cost of manufacture. Defendant sought to obtain the same result in substantially the same way. Like the plaintiff, it used, between the layers of windings, sheets of paper common to all of the series of helices, thereby securing the desired uniformity of tension.

Method Patent.

[1, 2] But it urges in support of its contention of noninfringement of the method patent, first, that it uses no single core; second, that it severs the series of helices into units by cutting the inserted sheets of insulating material between the adjacent units during the winding of the layer of wire thereon and not after the stick of helices has been fully wound.

1. As to the absence of a core.

A. Defendant is the successor of a copartnership, the members of which own the controlling interest in defendant. A minority interest is owned by its largest customer who at one time had been a customer of appellee. This copartnership had been charged by plaintiff with infringement of the patents in suit. By a contract of settlement with plaintiff, the firm had confessed the infringement and had agreed not to infringe thereafter. While defendant's minority stockholder claims to have had no knowledge of the contract at the time he made his investment, the circumstances surrounding the transaction are such that

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the trial court was justified in disregarding this testimony. But whether or not he had such actual knowledge at that time is immaterial. The evidence abundantly justifies the conclusion that the corporation was primarily formed for the purpose of evading the obligations imposed by the contract; the corporation took over the business as it was; under these circumstances, any estoppel arising from the contract as against the copartnership, should be deemed equally effective as against the corporation. And inasmuch as defendant made no change whatsoever in the method of manufacture in so far as the core is concerned, it is estopped to deny infringement in this respect.

B. But irrespective of estoppel, defendant, in our judgment, does use a single core. Plaintiff preferentially covers the spindle with a prepared tube to which the first layer of wire of each coil is fastened or anchored. Defendant first rolls four or five layers of paper on the mandrel fastening them with a sticker and then ties the wire around this paper and the mandrel. Thereupon one layer of paper is fed in and while the first coil of wire is wound thereon, the coil and paper are shellacked. Then, ordinarily, three layers of paper are fed in and another winding begins. Until the paper is cut during this wire winding, there is a plurality of coils with a single core, the shellacked paper. Whether or not, at the time of cutting, the upper layer has been completely wound and whether or not it is intended thereafter to wind additional layers so as to produce in the end a coil of only two or of more layers of wire, is immaterial; in either case there is infringement of plaintiff's method of producing the coil by the use of a single core.

2. As to the stick of helices.

A. Concededly, in some instances, whether because of defective machinery or defective operation, defendant, contrary to its ordinary method of manufacture, did not separate the single stick of helices into units until after the winding was complete. Furthermore, some special coils were always manufactured in this manner. In all such cases, infringement is clear.

B. While ordinarily defendant cuts the inserted sheets of insulating material between adjacent helices with sharp knives during the progress of each winding of the wire instead of sawing the stick into units after any desired length of wire is completely wound, infringement, in our judgment, is not thereby averted.

a. Even the smoothness which, defendant claims, results from its successive sharp cuttings of the insulating material, as against the single final sawings of the completed stick, is confined to the edges of the adjacent units; the two ends of the original stick frequently must be and are evened up by sawing. Obviously, however, defendant's more laborious and delicate practice, subject as it was to interruptions and omissions by the quite frequent breaking of the knives, aimed not at a better result but at a mere evasion of plaintiff's method. Plaintiff's inventive concept is the simultaneous winding of a plurality of coils on a common core or spindle in combination with the insertion of insulating layers common to the entire series of helices; it is immaterial thereto whether, because of the cutting of this common insulating material between the adjacent units before the winding is

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finished, the units fall apart from one another when they are completely wound, or whether the stick is to be severed into its units by sawing the insulating material between the adjacent helices only after the winding is completed.

b. Moreover, in claim 1, there is no element of separation into units. Defendant, however, contends that because of the statement in the specifications that "the operation of severing the helices may be performed by either the manufacturer or the user" and the further statement that the ends of the helices may be left long, brought out to a convenient point and there connected with each other as in series-parallel or differential relation "this referring to the use of a number of helices on the single tube, the act of severing them into individual coils being omitted," claim 1 must be based upon these statements and that thus limited it indicates the method of manufacturing the finished commercial article of the product patent, the stick of completed but unsevered coils, an article which defendant does not manufacture, at least as a commercial product. We cannot, however, assent to this limitation of claim 1. The claim evidently aims to cover the essentially new step in manufacturing these coils, that is, inserting sheets of insulating material in a manner common to all the coils of the series and building up the coils by simultaneously winding the layers of wires on the whole series. Whether a stick or units of helices be finally formed is unessential; that will depend upon the needs of the manufacturer or user. Ordinarily, separate units are desired; in that case, the stick must be cut up; the cutting or sawing, however, involves no invention.

Even though under defendant's ordinary method of manufacture, the sheets of insulating material, inserted between each two layers of wire, are cut between adjacent units before the upper layer of wire is completely wound thereon, so that the winding continues on the severed helices, this layer of wire is none the less properly described as superposed upon sheets of insulating material common to all helices, and not merely upon such sheets inserted between the layers of wire in separated helices.

Product Patent.

[3] As plaintiff concedes that this patent is limited to the finished "stick" of helices, it is not infringed by defendant's ordinary product, the severed coils. But the special coils which defendant does occasionally make in a stick and the usual coils which, because of breakage of knives or for other reasons, are not cut until the entire stick is wound, clearly do infringe.

Machine Patent.

[4-6] Machines to make single coils of wire with interposed sheets of insulating material were old; machines operated, however, by hand power and without plaintiff's automatic mechanism; and machines to wind series of spools of thread or wires in layers, but without the interposed sheet of material common to all, were likewise old. While Anderson invented the novel article and the novel method hereinabove considered, his machine was not designed solely therefor; it was equally adapted to produce a single coil. This is not only expressly stated

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in the specifications, but in some of the claims, both of those in issue and of those not in issue, the combination includes elements essential in producing plurality of coils, while in others it omits them.

As a machine to produce the old article, single coils of wire with interposed sheets of paper, the only novelty was in the patentee's specific mechanism; and as a machine to produce sticks of such coils it was but a new combination of elements, each old in its function, though in some respects of novel mechanism and operation. In no sense was it primary invention. What Anderson aimed at was a machine which, as stated in his specifications, would "more effectively, rapidly, and cheaply * * * wind strands into coils of superposed convolutions and introduce sheet material at intervals in the coils for the purpose of separating, protecting or restraining the convolutions." His inventive concept was the specific mechanism and its operation by which the problem that confronted him could be solved. Of this he says in the specifications:

"It is a comparatively simple problem to wind successive layers of wire; but to introduce between each layer the sheet of paper or other insulating material automatically and without stopping or slowing up the rotation of the winding-spindle, and to provide for the necessarily increasing length of such sheets, due to the increase in diameter of the coil, and to provide for the proper feeding of the paper to the rotating coil, which gradually increases in diameter, are problems which are not so easily solved, but which are solved by this invention."

It is unnecessary to consider all of the claims in issue; each was held valid and infringed; the broadest of them, claims 8 and 46 will suffice. They read as follows:

"8. The combination, with a winding spindle, of means for winding a plurality of coils or bobbins of material thereon, and means for inserting sheets of material at intervals in said coils, each sheet being common to all the coils."

"46. In a winding machine, the combination of a winding core or spindle, a rod or foundation carrying a plurality of guides for fibers, filaments, or strands, said spindle and rod or foundation being bodily movable with respect to each other for the purpose of forming layers upon the spindle."

That other claims add as additional elements the automatic features and the details of the feeding and cutting mechanism does not justify an interpretation of the claims in issue that would cover any and all means. A patentee cannot monopolize all means of effectuating a function, whether it be that of the entire combination or of any element thereof. Moreover, such an interpretation would carry the claims beyond the invention itself. Lewis v. Arbetter, 219 Fed. 557, 135 C. C. A. 325; King Philip Mills v. Kip Armstrong Co., 132 Fed. 975, 66 C. C. A. 45.

A machine which requires the mediation of an operator for coaction between the elements may be no less a true combination than one which secures such coaction by automatic device (Krell Auto Grand Piano Co. v. Story & Clark Co., 207 Fed. 946, 125 C. C. A. 394), and in a broad primary patent, the substitution of the one for the other may not avert infringement (Morley Machine Co. v. Lancaster, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715; Columbia Wire Co. v. Kokomo Wire & Steel Co., 143 Fed. 116, 74 C. C. A. 310). But when, as

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here, the invention is in the specific mechanism, a claim broadly worded, but necessarily in the light of the specifications, drawings, and inventive concept interpreted to cover only the patentee's novel mechanism including the automatic features, will not be infringed by the substitution of nonautomatic devices operating in a different way.

In claim 8, so read, "the means for inserting sheets of material at intervals in the coils, each sheet being common to all the coils," must be held to be the mechanism designed to introduce the sheet "automatically and without stopping or slowing up the rotation of the winding spindle." It is unnecessary to detail the differences in this mechanism and its operation in the two machines; it suffices that defendant's machine, concededly, does not operate automatically and its mechanism necessitates a slowing up of the spindle rotation for the sheet insertion. Furthermore "the intervals" at which plaintiff inserts the sheets are predetermined in its machine, one sheet following each layer of wire; and the increasing size of the successive sheets is automatically obtained. Necessarily as the coil increases in size, the inserted sheet covering and overlapping the layer of wire must likewise be enlarged; with defendant's machine, however, the operator must determine the successive sizes; he may and does insert not one but several sheets between each layer of wire; and he may, if he so desires, omit the sheet between any layers.

As to claim 46, literally interpreted, it would cover the ordinary thread-winding machines with a plurality of guides and would clearly be anticipated. But as an operative device the element of the means by which the spindle and rod are movable in relation to one another is implied in the claim. Limited as this must be to the mechanism described in the patent and its equivalents there is no infringement. Defendant's mechanism for controlling and reversing the direction of traverse of the wires electrically as they are wound upon the several coils differs entirely in character from that of the patent.

The decree in 2487 is affirmed; that in 2488 is reversed, and the cause remanded, with directions to dismiss the bill. Costs in either court that are not divisible as between two suits will be divided equally.

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BINDLEY v. DETROIT RIVER TUNNEL CO. et al.

(District Court, E. D. Michigan, S. D. August 23, 1918.)

1. PATENTS ⟸170—CLAIMS—CONSTRUCTION.
A patentee is entitled to protection against changes, etc., involving only mechanical skill; but a patentee late in an art is entitled only to what he shows and claims.

2. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The McBean patent, No. 745,454, for a method of constructing a tunnel under water, which combined two of the older methods and contemplated the preparation of a chamber and construction of the tunnel in place therein, *held* not infringed.

3. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The McBean patent, No. 745,456, for a subaqueous working chamber in tunnel construction, *held* not infringed.

4. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The McBean patent, No. 745,457, for a subaqueous tunnel, etc., *held* not infringed.

5. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The McBean patent, No. 797,524, for a subaqueous tunnel, etc., *held* not infringed.

6. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The McBean patent, No. 797,525, for a method of tunnel construction under water, *held* not infringed.

In Equity. Suit by Isa McBean Bindley, administratrix of Duncan D. McBean, against the Detroit River Tunnel Company and others. Decree for defendants.

Wade Millis, of Detroit, Mich. (Parker W. Page and Drury W. Cooper, both of New York City, of counsel), for plaintiff.

Henry Russel, of Detroit, Mich. (Robert H. Parkinson, of Chicago, Ill., and Oscar W. Jeffery and Harry G. Kimball, both of New York City, of counsel), for defendants.

TUTTLE, District Judge. After listening to unusually interesting and able oral arguments for four days, and now at the close of such oral argument, in accordance with my announced custom, I am going to dispose of this case.

[1] The manner of considering the particular art involved in a patent case is not unlike tracing the history of the explorations of a continent. If we start at a sufficiently early date, it is entirely undeveloped. Along come the different explorers, making it impossible for those who come after them to re-do what has already been done. Some are looking for gold, some for fountains of youth, some for fur-bearing animals, and some for homes. These ends desired give the general direction, while the topography of the country, savage natives, and other obstacles to progress are deciding factors in choosing particular mountain passes. Some, like Columbus, do not know where they have landed. If they in reality discovered a continent, we give them credit for it, even though they died in ignorance of what they had accomplished. Others, like Balboa, try to claim, not only what they can see, but make broad and sweeping claims, assuming that

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no one else has any rights. Still others, like our Pilgrim Fathers, prefer to settle down on a little patch and carefully fence it around, to indicate just what belongs to them. A discoverer cannot be content to take previous trails. A Roosevelt may find a river in the wilds of South America, and a Peary may discover the particular spot in the ice where the meridian lines intersect, but the time is past for discovering continents. Those who simply walk in the tracks of their predecessors, and see only those landscapes which are plainly visible from those paths, cannot be said to be discoverers. Such pretending discoverers are merely sightseers and students of geography. Such assumed inventors are in fact only mechanics and engineers.

Applying this thought to the subject of patents, the extent that an inventor is presumed to have explored beyond his actual path is the distance that a skilled mechanic or engineer is able to look from such tracks. The extent of the landscape is not to be determined as of the time the predecessor took the trail, but at the time the man who makes his claim for a patent went that way. He cannot receive credit for discovering those things which are so near to the old tracks that an ordinarily skilled mechanic or engineer, standing in those tracks, could have seen them without having them pointed out by the claimant. So in these patent cases we take the undeveloped portion of the art, and determine how much of what was open to discovery has actually been brought to light by the patentee. A patentee is not entitled to all that is left by prior patents, publications, and uses. He receives only that portion of what is left which he shows and claims.

In this manner, having determined the extent and scope of plaintiff's claims, we may proceed either to determine the question of validity or infringement. If both questions are fairly in dispute, I usually consider first the question of infringement. By pursuing that course, the court is less likely to pass upon matters not in issue, and avoids doing unnecessary damage to plaintiff's patent. In this manner we have studied the art of tunneling.

It is conceded that in 1903, when plaintiff's decedent applied for four of the patents here in suit, there was known in the art the old drifting method, by which for many years mountains had been tunneled. Small rivers, in certain kinds of soil, had also been tunneled by this method; but it was poorly adapted for going under the water. The shield method was another method which had been in use for tunneling under rivers, a well-known example of which is the Grand Trunk tunnel at Port Huron; the United States end being in this state and in this district. One difficulty with the shield method was that it was not possible to go near to the water. It had to go too deep, too far down. It made an unnecessary grade. A still greater objection, and one which ought to have made it prohibitive was the necessity for men working in such high air pressure that there was a tremendous loss of life. Both of those methods had to do with getting under the river by starting in from the side and keeping deep down, far below the bed of the river. It was desirable to have the tunnel as near to the surface of the water as the rules of the War Department for the protection of navigation would permit.

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There were three possible methods for that sort of construction then in use. One, the caisson method, by which, as in the shield method, the men were compelled to work under a high air pressure. By this method the workmen by means of the device went down from the surface of the water and worked on the bottom of the river. Although there was no bottom to the device, they were able to keep the water from coming in at the bottom by means of compressed air. It was an undesirable method, because of the danger attendant upon the high air pressure. As they got to a great depth, the pressure became so great that it was impossible for the men to live. Then there was another method of doing the work from above, the cofferdam method, which was possible; but you would finally reach a depth great enough so that it was prohibitive, because of the great hydraulic pressure. The water would be forced in through the cofferdam walls, under the wall or through the bottom. By the cofferdam method the bed of the river formed the base, and the walls were usually of sheet piling. Still another method was to construct the tunnel on shore, and float it to a place above the proposed site, and then sink it into position. No one of these three methods had been successfully employed in deep, broad rivers.

Just how far beyond these admitted methods the art went there is some contention here. As I view this lawsuit, and the just disposition of it, it is not necessary for the court to split hairs over the exact extent to which this art had developed beyond these admitted and well-known methods of doing and attempting to do work of that kind. When the court feels very certain about the proper disposition of a case, it is just the time it is liable to be mistaken about it. In this case I have in my own mind no doubt as to the result that ought to be reached. That is not the situation in many patent cases. In the last one I disposed of I said on the record that I reached my conclusion with doubts on my own part; but in this case I feel perfectly satisfied with the conclusion I reach. I feel that further study and thought would not change my views about it. I say that, knowing that those are just the times when a court is likely to be overlooking something.

[2] I will pass over the many intervening steps between those five admitted, well-known methods of the prior art and the patents in suit. There are many patents, like Weisker, O'Rourke, and Thomson, which made serious inroads upon the art. The effect of these prior patents is in dispute. My conclusion is such that the scope and value of these prior patents would not change the result.

The defendant contends that McBean uses only the cofferdam methods, and says it is the cofferdam method with a roof on the cofferdam. The plaintiff assumes that it is a new and different method from any of the others, and calls it building a tunnel in a working chamber. As I view it, McBean is a combination of the caisson method and the cofferdam method.

What McBean did was to drive down the sheet piles until they were in solid, substantial earth, or to bedrock, so that the walls were as nearly impervious to water as he could make them, making these sections as long as he saw fit, and putting in his sheet piling across the

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end, which acted as a bulkhead. And then (I am omitting many steps not here necessary, that are of real importance in the work) he put a roof or cover down under the water across what defendant calls the cofferdam, and in that way made what he calls an air chamber in which he could build a complete tunnel. It was so arranged that he could force air into it, if he was unsuccessful in making the cofferdam structure entirely impervious to water. So far as the sheet piling kept the water from coming in through the sheet piling, under the sheet piling, or up through the bottom, to that extent McBean was using the old cofferdam method; to the extent that it failed in this, resulting in the necessity for forcing in air, he was using the caisson method. He combined the two methods in such a way that he could use both at the same time, and let what had been objectionable in one be overcome by the other. In other words, the compressed air of the caisson method prevented the water from coming in as it had done with the cofferdam method. The resistance to the water from the cofferdam made it unnecessary to use the high air pressure, which was dangerous in the caisson method.

If McBean was entitled to all the credit for taking the steps from the two old separate methods to the new and combined method, I would feel that it was a step displaying such genius and bringing such results that he should be rewarded with a valid patent. Without undertaking now to narrow the art by the patents cited by defendant, I will pass that step and see whether, giving plaintiff the benefit of the serious doubt as to validity, the defendant has infringed.

The McBean patent combines the two well-known methods of the caisson and the cofferdam. For the purpose of this discussion and on the question of infringement I am giving McBean full credit for having made that advance in the art. As already indicated, it is plain that he is not entitled to all that credit.

The so-called first patent in suit is No. 745,454 of December 1, 1903. While there are claims 1, 3, 9, 10, and 11 in suit, it has been agreed on the record by counsel that whatever conclusion I reach as to No. 11 will dispose of this patent, and all of its claims in suit. Claim No. 11 reads as follows:

"11. The method of constructing a tunnel under water, consisting in erecting vertical walls around the site extending to bedrock or below the bottom of the proposed tunnel, then placing a roof thereon to form therewith a chamber, then forcing air into said chamber and expelling the water therefrom, and then constructing the tunnel in place therein."

It is so well agreed on this record just what the defendant has done that I am not going to waste time in attempting to describe it, except as may be necessary in discussing the particular claims.

The big question that has been discussed before me during nine-tenths of the time is whether or not this defendant, when it completed its tunnel and built the structure that went inside of the iron tube was building a tunnel within the working chamber described in this claim No. 11. That is really the meat of this lawsuit, and the thing important to this plaintiff, if he is right in his contention. That should be interpreted in the light of the art, in the light of the McBean drawings,

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specifications, and claims. What did he have in mind, and what new and useful thing did he show to the world? He built a complete tunnel in a working chamber. He did everything in the way of making a tunnel in a working chamber, except digging a portion of the trench, driving down some piles, and refilling a portion of the trench. Everything else was done in a working chamber. He dug down to the solid rock and filled in the concrete, just as if it was in the open air, without any interference with the water. He cut off the piles, other than the side piles, to the desired height. He built up his tube in this working chamber, and he put the concrete around the tube inside the working chamber. So he built an entirely completed tunnel in a working chamber.

Now, the defendant, on the other hand, has done nothing in a working chamber, except what was done inside of the iron casing. The question is here whether or not the defendant, by doing the concrete work inside of the iron casing, was building a tunnel in a working chamber, as shown by McBean. Defendant, without any air other than ordinary atmospheric pressure, went into the iron casing and built in the concrete lining, made it strong, made it durable, and finished a tunnel.

That makes it necessary for the court to reach some conclusion as to what is meant, within this patent, by a "tunnel," as well as by a "working chamber." It does not matter much which angle I proceed from, but it seems to me it is well to find out what McBean means by a "tunnel." Now, the problem was to get the tunnel so that it would be impervious to water and would resist the hydraulic pressure. When you had reached that point, so that it might be entered from the land, and anything that was desired could be done in it, without forcing in air, the problem had been solved. The defendant reached that stage in its work before it worked in any working chamber whatever. I find nothing in this patent which prevents defendant from building a tunnel by going down through the water with tremie pipes, pile drivers, and dredges. There is nothing in this patent which prevents defendant from constructing anything it sees fit on the land, and floating it over the place where the tunnel is desired, and then sinking it down in place.

What the defendant has done is to use the old method of working through the water, scooping out a ditch, constructing a tunnel on land, taking it out and sinking it, and by tremie pipes depositing the concrete down through the water under, around, and over the tubes in the bottom of the river, and by these methods finally reaching such a stage in the work that they have a hole under the river, which can be entered from the land. No air pressure is needed on the inside of it; men can enter it, men can work in it, the water is kept out, and when they reach that stage the difficult problem has been solved, and the structure is a tunnel, within the meaning of the patent, and it has been built without any working chamber. It is claimed by the plaintiff that then, from that time on, because defendants lined this tunnel with concrete work three feet thick, which undoubtedly gave it the great strength and durability to be desired in a tunnel, that they built a tunnel in an air chamber under the water.

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We must keep in mind the problem that McBean was trying to solve. It is plain that defendant solved it in a way entirely different from McBean. To take the position of the plaintiff in this case would mean that McBean had by this claim No. 11 in this patent in suit obtained such a monopoly over the right of constructing tunnels that no engineer or contractor could construct a subaqueous tunnel by beginning at the outside in his work, no matter what method he used, because just as soon as he kept the water back and resisted the hydraulic pressure sufficiently, so that he could begin from the outside and work inside, and complete his tunnel on the inside, just so soon he was working in a chamber. There is nothing in this patent that warrants any such broad construction or interpretation of it by the court. It seems very clear to me that this patent, called the first patent in suit, has not been infringed.

[3] I turn now to what has been called the second patent in suit, which is No. 745,456, December 1, 1903. It is agreed by counsel that my attention may be directed to claims 2 and 6, and that whatever result I reach as to these two claims ought to be the conclusion I reach as to the others.

Claim 2 reads as follows:

"2. In tunnel construction, a subaqueous working chamber formed by the roof of the tunnel and walls extending downward below the bottom of the structure to be built."

Claim 6 reads as follows:

"6. In tunnel construction, a subaqueous working chamber, comprising impervious side walls, extending downward to bedrock or to a depth below the bottom of the proposed tunnel, and the tunnel roof supported thereon in permanent position."

This is like the so-called first patent, except that it substitutes for what was a wooden roof in the first patent a metallic roof, which is subsequently to become the top of the tube for the tunnel. The conclusion reached as to this patent is the same as that reached as to the first patent, for the reasons mentioned in disposing of the first. Like the first patent, it is held not infringed.

[4] The so-called third patent in suit, No. 745,457, December 1, 1903, is for the actual tunnel inside the working chamber. In his first two patents McBean undertakes to describe the working chamber and the method by which he constructs his subaqueous tunnel, while the third patent, the one last mentioned, describes the tunnel itself. It is agreed by counsel that, while there are three claims in suit, 6, 9, and 10, the conclusion reached with reference to 6 and 10 should be controlling as to 9.

Claim 6 reads:

"6. A subaqueous tunnel, comprising a metallic tube, supporting side walls therefor, a pile foundation and a mass of masonry serving as a bed for said tube, said walls and piles being anchored to said masonry."

Claim 10 reads:

"10. A subaqueous tunnel structure, comprising a mass of masonry, inclosing the tunnel passage, foundation piles imbedded in said masonry, sheeting side

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walls anchored to the masonry, and tie rods connecting the sheeting on opposite sides."

Claim 6 claims the very things that were shown in the first patent, and, in addition, the anchorage of the concrete to the sheet piling that formed the sides of the working chamber. McBean went down to bedrock, and this anchorage would, of course, tie the masonry to the sheet piling, and would add to the support from the piling directly under the tunnel the extra support from these sheet pilings at the side. It would also tie the sheet piling to the tunnel proper.

I find nothing of this kind in the defendant's structure. I find no supporting side walls within the meaning of this patent, and no pile foundations within the meaning of this patent. There are no side walls which go down to bedrock. The meaning which I find McBean had for piles in his patent is the meaning which I have always had in mind, a long, tapering timber which goes down into soil that is not substantial enough to be used for a foundation in the ordinary way. These piles are driven down, and then, by reason of the friction between their circumference and the earth, they are substantially solid. I do not find that McBean had in mind such a foundation as the defendant has built here.

There is little, if any, value in these patents, other than the so-called first one. If there was any value to the public in McBean's discovery, it was shown in the first patent. These other patents cover minor matters. I doubt very much their validity, not only because they are a part of what was shown in the first patent, but upon the broad question that they do not approach that degree of skill, genius, and novelty necessary for a valid patent. The first patent stands in a different class. If these other patents have any value at all, they are dealing with things so old that they should be held to the specific things described and the exact combination described. When we come to consider equivalents, or as to any other phase of their construction, they must be interpreted strictly and not given a broad meaning.

Looking more particularly at claim No. 10 I perhaps ought to mention the four posts or piles which defendant used to position the grillage. Plaintiff calls them piles; defendant calls them pegs; but it does not make much difference what name is given them. I am satisfied that the real purpose and function they serve is to fix the grillage as to altitude and level, laterally and longitudinally, in position. That is the real function they serve. It is an important function in that way, but any other thing they do is simply an unimportant incident, and one the court ought not to be influenced by in this lawsuit.

In view of the degree to which the art must be narrowed, and in view of the description given by McBean himself, I am forced to say there is no infringement.

[5] The fourth patent is No. 797,524, August 15, 1905. This is like patent No. 3, just described, except it shows a different method of putting the tunnel together. The only claim I am asked to consider here is claim No. 8. It is agreed by counsel that whatever dis-

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position I make of claim No. 8 ought to be the disposition which I make of the other three claims in suit.

Claim 8 reads:

"8. A subaqueous tunnel, comprising a masonry base, inclosing side walls, supporting piles and devices interconnecting said piles and said side walls; said devices and the tops of said piles being imbedded in said masonry."

What I have said in reference to the claims of the third patent applies with equal force to the so-called patent No. 4, and ought to be controlling. There are no inclosing side walls within the definition of the claim. There are no supporting piles within the definition of this claim. Neither are there any devices interconnecting piles to the side walls, within the fair meaning and interpretation of these claims.

[6] Coming now to the last patent in suit, No. 797,525, August 15, 1905, it is agreed by counsel that I should dispose of claims Nos. 1 and 3, and their disposition should control as to 5 and 8.

These claims read:

"1. The method of constructing subaqueous tunnels, which consists in first building a foundation or base, and then progressively erecting the tunnel superstructure thereon within a pneumatic chamber.

"3. The method of constructing subaqueous tunnels, which consists in first preparing a foundation of piles, then imbedding the tops of said piles in masonry to form a tunnel base or foundation, and then progressively erecting the tunnel superstructure thereon."

This so-called fifth patent is more like the first patent, and it rests upon the very same idea covered in the first patent. As I read this claim 1, my first thought, without having in mind the drawing and specifications and what McBean said about it, was that he was claiming that he first built a foundation and then within a working chamber did the rest of the work. Upon more careful thought I am satisfied that he is simply making a broad sweeping "Balboa" claim that will cover everything. I think he intends to cover any tunnel that is built in an air chamber, but what I have said with reference to the first patent disposes of this fully. Defendant did not build a tunnel in a working chamber.

The bill is dismissed, with costs to the defendant, to be taxed.

In re BLANCHARD.

(District Court, D. New Jersey. October 14, 1918.)

1. BANKRUPTCY ⇐228—FINDINGS OF REFEREE—REVIEW.
A finding of fact by a referee on conflicting evidence will not be disturbed, unless there is cogent evidence of mistake; but, if the finding be a deduction from established facts or uncontradicted evidence, it is not entitled to such weight.

2. BANKRUPTCY ⇐340—PROVABLE CLAIMS—EVIDENCE.
Evidence *held* insufficient to support a finding that claimant lent stock directly to her sons, one of whom was the bankrupt, rather than to a

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corporation of which she and they were stockholders, and by which the stock was pledged.

3. PRINCIPAL AND AGENT ⊂⇒136(2)—LIABILITIES OF AGENT—ACTING FOR DISCLOSED PRINCIPAL.
Where an agent acts on behalf of a disclosed principal, his acts and contracts, within the scope of his authority, are, in the absence of an express agreement otherwise, the acts and contracts of the principal, and involve no personal liability on the part of the agent.

4. BANKRUPTCY ⊂⇒340—ALLOWANCE OF CLAIMS—CLAIMS BY RELATIVES.
Claims of relatives of a bankrupt should be closely and carefully scrutinized, and not allowed, unless the evidence is clear and convincing.

5. PLEDGES ⊂⇒1—ACCOMMODATION PLEDGE—RIGHTS OF PLEDGOR.
Property pledged by the owner to answer for the debt or default of another occupies the position of a surety.

6. BANKRUPTCY ⊂⇒314(1)—PROVABLE CLAIMS—COSURETY OF BANKRUPT.
Claimant, who lent stock to a corporation of which she and three sons, one of whom was the bankrupt, were stockholders, which stock the company pledged to secure its note, indorsed by the sons, on insolvency of the company and her purchase of the note to save her collateral, *held* entitled to prove one-fourth the amount paid against the bankrupt estate, on the ground that as between themselves the stock pledged and the indorsers were cosureties.

In Bankruptcy. In the matter of Theodore C. E. Blanchard, bankrupt. On petition to review an order of the referee, to whom this matter was referred, dismissing a petition of the trustee to re-examine and reduce the claim filed against the bankrupt's estate by Emeline C. Blanchard, and allowing the same, as a general unsecured claim against the estate, in the sum of $297,719.26. Reversed in part.

Robert H. Southard, of Newark, N. J., for trustee.

Albert C. Wall, of Jersey City, N. J., and William F. Allen, of New York City, for claimant.

HAIGHT, District Judge. The primary question in this matter, as I understand it, is whether claimant's stock in the Prudential Insurance Company, which was first pledged with the Fidelity Trust Company to secure the payment of a note or notes of the Blue Ridge Enamel Brick Company, and later with Milton E. Blanchard, to secure a note of the same company made to his order, was loaned by the claimant to her sons jointly—the bankrupt, Fred C. Blanchard, and William W. Blanchard—as it is contended on her behalf, or whether it was loaned to the Brick Company as the trustee contends. The referee has found in accordance with the claimant's contention. If his conclusion in that respect was correct, undoubtedly the allowance of the claim was proper. I have accordingly examined with care all of the evidence which was before the referee, and am forced to the conclusion that his finding was not justified from the evidence.

[1] In so deciding I have not been unmindful of the rule which prevails in this district, and elsewhere I think, that the court will not disturb the finding of fact of a referee, based upon conflicting evidence, involving questions of credibility, unless there is most cogent evidence of mistake and miscarriage of justice. In re Partridge Lumber Co., 215 Fed. 973, 976 (D. C. N. J.). But it is also a general rule that,

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if the finding be a deduction from established facts or uncontradicted evidence, it will not carry any great weight, for the court, having the same facts, may as well draw inferences or deduce conclusions as the referee. In re New York & Philadelphia Package Co., 225 Fed. 219, 221 (D. C. N. J.). There was really no question before the referee which had to be solved from conflicting evidence, involving the credibility of witnesses, but rather the question was whether the evidence was sufficient to justify a finding that the stock was loaned directly to the sons of the claimant rather than to the Brick Company. A review of the evidence is necessary, I think, in order that the reasons upon which my conclusion is based may be understood.

[2] On August 1, 1904, the Brick Company borrowed $205,000 from the Fidelity Trust Company on its note, indorsed by the claimant and her three sons before named, and pledged as collateral security for its payment 1,176.46 shares of the capital stock of the Prudential Insurance Company, all or the greater part of which belonged to the claimant. Whether this was an original loan, or whether it was a consolidation of previous unpaid loans, the evidence does not positively disclose; but it would seem that it was the latter, supplemented possibly by an additional loan made on the day that the last-mentioned note was executed. On April 3, 1908, this note, as well as some others made by some of the claimant's sons individually (for the payment of which collateral belonging to the claimant had likewise been pledged), were called, and a demand made that they be paid on or before April 6th. In order to prevent a sale of the collateral, Milton E. Blanchard, another son of the claimant, who apparently was not interested in the Brick Company, took up the note held by the Fidelity, and on April 6th a new note for $216,411.67 (being the amount that he paid to the Fidelity), payable in one year from date, was made to his order by the Brick Company. It was indorsed by W. W. Blanchard, Fred C. Blanchard, and the bankrupt. There was pledged with it, as collateral, 1,225 shares of the capital stock of the Prudential Insurance Company belonging to the claimant, included in which, as far as I can ascertain from the evidence, were the 1,176.46 shares held by the Fidelity as collateral for the $205,000 note. This note was held by Milton E. Blanchard until March, 1914, a short time after the voluntary petition of the bankrupt in this case was filed, when the amount due thereon was paid by the claimant, in order to prevent the sale of the collateral which had been pledged for its payment, and the note was transferred to her. She is still the holder of it.

The disputed part of her claim is $271,155, which represents the amount due on the note, after giving credit for a dividend received from the Brick Company, which in the meanwhile had been adjudged a bankrupt. The claimant, as well as her three sons, were the only persons financially interested, at least to any extent, in the Brick Company. The bankrupt was the president, Fred C. Blanchard the treasurer, and William W. Blanchard the general manager. Its capital stock was originally $100,000, or $150,000, of which the claimant owned 100 shares, of the par value of $10,000. Afterwards she ac-

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quired 300 shares of the par value of $30,000—possibly more—in liquidation of a debt due her for moneys which she had advanced from time to time to the company. The bankrupt apparently gave very little attention to the business of the Brick Company; William W. Blanchard having been in active charge of its affairs. There is no evidence that any new arrangement regarding the use of the claimant's stock as collateral was made when the note to Milton E. Blanchard was executed. Apparently the arrangement under which the stock was originally procured from the claimant to borrow money from the Fidelity was continued. The stock which was held by the Fidelity was simply turned over to Milton, and he assumed the position which the Fidelity had formerly occupied.

It is necessary, therefore, to ascertain what the evidence discloses as to the arrangements which were made when, and circumstances under which, the stock was originally acquired from the claimant. There was no written agreement, or any memorandum in writing, respecting any of the original transactions. The only competent evidence on this point, outside of a letter to the Fidelity signed by the claimant, was the unaided recollection of the claimant, and two of her sons and her daughter, as to what generally transpired when they asked her for stock for borrowing purposes, in which pursuit they seem to have been quite extensively engaged, both personally and on behalf of the Brick Company, for 10 years or more preceding the bankruptcy. The claimant, Mrs. Blanchard, a woman over 90 years of age, testified that she did not think that the stock was pledged for the Brick Company's debts, and did not know whether the sons specified the purpose for which they wanted it, although they may have done so. She had no clear recollection of the transactions, or anything about them. Her testimony may be well summarized in her own language, viz.:

> "I loaned my stock to my boys. * * * Why, I loaned it to the boys whenever they wanted it; they knew they could have it when they needed it. * * * I trusted my boys and gave it to them; that is all I know about it."

Mrs. Walter, a daughter who lives with the claimant, and whose husband, in later years, has been attending to the claimant's business affairs, stated that she remembered that her brothers frequently met at their mother's home for luncheon, and on some occasions they requested loans of stock of the mother, that they might borrow on it; that she remembered, when improvements were needed at the plant of the Brick Company, the brothers would ask for a loan of the stock, so that they might borrow on it and make the necessary improvements; that her mother sometimes objected to having the stock go out of her hands, and would tell them "to be sure and return it to her as soon as they could"; that they would say that the stock would be perfectly safe with them, and that they hoped to return it soon.

Fred C. Blanchard testified that the brothers met at their mother's home very frequently for luncheon; that the brothers explained the condition of the Brick Company from time to time to their mother,

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and that if they borrowed any stock it was for the purpose of getting money from the stock and placing it to the use of the company; that sometimes he procured the stock, and sometimes his brother did; and that—

"we always promised, at those times, to return the stock to her—just as soon as we possibly could * * * We [two brothers and himself] made an explanation of the need of the money and the condition of the company, and gave our promises to return the stock."

He admitted having testified, during an examination held in the general bankruptcy proceedings in this case under section 21a, regarding the manner in which the stock in question came into the possession of the Brick Company, as follows:

"As they needed money they borrowed the stock from my mother, and that was the only way."

The only explanation given by him of the apparent difference in his testimony was that by the use of the word "they" he referred to his two brothers and himself; that the "Brick Company was the three brothers."

W. W. Blanchard testified that, after he and his brothers had used up all of their stock, they felt compelled to go to their mother:

"We would say: 'Mother, it is absolutely necessary; we must have money, and can't you let us have say probably 10 or 20 shares of Prudential stock, and we will get the money on it.' * * * We always assured her we would hold ourselves responsible for the return of her stock. * * * My brother Theo would invariably say she need have no fear whatever; they (referring to the Fidelity Trust Company) wouldn't dare to sell her stock, and, if they did, we will see that it is made good, or she would get the equivalent back."

By "they" he stated that he referred to the Fidelity Trust Company, and by we "to Fred and myself." He further testified, when asked the direct question, that she had loaned the 1,225 shares to the three brothers. He admitted, however, that, when being examined in the general bankruptcy proceedings under section 21a, he had testified that the Blue Ridge Company had borrowed the stock in question from his mother. He attempted to explain the apparent conflict in his testimony by stating:

"I never differentiated between myself and my brothers, nor myself and the Blue Ridge Enamel Brick Company, until my attention had been called to the fact that I had stated that the Prudential stock had been loaned by my mother to the Blue Ridge Company. The importance of it was read to me, or rather the testimony was read to me, and I saw at a glance that I had said what was not the case. That stock was never loaned to the Brick Company, although in my testimony I said it was. I treated as one—we brothers—and never thought of differentiating between myself and my brothers. I did not realize the importance of it."

He then went on to reiterate that the stock was loaned to the sons, and was never loaned to the Blue Ridge. I cannot conceive that the testimony of Mr. John R. Hardin, who acted as an attorney for apparently all of the brothers, as well as the mother, at the time the Fidelity Trust Company note was taken over by Milton, and which was relied on very largely by the referee, was competent as establishing the conditions under which the stock was originally loaned,

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or to whom it was loaned, because, as far as it appears, Mr. Hardin had no connection with those transactions, and the impression that he had—and he frankly stated that it was only an impression—that Mrs. Blanchard had loaned the stock to her boys, as distinguished from the Brick Company, was, for all it appears, based on what he had been told by others. It will be noted that all of the testimony recited above, which I have considered competent, was given by interested parties, and, as respects two of them, was quite different from that which they had given when the importance of establishing that the stock had been loaned to the sons, rather than to the Brick Company, was not apparent to them. All of the witnesses testified that the loans of stock by the mother covered a period of 10 years or more prior to 1908. None could testify when any particular loan was made, or how much stock was loaned at any one time. The witnesses were testifying in 1915. Moreover, it is entirely clear from this testimony that the claimant knew, at the time the stock was loaned, that it was to be used for the benefit of the Brick Company, in which she was interested as a stockholder, and apparently, at some of the times, as a creditor. Some of the testimony is more susceptible of the inference that the sons agreed to indemnify or hold her harmless against loss by reason of the delivery of the stock than that they were personally borrowing it. For instance, William testified:

"We always assured her that we would hold ourselves responsible for the return of the stock."

That clearly imports an indemnity agreement. If the stock was loaned to the sons, there was no need of an assurance to their mother that they would hold themselves responsible for the return of it. The bankrupt was not called as a witness, although he had testified in the main bankruptcy proceedings. It appears that on July 5, 1901, Mrs. Blanchard signed a letter, prepared by the president of the Fidelity Trust Company, authorizing the Brick Company "to borrow such sums of money and at such times as may be deemed by them necessary, for their use and benefit, and to pledge therefor certificates [naming them] of the capital stock of the Prudential Insurance Company of America, standing in my name on the books of the company." While, because of the claimant's age and the circumstances under which the letter was signed by her, I attach no great importance to it, the natural inference to be drawn from this letter is that the stock had been delivered to the Brick Company. Later on, when Milton took over the note, he wrote his mother a letter, stating the terms upon which he would hold certain of the pledged stock which he found necessary to be transferred to his own name, and therein referred to the stock as having been "pledged with your consent to secure the loan made by me to the Blue Ridge Enamel Brick Company."

In the dealings of the parties respecting the affairs of the Brick Company, there was apparently no distinction made between the claimant's three sons and the Brick Company itself. The mother was an indorser on the original note, and hence her liability thereon was fixed, irrespective of the stock furnished by her to be used as collateral. I can see no good reason, therefore, why the delivery of the

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stock should have taken the form of a loan to the sons rather than to the company. The sons, in seeking to borrow the stock, were unquestionably acting, to the mother's knowledge, as agents for the company; the stock was to be, and actually was, used for the benefit of the latter, in which she was financially interested. The claim is presented by a very near relative of the bankrupt, and is sought to be proved by other relatives, whose interest in the establishment of the claim is apparent and substantial.

[3, 4] Under such circumstances, the evidence must be considered, as I fear the referee overlooked, in the light of two general rules, the latter of which cannot, I think, be too rigidly adhered to. The first of these rules is that, where an agent acts on behalf of a disclosed principal, his acts and contracts, within the scope of his authority, are, in the absence of an express agreement otherwise, the acts and contracts of the principal, and involve no personal liability on the part of the agent. Whitney v. Wyman, 101 U. S. 392, 396, 25 L. Ed. 1050; McCauley v. Ridgewood Trust Co., 81 N. J. Law, 86, 88, 79 Atl. 327; 2 C. J. 812, § 486, and cases there cited. And the presumption in such cases is that it was the intention to bind the principal only, which presumption can be overcome only by clear and explicit evidence of an intention to substitute his personal liability for that of the principal. Moline Malleable Iron Co. v. York Iron Co., 83 Fed. 66, 70, 27 C. C. A. 442 (C. C. A. 7th Cir.); Hall v. Lauderdale, 46 N. Y. 70, 74; 2 C. J. 813, § 487; Id. 923, § 661, and cases cited. The second rule above referred to is that claims of relatives of a bankrupt should be closely and carefully scrutinized, and not allowed, unless the evidence is clear and convincing. In re Domenig, 128 Fed. 146, 148 (D. C. E. D. Pa.); In re Grandy & Son, 17 Am. Bankr. Rep. 206, 214, 146 Fed. 318 (D. C. S. C.); In re Wooten, 118 Fed. 670, 671 (D. C. N. C.); Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 89 C. C. A. 605, 24 L. R A. (N. S.) 184 (C. C. A. 6th Cir.); Baumhauer v. Austin, 186 Fed. 260, 108 C. C. A. 306 (C. C. A. 5th Cir.).

I am unable to conclude that the claimant's contention that the stock was loaned to the bankrupt and his two brothers personally, rather than as agents of the Brick Company, has been established as against other creditors by such clear, explicit, and convincing evidence as the before-mentioned rules require.

[5, 6] The next question is whether the fact that the claimant is now the holder of the note which was given by Milton to the Brick Company to take up the note originally held by the Fidelity, and that the bankrupt was an indorser thereon at the time she acquired it, entitles her to recover the full amount of the note from his estate; and, if not, what part thereof, if any, she may recover. This necessitates an ascertainment of the legal relationship which the pledging of the claimant's stock and the indorsing of the notes by the sons created as between the claimant and the sons. As the evidence fails to establish that the stock was loaned to the sons personally, there is presented a situation where it appears that stock belonging to the claimant was loaned by her, at the request of her sons, and used by them as representing the company, with her consent, for the express

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purpose of enabling the Brick Company to borrow money on its note or notes; the latter being also indorsed by the sons for the same purpose. The stock was therefore surety for the payment of the note, for it is well settled that, when property is pledged by an owner to answer for the debt or default of another, it occupies the position of a surety. Brandt on Suretyship & Guaranty, vol. 1 (3d Ed.) § 43, and cases there cited; National Bank v. Silliman, 65 N. Y. 475, 478; Hanford v. Bockee, 20 N. J. Eq. 101, 105. The sons were likewise sureties for the payment of the note, and undoubtedly, as between themselves, their understanding (which parol evidence was admissible to show, Wilson v. Hendee, 74 N. J. Law, 640, 66 Atl. 413) was that they were to be cosureties. Thus it appears that the stock was pledged as security for the same debt as that for which the sons became surety, and at the same time. On this bare set of facts, were it not for the fact that the suretyship of the sons took the form of an indorsement of a promissory note, there would seem to be no question but that the claimant's stock and the sons were cosureties, and as such required to bear a proportionate share of the loss. Brandt on Suretyship & Guaranty, vol. 1, § 281, and cases there cited.

The trustee, however, invokes the rule laid down in a number of cases, and which I think may be considered as a general one, that an accommodation indorser of a note, except there be an agreement to the contrary, is not liable as a cosurety to a surety who signs a note as a maker (see cases cited in Brandt on Suretyship & Guaranty, vol. 1 [3d Ed.] § 286; 32 Cyc. 17, note 16), and contends that the claimant's stock occupied, in effect, the same position as if the claimant had signed the note as an accommodation maker. Hence it is argued on his behalf that, on familiar principles, the claimant cannot recover against the bankrupt. Even if it be assumed that the claimant's stock occupied the same legal position as if the claimant had signed the note as an accommodation maker, it seems to me that the trustee's contention is not sound, because it is entirely clear, in view of the circumstances under which, and the purpose for which the stock was procured and pledged, and the relationship of the parties toward the Brick Company, that the claimant and her sons never intended, as between themselves, that her stock should be liable for a greater proportion of the Brick Company notes than the sons should be liable for, which intention, for all present purposes, may be considered as a sufficient agreement between the sureties to satisfy the exception mentioned in the rule, and to overcome the presumption upon which the rule is based, that those who sign in different capacities are presumed not to be cosureties.

The claimant's contention that they were not cosureties is based on the proposition, set forth in her proof of claim and relied upon at the hearing and the argument, that the stock was not loaned to the company, but was loaned to the sons, and by them loaned to the company. Of course, if such were the fact it needs no argument to demonstrate that the stock, so far as the claimant is concerned, would not have occupied the position of a cosurety with the sons, for in that case the stock would have been pledged as the property of the sons, and not of the claimant. But, as it has been heretofore found, the

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evidence does not establish that the stock was loaned to the sons. While there is some evidence from which it might be inferred that the sons had agreed to indemnify the claimant against loss (and if such had been the fact it would have, I think, rebutted the inference that the stock and the sons were cosureties), it would not be permissible, I think, to consider any such evidence in this matter, because it would be so utterly inconsistent and at variance with the theory on which the proof of claim is based, and the matter was tried, and the appeal argued. There could not exist at the same time an agreement to loan the stock to the sons personally and an agreement to loan the same stock to the company upon the sons' indemnity agreement.

The claimant having chosen to attempt to overcome the presumption of cosuretyship on the theory that the stock was loaned directly to the sons, and offered evidence to that effect, she is bound, on this appeal, at least, to stand or fall on the position which she has taken. I do not mean to be understood, by anything that I have just said, as intimating an opinion as to whether or not an indemnity agreement such as that above discussed would be within or without the statute of frauds. It follows, therefore, I think, that the only legitimate conclusion which can be reached is that the claimant's stock occupied the position of a cosurety with the sons for the payment of the note. Such being the relationship, it is entirely well established, as in reason it must be, that the mere fact that the claimant has paid and acquired the note in order to save her stock, does not entitle her to recover against one of her cosureties more than his proportionate share of the debt which she paid. Lidderdale v. Robinson, Fed. Cas. No. 8,337, 2 Brock. 159, affirmed 12 Wheat. 594, 6 L. Ed. 740; German, etc., Bank v. Fritz, 68 Wis. 390, 32 N. W. 123; Dillenbeck v. Dygert, 97 N. Y. 303, 49 Am. Rep. 525; McDaniel v. Lee, 37 Mo. 204; In re Carmichael, 96 Fed. 594 (D. C. N. D. Iowa); In re Bingham, 94 Fed. 796 (D. C. Vt.); 37 Cyc. 428; Brandt on Suretyship & Guaranty, vol. 1 (3d Ed.) § 341. As there is no evidence that the other sureties are insolvent, and no other equity to change the general rule appears, the claimant is only entitled to recover from the bankrupt's estate one-fourth of the amount which she paid to Milton E. Blanchard when she acquired the note. See 32 Cyc. 285, E, et seq., and cases cited.

My conclusion, therefore, is that, in so far as the order of the referee allowed her claim for any sum in excess of such one-fourth, it was erroneous, and should be reversed accordingly.

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THE SARMATIA.

THE BARBARIGO.

(District Court, D. Maryland. November 14, 1918.)

COLLISION ⇐125—VESSEL AT FAULT—EVIDENCE.

Under conflicting evidence, in view of credit given witnesses, fault for collision between two of a fleet of convoyed ships, depending on which was out of its proper place, in a line, abreast, 500 yards apart, *held* solely with respondent.

In Admiralty. Libel by Peder Christian Moller Pederson, master of the steamship Sarmatia, against the steamship Barbarigo; Umberto Nobile, claimant. Decree for libelant.

George Forbes, of Baltimore, Md., for libelant.

Ritchie, Janney & Stuart, of Baltimore, Md., and Kirlin, Woolsey & Hickox, of New York City, for respondent.

ROSE, District Judge. Shortly after 1 o'clock on the morning of May 16th last, at a point in the Mediterranean something over 200 miles east of Gibraltar, there was a collision between the Danish steamship Sarmatia, hereinafter referred to as the "Dane," and the Italian steamship Barbarigo, spoken of as the "Italian." They formed part of a fleet of seven or eight merchant ships, under convoy of destroyers, armed trawlers, etc. The convoyed vessels were sailing in line abreast. Each ship should have been 500 yards away from its nearest neighbor, whether to the right or to the left.

The night of the collision was calm. The moon had gone down. There may have been some clouds in the sky, and it was therefore dark, but there was no mist. All the witnesses, differing as they do as to much else, agree that ships could be seen for a distance many times greater than would have been necessary to have avoided the accident.

Nothing in the testimony suggests that there was anything the matter with the steering gear or other machinery of either vessel. They came together because one or the other of them was carelessly handled. As a matter of course each of them says it kept its position, and the other came down on it. As it is not likely that more than one of them was out of its proper place to any material extent, the sole question is: Which one was where it should not have been?

The Italian says that the Dane closed down on it and drew a little ahead, so at the time they came together, the Dane was about a half length forward. The Dane's story is that the Italian had been ahead about a half ship's length, and that shortly before the collision, she began to drop back and down upon the Dane, and continued to do so until she struck. There is no question that the bluff of the port side of the Italian's bow struck or was struck by the starboard side of the Dane at a point a little abaft of the latter's main rigging.

If the Italian's version is true, the Dane must have been moving appreciably faster than the other ship. The Dane's account is con-

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sistent with the speed of the two ships being at the critical period more nearly equal. While sailing in convoy, the aim is to keep all the ships moving at a uniform rate, a purpose which, of course, is not always perfectly attained.

As the distance between the ships grew perilously narrow, the Dane gave a whistle signal. The collision followed hard thereon. Various witnesses estimate the interval somewhat differently. Some say it was one minute; some three. Such estimates, of course, have no value other than to show that the intervening time was of the shortest.

That the Dane whistled was not disputed, but there is a question as to how many blasts it blew. It says there were two, signifying it was turning to port, and out of the Italian's way. The witnesses from the latter swear that it gave but one; that is, that it gave notice that it was doing what they say it was, namely, turning to starboard. Whether the number was one or two had in itself nothing to do with the disaster. The signal, whatever it was, never caused the collision nor contributed to it. The conflicting stories told about it are, however, significant as bearing upon the truthfulness of the persons who have testified concerning it. Some of the witnesses, who were on one or the other of the ships in collision, were, at the time it happened, asleep, or in such parts of the ship that they did not hear the signal at all; but those who did without exception testify in support of that number of blasts favorable to the vessel upon which they were. Three individuals, who were aboard the Owego, have been examined. It was under the American flag, was a member of the convoy, and was sailing next to the Dane on the latter's port side. Two of these witnesses were produced by the Italian, and one by the Dane. The latter said he heard whistles, but he frankly says he does not remember how many. Whether his use of the plural "whistles" was intended by him to have any meaning does not appear. The mate of the Owego was on her deck at the time the ships came together, and was produced on behalf of the Italian. He says there were two blasts, and the master of the Owego, who was asleep when the signals were given, testifies that when he came on deck a few minutes afterwards the mate told him that two blasts had been sounded. I have no question that the fact was so.

Four of the officers and men of the Italian, being all who were on her deck at the time, and who have been examined, say that there was only one blast. The ships were too close together for any of these witnesses to have failed to hear both whistles, and while it would have been easy for some, it would have been difficult for all of them to have become confused in their recollection as to the number. Their uniting in saying that only one blast was blown suggests that there was a concerted effort on their part to make the court believe that the whistle signal was in accord with the story which it was for the interests of their ship to have accepted. This conclusion, moreover, merely strengthens the unpleasant impression which these particular witnesses made at the hearing. It is true some of them were struggling, and perhaps greatly struggling, with the difficulty which unlettered or slightly lettered men have in conveying their

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ideas through interpreters, the latter not familiar with the peculiarities of the particular dialect of the language spoken by them, and entirely ignorant of nautical terms in any tongue. Still, after making all proper allowance on this score, it remains true that they compared unfavorably with those produced from the Dane.

The Italian examined as a witness for it, an Italian army officer who was on board as sort of supercargo. He did not come on deck until a few minutes after the collision. He locates the Italian at that time as about its proper distance from the Norwegian ship on its starboard and from the Owego to the port of the Dane. It is stipulated that the Italian naval officer in command of the merchant fleet, and who came on deck about the same time, would have given like testimony, had it been practical to examine him. It is, however, easy to be mistaken as to distances at sea, particualrly at night. It is curious, but true, that there is a very strong instinct which makes almost every man in a case of collision, be it on land or sea, a partisan, subconscious, perhaps, but no less intense, of the conveyance in which he was at the time the accident happened. In view of these considerations and of the other evidence, I cannot give controlling weight to the testimony of these gentlemen.

At the time of the collision there must have been a number of people on the deck of some of the other five or six ships in the convoy, and some of these may have seen more or less of the accident. I believe both parties have been diligent in their efforts to locate them, but they have succeeded in producing three only, all from the Owego. Of these three, as already stated, but two were on deck when the ships came together, and unfortunately they flatly contradict each other.

The mate of the Owego was then in charge of her navigation. He claims that at the moment of collision the two ships were from 800 to 1,000 yards to the starboard of his vessel. This is the approximate position in which they would have been had the collision taken place as the Italian says it did. The master of the Owego, who came on deck a moment or two later, confirms this estimate. In weighing the value of their testimony, it is probably unimportant to note that they were mistaken as to what happened after the collision. They think that the Dane dropped to the rear. It was the Italian who fell back. Their error, in a respect in which they did not claim to be positive, does not discredit their testimony. At night they could readily have been mistaken. The testimony of these witnesses was taken in New York, and I did not have the advantage of seeing or hearing them.

The third witness from their ship was an enlisted man in the United States navy. He was a member of the armed guard. He testified in open court, and struck me as being unusually intelligent and impartial. He locates the Dane at the time of the collision about 150 yards to the right of the Owego's course; the Owego then being a ship's length ahead of the Dane. This would be about the position in which the Dane would have been, had its testimony been true, namely, that the only departure it made from its proper place was in turning somewhat to port to avoid the Italian. He, moreover, agrees with the wit-

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nesses from the deck of the Dane, in that, not long before the collision, the Italian seemed to be something like a half ship's length ahead of the Dane. The only portion of his testimony inconsistent with the account given by the witnesses on the Dane is that, according to him, the latter was about as close to his ship when he went on watch as it was at the time of the collision. According to the story of the Dane, before it moved down towards that ship in an effort to avoid the Italian, it was 400 or 500 yards away from the Owego.

The written testimony of the master and mate of the Owego has not favorably impressed me. They appear to be persons who would scarcely have been holding these positions, had not the demand, created by the war, for qualified officers, put many men in places which they could not otherwise have attained. They were rather singularly forgetful of things which it would have been natural for them to remember. For example, they cannot recall that there was a ship on their port side. It seems quite satisfactorily established that there was in that position a large five-masted Italian steamer.

Some comment has been made on the failure of the Dane to produce its helmsman. There is no question that, from the time the case got into the hands of its proctor in this port, all diligence to secure him was exercised. It is unfortunate that we do not have the benefit of the story he could have told.

As is usual in these cases, there are discrepancies among the stories of the witnesses for the Dane. It remains true, however, that the impression made on my mind by all the testimony is such that I am constrained to find the Italian solely to blame.

UNITED STATES v. GOULED et al.

SAME v. GOULED.

(District Court, S. D. New York. September 13, 1918.)

SEARCHES AND SEIZURES ⇐5—DISPOSITION OF PROPERTY SEIZED—MATERIAL EVIDENCE.

The addressee of a letter, taken from him under a search warrant issued on a sufficient showing charging him with crime, is not entitled to return of the letter, where it contains material evidence against the writer, who is a codefendant.

Criminal prosecutions by the United States against Felix Gouled, Aubrey W. Vaughan, and David L. Podell, and against Felix Gouled. On motion of defendant Gouled for return of books and other property seized under search warrants. Denied.

See, also, 253 Fed. 242.

Francis G. Caffey, U. S. Atty., of New York City.

Martin W. Littleton, of New York City, for defendant Gouled.

MANTON, Circuit Judge. This is a motion to require the district attorney of the United States for the Southern District of New York

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to deliver to the petitioner (defendant herein) all books, papers, contracts, memoranda, check books, account books, check vouchers, letters, personal diary, diaries, ledger, telephone address books, and other papers described in his petition. The property taken from the defendant was seized on the 17th of June and on the 22d of July, 1918, from his place of business at No. 1 Madison avenue, New York City.

The grand jury has indicted the defendant and others for violation of section 37 of the United States Criminal Code. Act March 4, 1909, c. 321, 35 Stat. 1096 (Comp. St. 1916, § 10201). A conspiracy to defraud the United States is alleged, and consists of fraud in the sale of articles of clothing to the government. The affidavit on behalf of the government indicates that a search warrant was issued on each of these days, and each search was made pursuant to the warrant. A search warrant may be issued as a means of obtaining evidence of crime. Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575.

But the defendant urges that this search was made in violation of the Fourth and Fifth Amendments of the Constitution, relying upon Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and Flagg v. United States, 233 Fed. 481, 147 C. C. A. 367. But the distinction in the Weeks and Flagg Cases and the case at bar is that here there are two search warrants, which were used and which are not successfully attacked as irregular or invalid. Judge Coxe, in his opinion in the Flagg Case, said that—

"had there been such a warrant issued on proper proof by competent authority in the case at bar, the defendant's contention that the seizure of his property was unlawful, wanton, and in violation of his constitutional rights might have been unavailing. Such a warrant, issued by a court of magistrate having jurisdiction, protects the officer executing it, even though he may transcend his authority."

The question of whether the use of the evidence may compel the defendant to be a witness against himself is prematurely raised, and whether or not there has been a violation of the Fifth Amendment must be tested when proof is offered upon the trial. The Fourth and Fifth Amendments must be treated as quite distinct, and have been by the courts. Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652. The language of the Espionage Act (Act June 15, 1917, c. 30, tit. 11, § 2, subd. 2, 40 Stat. 217) is that a search warrant may be issued—

"when the property was used as the means of committing a felony, in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be."

It was the intention of Congress to thus grant the use of the search warrant for the discovery and detection of crime, which proved to be an infraction of the so-called Espionage Law. It does not go further than this. The circumstances of this case do not warrant a finding of unreasonable search. There was reasonable ground to believe that the crime had been committed, as demonstrated later by the finding of

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the indictment and the plea of guilty of one of the defendants. Warrants were issued after sworn affidavit was made by duly authorized agents, and are sufficiently descriptive of the property which was taken, so as to sustain their validity. Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658. The papers taken, at least those coming into the hands of the district attorney, were returned at the time of the hearing of this motion, except a letter sent by Podell to Gouled, which was a bill for services, and which it is asserted will be used as an exhibit on the trial, and is referred to in the indictment as a letter sent through the mails in violation of section 215 (Comp. St. 1916, § 10385); one of the counts of the indictment being a violation of this section. Clearly this exhibit would be admissible against Podell, and should not be returned to Gouled.

The motion is denied.

WEST VIRGINIA TRACTION & ELECTRIC CO. v. ELM GROVE MINING CO. et al.

(District Court, N. D. West Virginia. December 9, 1918.)

No. 46.

COURTS ⊂=284—FEDERAL COURTS—ENFORCING FEDERAL LAWS—ORDER OF FUEL ADMINISTRATOR.

Though, in the absence of diversity of citizenship, the federal court has no jurisdiction to determine the controversy of price at which defendant agreed to furnish coal to plaintiff, a public service corporation, it will, leaving that question for courts of competent jurisdiction, enjoin defendant from disobeying the order of a state fuel administrator, under the Lever Act, to continue furnishing plaintiff with coal till the act by its terms ceases to be in effect, by termination of the war, ascertained and proclaimed by the President.

In Equity. Suit by the West Virginia Traction & Electric Company against the Elm Grove Mining Company and others. On motions to award temporary injunction and, per contra, dissolve restraining order. Motion to dismiss denied, and application for temporary injunction granted.

John J. Coniff, of Wheeling, W. Va., for complainant.
Joseph Handlan, of Wheeling, W. Va., for defendants.

DAYTON, District Judge. The plaintiff here has filed its bill and amended bill, alleging in effect that it is a West Virginia corporation, a common carrier, operating some 16 miles of street railway in Wheeling, and from that city to the Pennsylvania line, at West Alexandria, also an electric power plant at Elm Grove, W. Va., and a waterworks just outside of Wheeling. It charges its car line accommodates, in transportation of passengers, freight, and express, among others, several hundred workmen in plants outside the limits of Wheeling, engaged in the manufacture of munitions for the government; that its electric power plant furnishes electricity to about 12,000 families, and

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its waterworks water to about 1,500; that the defendant corporation is a West Virginia coal-mining corporation, operating at Elm Grove, of which defendant Paisley is president and defendant Skillcorn is manager; that on May 4, 1910, its predecessor, the City & Elm Grove Railway Company, made a contract with the predecessor of the defendant corporation, the Elm Grove Coal Company, which contract has been assumed by the plaintiff and defendant corporations for and on behalf of their respective predecessors, by which plaintiff was to be supplied with coal. An admitted copy of this contract is exhibited with the bill.

A bitter controversy turns upon the construction to be given certain of its provisions. By its terms, the defendants' predecessor, for itself, its successors and assigns, for 10 years from its date and so long thereafter as it should be able to supply the necessary quantity from its mine, undertook to furnish run of mine bituminous coal free from dirt, slate, and noncombustible material, in a quantity of 40 tons a day, subject, however, to the right of the purchasing corporation, by written notice given on the 1st of a month, to either increase or diminish the amount to be furnished until a similar notice on the 1st of another month was given to the contrary; the purpose being that the purchasing corporation should be furnished all the coal required for the operation of its power plant, if the selling corporation was able to furnish it. It is then stipulated that the selling corporation should erect a trestle from its mines to the power plant of the purchasing corporation, and in effect the latter should pay each year 6 per centum of its cost, so long as it was used for the delivery of such coal. For the coal, so delivered, the price to be paid was $1 per ton of 2,000 pounds, payable on the 20th of each month for the amount furnished the preceding month, subject to this condition:

"Whenever any increase or decrease shall be made from the mining rates now in force and operation, then the price to be paid by the said party of the second part (the purchasing corporation) to the said party of the first part (the selling corporation) for the coal delivered under the provisions of this agreement shall be increased or decreased, and such increase or decrease shall apply with respect to the price to be paid under this agreement whenever any subsequent changes in mining rates shall occur during the continuance in force of this agreement."

What was meant and included in the words "the mining rates," as used in this contract, has given rise to substantially the whole trouble between the parties. The plaintiff contends that the interpretation must be restricted to the cost of cutting and loading coal into mine cars at the miner's place of work. On the other hand, the defendants insist that it should include the total cost of production, presumably thereby meaning to include overhead and outside work, and fixed charges, such as interest, insurance, tax, and office expenses.

It is not likely that these terms were used in this contract without a mutual recognition of the fact that they were used in a sense generally understood by those engaged in mining coal. It would seem, therefore, to be an easy matter to determine from mine operators and mine workers this common understanding, and settle accounts accordingly. The plaintiff charges, in effect, that from May 4, 1910, the date

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of the contract, to November, 1916, when it assigned the contract to the defendant corporation, a period of over 6 years, the Elm Grove Coal Company accepted compensation for the coal furnished at the price of $1.11 per ton, according to an agreed adjustment as to "the mining rates," in accord with plaintiff's interpretation of their meaning, but that about a month after it had become the assignee of the rights and obligations of the Elm Grove Coal Company, in December, 1916, the defendant corporation demanded a fixed price of $1.30 per ton; then in January, 1917, the sum of $1.44; in May following, $1.58 per ton, basing these demands on alleged increase in cost of production and 10 per cent. additional; and finally, on December 24, 1917, notified plaintiff, unless it settled for all coal furnished from November 1, 1916, at the rate of $1.90 per ton it would cease on January 1, 1918, furnishing it any at all.

The plaintiff charges it refused these demands, but made repeated requests to be furnished with data upon which the price payable for and on account of increased "mining rates" could be adjusted, which was refused—made propositions that a friendly suit be instituted to interpret the contract, or that the controversy be submitted to arbitration, which proposals were rejected. I cite the case as made out by the allegations of the bill, without taking the time to set forth wherein its charges are either denied or modified by the answer, because this motion is to dismiss, and, if there be issues of fact raised by such answer, they could only be settled after time had been given to bring forward the evidence to determine them.

But, be all these things as they may, it is very apparent, if this were all, there could be no possible excuse for this court taking jurisdiction of the matter in any way. Its right to do so is based upon these further facts: Congress passed an act approved August 10, 1917, commonly known as the Lever Act, "to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," 40 Stat. 276. This act, by the terms of its twenty-fourth section, "shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President." Under the powers conferred by it, the President, by executive order of date August 23, 1917, designated and appointed Harry A. Garfield as Fuel Administrator to carry into effect the provisions of the act so far as relating to fuel, and authorized him to appoint all necessary assistants. In accord with this power, the Fuel Administrator so appointed promulgated a series of regulations whereby state administrators, county administrators, and local committees were provided for. In this state J. Walter Barnes was appointed such state administrator, Charles M. Ketchum was appointed as administrator and chairman of the local committee, composed of himself, James W. Ewing, and Roy B. Naylor, for Ohio county.

Without entering into minute detail, it suffices to say that when the demand of December 24, 1917, for $1.90 per ton was made by defendants, under penalty for noncompliance of their ceasing to furnish coal

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on January 1, 1918, the plaintiff appealed to the state administrator to intervene and prevent such action. In the meantime the President, under and by virtue of the powers conferred upon him by this Lever Act, had fixed a maximum price for coal in this district of $2.45 per ton. The result of this appeal was that the state administrator, advised by his local committee, promulgated an order on December 29, 1917, directing the defendant coal company to continue to furnish coal at the price provided in the contract, or at a price not exceeding $2.45 per ton. An immediate contention arose between the parties as to the meaning of this order. The defendants insisted that under its terms they were permitted to charge the maximum price fixed by the President. The plaintiff insisted that the contract must govern, and no price greater than its terms provided could be charged.

Thereupon the local committee, "at the expressed and written request of both parties," took further action in the premises. They undertook to construe the meaning of the contract in the use of the words "mining rates." They concluded that the interpretation thereof contended for by the plaintiff was the true one, and should be held to mean "the cost of cutting and loading coal into mine cars at the miner's place of work." They further undertook to ascertain the changes in "mining rates," so construed, that had occurred since the date of the contract in May, 1910. They ascertained these changes to be three in number, and that the average contract price for the period, by reason of these changes, would be $1.49. For reasons, however, set forth in their report, they recommended a compromise price of $1.70 to be paid. This plaintiff agreed to pay for future deliveries, upon condition that all its rights under the contract were reserved to it. Upon this condition, it alleges, it from time to time tendered to pay this price for coal delivered, but it was refused, and, on April 17, 1918, the defendant corporation gave notice that it would stop furnishing on April 18, 1918, and did stop so doing from noon of that day, until required to furnish such coal by an order of the state fuel administrator issued on April 19, 1918. The state fuel administrator, rightly takes the position that he has no power to construe the terms of the contract, but that because the plaintiff is a public service corporation, and its need for the coal is apparent for the public welfare, he has right to require the coal company to furnish it. He thereupon issued this order of April 19, 1918, requiring the defendant to furnish coal at the price fixed by its contract, not to exceed the maximum price fixed by the President.

The defendant coal company refused to obey this order in practical effect. It gave notice on May 9, 1918, to plaintiff, that it would, on the following day, at noon, discontinue furnishing coal unless prior thereto it had been paid at the rate of $2.45 per ton of 2,000 pounds for all coal furnished since January 1, 1918, to May 4, 1918, and plaintiff in writing had agreed that it would continue to pay such price. Thereupon the plaintiff filed on May 10, 1918, its bill, upon which a temporary restraining order was granted by this court. A hearing was directed to be had on the 18th day of May following, continued to May 20th by agreement of counsel, when plaintiff filed an amended

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bill, the defendants filed their motion, with grounds therefor in writing, to dismiss, and this motion and plaintiff's application for a temporary injunction were argued by counsel under agreement that the temporary restraining order should continue in effect until the decision of the court upon such application, and the further agreement that on or before the 23d of May, 1918, the defendants should be permitted to file their answer, which should be read as an affidavit in resistance of the motion for temporary injunction. This answer was filed on May 23d, and on October 1st the defendants further filed papers entitled "Statement of Account," and "Cost of Production by Companies, Panhandle Coal Operators' Association."

I greatly deplore the delay that has occurred in the decision of these questions. War conditions, quarantine regulations, and very greatly increased court work on account of criminal prosecutions under war statutes have been largely the cause of it. The questions involved are wholly ones of first impression, too, and have required careful consideration. I have hereinbefore said that the state fuel administrator rightly took the position that under the Lever Act he had no power to construe the existing contract between the parties; that he could only require, in the interest of the public welfare, that the plaintiff, as a public service corporation, should be supplied with coal necessary for its operation by the defendant coal company in execution of its contract and upon its contractual terms and conditions. It was not the purpose and intent of this Lever Act to abrogate existing contracts. By its express terms it so declares in these words:

> "The maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of maximum prices by the commission."

In this contract, made and operated under without objection for more than 6 years, the price is fixed at $1 per ton, subject from time to time to increase or deduction in accord with changes occurring in the mining rates. That the Fuel Administration had and could have nothing to do with the controversy arising as to the meaning of these terms in the contract, or with the settlement of disputed accounts between parties growing out of different constructions thereof, is to me clear and conclusive. The parties had the plainest and simplest remedy. If the coal company desired to establish its contention, it had only to bring its action at law in any court of competent jurisdiction for the sums it felt itself entitled to, wherein a judicial construction of the contract would be made, and it would be awarded its compensation according to such construction. It admits its assumption of the contract. It may be one very unfavorable to its interests under present conditions; on the other hand, it may have been a very favorable one to it when executed 8 years ago, when the coal market was overstocked and prices very low. Be that as it may, it has assumed this contract, and it should abide by it, appealing to the courts to determine its construction and all controversies arising in the course of its execution.

For it, on the contrary, to determine to place its own construction on the contract, refuse to sue or arbitrate, within short intervals, charge increased sums over what had been paid to and accepted by its assignor

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as the contract price for more than 6 years, until at last a sum over two times greater was demanded under penalty, within 24 hours, of ceasing to furnish coal at all, thereby necessitating a complete cessation of plaintiff's street car and lighting facilities, does not seem to me, under any conditions, to be in accord with equity and good conscience. To do so in war times, when the life and welfare of the country demand of us all every sacrifice for the common good, such a course becomes far more reprehensible. I am persuaded that to prevent just such lines of conduct was one of the purposes of Congress in the enactment of this Lever Act. No question is raised here as to its constitutionality, and I know of none that can be raised. Clearly it gives power to the President, through officers authorized to be and appointed by him, to so conserve and regulate the distribution of food and fuel in such way that greed and extortion should not run riot, and the ability of men, women, partnerships, and corporations to work for the successful ending of the country's conflict should not be either crippled or hindered.

That Barnes, as state fuel administrator, is a government officer, charged with governmental duties and obligations, cannot be questioned. That the order issued by him on April 19, 1918, requiring this coal company to continue supplying the plaintiff with coal, was within the scope of his power and duties as such government officer, it also seems to me, cannot be denied, in view of the terms and requirements of this Lever Act. The primary duty and obligation of federal courts are to construe and enforce the federal laws. For this purpose they were created.

It cannot be assumed that, because Congress did not expressly so provide, federal courts can shirk the responsibility of enforcing the administrative orders of the fuel administrators acting legally and rightly within the terms and requirements of this act. Therefore it is not only permissible, but an absolute obligation upon this court, upon the appeal here made, to see to it that this order of the state fuel administrator is enforced. Like him, it cannot and will not assume to construe the contract, or in any way attempt to settle the conflicting claims and accounts arising under it, but leave that for courts of competent jurisdiction to do, if the parties persist in disagreeing. That this court does not have jurisdiction to do so seems to me to be very clear, for the reason that a purely civil controversy is involved therein, with no diversity of citizenship existing between the parties.

The motion to dismiss will be overruled. The application for a temporary injunction will be granted, to be in force until further order of this court, but in no event longer than the expiration of the Lever Act by virtue of the President's proclamation of the end of the war. It will be limited alone to put in effective force the state fuel administrator's order of April 19, 1918, requiring the defendant coal company to continue to supply coal to plaintiff under the contract, expressly reserving to the parties all right to assert and maintain, in any court of competent jurisdiction, any and all claims, accounts, and demands, one against the other, as to the contract, its construction, and the price to be paid for the coal delivered and to be delivered. It will allow the plaintiff to make such payments as it may deem it should under the

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contract make, and the coal company to receive the same, without in any way compromising or affecting their several rights under the contract.

In re KLIGERMAN.

(District Court, E. D. Pennsylvania. December 3, 1918.)

No. 4830.

1. BANKRUPTCY ⟸264—COMPOSITION—SALE.
   Where the referee, as part of a composition plan, sold property of the bankrupt, and confirmation of the sale was conditioned upon confirmation of the offer of composition by the court, the sale is null and void, where the offer of composition was rejected.
2. BANKRUPTCY ⟸382—COMPOSITION—CONFIRMATION.
   In determining whether an offer of composition should be accepted, the court will not consider the interest of the bankrupt, or a purchaser of the bankrupt's property, etc., but only the interest of the creditors.
3. STATUTES ⟸216—CONSTRUCTION—CONGRESSIONAL DEBATES.
   The amendment of 1910 to Bankruptcy Act, § 47a (2)—Comp. St. 1916, § 9631—declaring trustees shall be vested with all the rights of a creditor holding a lien by legal or equitable proceedings, etc., *held* not so ambiguous as to warrant recourse to congressional debates.
4. DOWER ⟸46(3)—PENNSYLVANIA—LIABILITY FOR DEBTS.
   In Pennsylvania, land is a chattel for payment of debts through a species of conversion, which extinguishes every derivative interest and it may be seized as personal property on a fi. fa., and passes by sheriff's sale to the purchaser, free from dower rights of the debtor's wife.
5. BANKRUPTCY ⟸143(8)—BANKRUPT'S LANDS—DOWER RIGHTS.
   Under the amendment of 1910 to Bankruptcy Act, § 47a (2)—Comp. St. 1916, § 9631—which gave the trustee the rights of a creditor holding a lien by legal or equitable process, etc., and in view of section 70 (section 9654), *held*, that the land of a Pennsylvania bankrupt could be sold free from dower rights of his wife; such rights under the state laws being subject to the claims of creditors.
6. BANKRUPTCY ⟸11—JURISDICTION OF COURT—RECORDS.
   Where, pursuant to an offer of composition, the trustee executed a deed to the bankrupt's property to carry out a sale, contingent on confirmation of the composition, *held* that, the matter having been referred to a special referee, after an increased offer, the court, on exceptions to such referee's report, was without jurisdiction to order expunged from the records the trustee's deed, which had been recorded without authority.

In Bankruptcy. In the matter of Harry Kligerman, bankrupt. On petition for confirmation of composition, and on exceptions to report of special referee. Confirmation of composition refused, exceptions overruled, and cause remitted to special referee.

See, also, 219 Fed. 758.

H. H. Gilkyson, of Phœnixville, Pa., for creditors.
G. Albert Smyth, of Philadelphia, Pa., for bankrupt.
W. S. Talbot, of West Chester, Pa., for trustee.
Geo. B. Johnson, of West Chester, Pa., for exceptants.

THOMPSON, District Judge. Harry Kligerman, upon his petition in voluntary bankruptcy, was adjudicated a bankrupt on June 3, 1913.

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In his schedules was included a farm in Chester county of 106 acres, valued at $4,500. The bankrupt, on November 11, 1913, made an offer of composition to his creditors, to pay all costs, fees, and priority claims, in full, in cash, and to pay unsecured creditors 10 per cent. of their claims in cash, upon condition that a private sale of the real estate of the bankrupt to Abraham Kligerman, freed and clear of liens, be approved. The offer of composition was accepted in writing by a majority in number and amount of creditors on December 16, 1913. The total amount to be paid under the offer was $2,399.76. The referee reported the offer to the court with a favorable recommendation on November 21, 1914. On the same day the referee ordered a private sale of the real estate to Abraham Kligerman, clear of all liens and incumbrances, for the sum of $2,010, "upon the confirmation of the offer of composition by the United States District Court for the Eastern District of Pennsylvania."

Nothing further was done towards confirmation of the offer of composition until March 14, 1918, because litigation was pending in the state courts over fire insurance covering buildings upon the farm which were destroyed by fire after the offer of composition was made. On December 20, 1917, however, the trustee executed a deed to Abraham Kligerman, in which the wife of the bankrupt joined, which was left in the possession of the trustee under an agreement between George B. Johnson, Esq., counsel for the bankrupt, and Wesley S. Talbot, Esq., counsel for the trustee, that it so remain until the question of confirmation of the composition should be determined by the court.

On March 14, 1918, a petition of the trustee was presented to the court, setting out that he had joined with the wife of the bankrupt in a deed to Abraham Kligerman, and had in bank for distribution to the creditors $2,655.41, sufficient to carry out the terms of the composition. Attached to this petition was the petition of the bankrupt, sworn to November 1, 1917, praying for confirmation of composition.

The present referee, Thomas R. Haviland, Esq., having called the attention of the court to an offer for the real estate of $3,000, afterwards increased to $3,500, free of liens and incumbrances, an order was entered referring the matter to Referee Haviland, as special referee, to ascertain and report the facts, together with the testimony and his findings and recommendations thereon.

A motion to vacate the order of reference was overruled in an opinion filed April 15, 1918, in which it is stated that, under the circumstances:

> "The court should not confirm the composition, unless all the facts are thoroughly made known to all of the creditors and a full report is made to the court, as indicated in the order of special reference."

On August 17, 1918, the special referee returned his report, with exceptions thereto on the part of the bankrupt, and his rulings upon the exceptions. The referee reports that, having given notice, he held a meeting of the creditors at his office on May 10, 1918. The meeting was not largely attended. Mr. Johnson, as attorney for the bankrupt, was present representing the bankrupt and nine creditors, whose claims aggregated $1,391.04; Mr. Talbot, as attorney for the trustee

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and representing a creditor with a claim of $767.81, also two creditors with claims of $81.40 and $243, respectively, and the tax collector of Charlestown township, Chester county, having a claim for taxes. Of the creditors present or represented at the meeting, all voted in favor of the original offer of composition, excepting the tax collector.

The referee reports that the increased offer for purchase of the premises, if accepted, would realize a dividend for the common creditors of over 19 per cent., as against the 10 per cent. offer. This percentage is based upon the opinion of the referee that a sale in bankruptcy by the trustee would divest the dower interest of Kligerman's wife.

The exceptions to the referee's report consist largely in statements of fact. * * *

The recommendations of the special referee are:

(1) That the offer of composition of 10 per centum to the common creditors and the payment in full of the preferred and secured claims be rejected.

(2) That an order be made remitting the cause to the referee for the further and ordinary administration of this estate.

(3) That an order be made, if the court has jurisdiction, expunging the deed of Harry F. Taylor, trustee of Harry Kligerman, to Abraham Kligerman, dated December 20, 1917, and recorded May 10, 1918, from the records in the office of the recorder of deeds for Chester county, at West Chester, Pa.

[1-5] In passing upon the first recommendation of the referee, the first inquiry is whether the composition offered is to the best interests of the creditors, and the answer to that question depends upon whether a sale under an order of the bankruptcy court would divest the dower interest of the wife of the bankrupt. If the dower would be divested by such sale, the common creditors would receive nearly double the dividends they will receive if the present offer of composition is confirmed. The confirmation of the sale by the former referee was expressly conditioned upon the confirmation of the offer of composition by the court. If the court is not satisfied that the composition offered is for the best interest of the creditors, the offer should not be confirmed. If the offer of composition is not confirmed, the sale ordered by the former referee would be absolutely void and of no effect.

The interest of the bankrupt and that of the purchaser are to be regarded as entirely outside of the consideration of the court in determining what is for the best interest of the creditors. * * *

The question whether, under a duly authorized sale in bankruptcy, the purchaser takes the bankrupt's real estate free from the wife's inchoate right of dower, depends upon the construction to be given to the amendment of 1910 (Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [Comp. St. 1916, § 9631]) to section 47a (2) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557). The language of the amendment is as follows:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

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Prior to the amendment of 1910, the courts, in construing the effect of bankruptcy upon the dower in the bankrupt's real estate, followed the ruling of the Supreme Court in Porter v. Lazear, 109 U. S. 84, 3 Sup. Ct. 58, 27 L. Ed. 865, where the question arose under the Bankruptcy Act of August 19, 1841 (5 Stat. 440, c. 9).

Since the enactment of the amendment, the question has arisen in the Middle district of Pennsylvania in the cases of In re Codori, 30 Am. Bankr. Rep. 453, 207 Fed. 784, and In re Freedman, 31 Am. Bankr. Rep. 53; Judge Witmer holding in those cases that the amendment of 1910 to section 47a (2) has the effect of vesting in the trustee in bankruptcy the enlarged rights, remedies, and powers of a judgment or other creditor having a lien upon the bankrupt's real estate, enabling him to sell such real estate acquitted and discharged of the inchoate right of dower, with the same effect as by a sheriff's sale after levy on a proper writ of execution.

In the Western district of Pennsylvania, in the case of In re Chotiner, 32 Am. Bankr. Rep. 760, 216 Fed. 916, Judge Orr held that the amendment does not authorize a trustee in bankruptcy in Pennsylvania to sell the bankrupt's real estate free from the wife's claim of dower, because the Bankruptcy Act as amended cannot be construed to affect estates other than that of the bankrupt.

Thus, in carefully considered opinions, contrary conclusions have been reached by Judge Witmer and Judge Orr affecting the title to real estate of bankrupts in Pennsylvania.

Judge Orr appears to have been influenced by the fact that the purpose of the amendment, as appears by the discussion in the House of Representatives in the Congressional Record for the Sixty-First Congress, Second Session, pages 2263 to 2279, was to remedy the defect in the trustee's title to property made apparent by the decision of the Supreme Court in the case of York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782.

The question at once arises whether there is such ambiguity or doubtful meaning in the language of the amendment as to justify recourse to the statements of the Representatives in Congress, during debate upon its passage, in aiding its construction. United States v. Union Pacific Railroad Co., 91 U. S. 72, 23 L. Ed. 224; United States v. Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007.

Mr. Justice Trunkey, following the established policy of the courts recognizing the common-law right of dower, and citing the Pennsylvania decisions upholding the right, except as affected by the rights of creditors, said in the case of Lazear v. Porter, 87 Pa. 513, 30 Am. Rep. 380, which was affirmed by the Supreme Court of the United States in Porter v. Lazear, supra:

> "A statute ought not to be interpreted as authorizing a sale of the husband's lands, freed from dower, unless such is its clear intendment. Were the meaning of the bankruptcy law and the effect of a sale of the bankrupt's land, as to dower, doubtful, the conclusion must be that the wife's estate is not divested."

But the language of the amendment in terms free from doubtful meaning includes "all property in the custody or coming into the cus-

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tody of the bankruptcy court." Nor is there doubtful meaning in the language vesting the trustee with "all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon." "All property" embraces, not only the bankrupt's personal property, but his real estate. What, then, are the rights of a creditor holding a lien by legal or equitable proceedings upon real estate in Pennsylvania upon the inchoate right of dower?

The law of Pennsylvania differs from the common law, in that the right of creditors prevails against the right of dower.

Land is a chattel for the payment of debts through a species of conversion, so far as may be necessary to the purpose of satisfaction, which extinguishes every derivative interest in it. Thus a judgment or a mortgage binds it and converts it, and it may be seized as personal property on a fi. fa., and passes by virtue of the sheriff's sale to the purchaser free from dower. Kirk v. Dean, 2 Bin. (Pa.) 341; Mitchell v. Mitchell, 8 Pa. 126; Helfrich v. Obermyer, 15 Pa. 113; Blair County Directors v. Royer, 43 Pa. 146.

Under the clear language of the amendment, therefore, the title vested in the trustee as to all the property in the custody of the bankruptcy court, both real and personal, instead of being, as it was before the amendment of 1910, only such title as the bankrupt himself had and could alone convey, is in addition thereto such title as a creditor could cause to be conveyed to a sheriff's vendee through and by judgment, execution, levy, and sale. In other words, the title which vests in the trustee is the title of a sheriff's vendee.

Judge Orr points out difficulties in applying the provisions of the various acts of assembly in relation to execution by the sheriff to a sale by a trustee in bankruptcy. But a trustee in bankruptcy derives his authority to sell from the provisions of the Bankruptcy Act, and is not required, in selling under an order of the bankruptcy court, to follow the statutes of Pennsylvania relating to execution.

Section 70 (Comp. St. 1916, § 9654) directs that the real and personal property belonging to a bankrupt's estate shall be sold, and that the title to property which has been sold shall be conveyed to the purchaser by the trustee. The trustee, therefore, having the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, and having the power to sell all the property of the bankrupt, conveys to the purchaser the same title which a creditor could have conveyed to a sheriff's vendee upon compliance by the sheriff with the statutory requirements of execution, levy, inquisition, appraisement, etc.

I am unable to see that the question is affected by the incident that, if the trustee as to land in Pennsylvania is vested with title, free of dower, the Bankruptcy Law would not be uniform, because in other states there is no conversion of real estate for the payment of debts, so as to divest the wife's dower. There has never been any question of uniformity as to the rights of creditors variously affected by the statutes of the several states in relation to exemption allowed under the Bankruptcy Act. There is no hardship if the property coming into the custody of the bankruptcy court is subjected to the claims of cred-

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itors to the same extent and in the same manner as if their claims were asserted in the state courts. Where a creditor may sell the real estate of his debtor clear of the wife's inchoate right of dower in the state courts, it is unjust and inequitable to creditors that such rights should be denied them in a court of bankruptcy within the same state.

These views are in harmony with, and not in contravention of, the provisions of section 8 (a) of the Bankruptcy Act (Comp. St. 1916, § 9592), providing that, in case of death, the widow and children shall be entitled to all rights of dower and allowances fixed by the laws of the state of the bankrupt's residence. The laws of the state of Pennsylvania give a lien creditor the right to sell the real estate free of dower, and the wife is therefore not deprived of any right she would have as against a creditor having a lien on her husband's real estate under the laws of Pennsylvania.

Entertaining the views herein expressed, I agree with Judge Witmer in the conclusion reached by him in the cases of In re Codori and In re Freedman, that the title passing upon a sale by the trustee of the bankrupt's real estate would be free and clear of dower. As a sale under the present offer would produce a fund which would nearly double the amount offered in composition, it is apparent that the composition is not for the best interests of creditors, and should not be confirmed.

The confirmation of the offer of composition is refused, and the cause will be remitted to the referee for the ordinary administration of the estate, in accordance with the second recommendation of the special referee.

[6] As to the third recommendation of the referee, the court has no jurisdiction in these proceedings to order that the deed of the trustee be expunged from the records in the office of the recorder of deeds for Chester county.

It remains to dispose of the exceptions on behalf of the bankrupt. As heretofore observed, the exceptions are devoted largely to statements of fact; they were recklessly and frivolously made, and are not only without any foundation in proof, but proved to be untrue.

Without further comment, the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth exceptions to the findings of fact, and the first, second, third, fourth, and fifth exceptions to the conclusions of law, are dismissed, at the costs of the exceptant.

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UNITED STATES v. LEW LOY.

(District Court, N. D. Ohio, E. D. April 22, 1918.)

No. 8918.

1. ALIENS ⇐23(2)—CHINESE PERSONS—DEPORTATION.
Where the entry of a Chinese person as a merchant or student is valid, he does not lose his right to remain because he subsequently becomes a laborer.

2. ALIENS ⇐23(2)—CHINESE PERSONS—INFERENCES AS TO ENTRY.
Where a Chinese person is admitted as a student, merchant, or miner child of a merchant, the weight to be accorded the inference from his immediate adoption of the occupation of a laborer depends on the circumstances, etc.

3. ALIENS ⇐32(5)—CHINESE PERSONS—CERTIFICATE OF ADMISSION.
Where a Chinese person, admitted as the minor child of a merchant, received a regular certificate of admission, the government, in subsequent deportation proceedings based on the fact such person had become a laborer, has the burden of showing that the entry was not for the purpose of conserving the family relation and following the occupation of a merchant.

4. ALIENS ⇐32(8)—CHINESE PERSONS—CERTIFICATE OF ADMISSION—EVIDENCE TO OVERTHROW.
The effect of a certificate of admission issued to a Chinese person as the minor son of a merchant can be destroyed only by substantial evidence, and cannot be overthrown by a mere suspicion that such person entered to become a laborer.

5. ALIENS ⇐32(8)—CHINESE PERSONS—DEPORTATION—EVIDENCE.
In proceedings to deport a Chinese person, who was admitted as the minor son of a merchant, but subsequently became a laborer, evidence *held* insufficient to warrant deportation, not showing that such person entered intending to become a laborer.

Deportation proceedings by the United States against Lew Loy. On appeal from a judgment of deportation rendered by a United States commissioner. Judgment reversed, and defendant discharged.

F. B. Kavanagh, Asst. U. S. Atty., of Cleveland, Ohio.

White, Johnson, Cannon & Neff, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. This is an appeal from a judgment of deportation rendered by a United States commissioner on a former hearing. The commissioner's order was affirmed, and on appeal to the Circuit Court of Appeals this judgment of affirmance was reversed, and the case was remanded for a new trial. 242 Fed. 405, — C. C. A. —. At this new trial additional evidence has been introduced. Upon consideration of all the evidence, I find the following facts:

Lew Loy is a Chinese person, and the son of Lew Fook Shing. The father, in October, 1910, when defendant entered the United States, was a merchant resident in the United States. He was then, and from October 6, 1907, had been, interested in and connected with a store at No. 1261 Broadway, Oakland, Cal., which business was later removed to No. 527 Twelfth street, Oakland, Cal., and was there continued until a recent date. This appears from the testimony of de-

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fendant, his father, and R. J. Faneuf, superintendent of the United States post office at Oakland, Cal.

Defendant arrived at the port of San Francisco on the steamship Mongolia about October 15, 1910. He was not permitted to land until about a month later, during which time the United States immigration officers investigated his right to be admitted. Witnesses were brought forward, who, it must be held, established to the satisfaction of these officials the defendant's status as a minor son of Lew Fook Shing, and the latter's status as a Chinese merchant lawfully in the United States. He was thereupon permitted to enter, and a proper certificate was issued to him, bearing date of December 12, 1910. Attached to this certificate is a photograph plainly recognizable, notwithstanding the lapse of time, as the defendant. This certificate states defendant's age as being 20. On this hearing defendant's father testifies that his son was really only 19, as the age thus given is according to the Chinese rule of counting ages, which, it seems, treats a child as one year of age as soon as he is born, and two years of age at the next birthday of the Chinese emperor, even though that birthday should arrive one or two months after the birth of the child. I accept as true this statement, first, because the photograph attached to the certificate is obviously that of an immature youth; and, second, the father's testimony in my presence convinced me that he was a witness entitled to full credit.

About a year later a younger son, named Lew Horn, arrived at the port of San Francisco, was also admitted as the minor son of a resident Chinese merchant, and is now, according to the testimony, at Los Angeles, Cal., engaged in business, not as a laborer, but as a Chinese merchant.

These two sons are the only children of Lew Fook Shing. The mother remains in China; and, in explanation, Lew Fook Shing testifies that she is a bound-foot woman, that she has a home, that he at one time furnished her with $2,000 in money, and has since sent her money to aid in her support; that, because she is a bound-foot woman, it is difficult for her to get about; that she likes to be with relatives, and is adverse to coming aboard a steamer.

Defendant, upon his arrival and after the delay in San Francisco, incident to establishing his right to enter, went to Oakland, Cal. There is some uncertainty in the testimony as to how long he remained in Oakland and San Francisco before coming to Cleveland, Ohio. Defendant, when first arrested, April 30, 1914, at Cleveland, Ohio, was immediately interrogated by the immigration inspector, and at that time answered the question, "How long did you stay in Oakland?" "About one or two months; then I came here." Upon the former hearing he said:

"I stayed in San Francisco about two months to learn the business, and then went to Oakland and stayed with my father about four months, and left him and came to Cleveland."

His father on this hearing goes into greater detail, and says that when his son was first admitted he came to his store and lived with his father at Oakland for a few months, then he went to San Fran-

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cisco and stayed at the Fook Weh store at No. 707 Grand avenue, for the purpose of learning the business, and attended school. Then, about two months later, he returned to his father's store at Oakland, remaining there some two months more, before his departure for Cleveland.

The father did not testify at the former hearing, but his statement was taken ex parte before an immigration inspector at San Francisco, and was introduced on behalf of the government. He was not asked how long his son had remained with him in Oakland, nor how long he remained in San Francisco. He does say that his son was engaged in learning business after his arrival and before his departure for the East.

I believe and find that the father's statement of his son's movements before coming East is true. The unrefreshed recollection of the son, made immediately upon his arrest, does not deprive his later testimony, or that of his father, of credibility, especially as other inaccuracies to the defendant's prejudice in matters of time appear in the same statement.

Defendant came to Cleveland, Ohio, not later than six months after his arrival in the United States. He and his father say that he came in company with two Chinese merchants and family friends named Chin Check Weh and Low Lim, and that he came for the purpose of finding a suitable location and engaging in business. He has not, since his arrival in Cleveland, been engaged in or connected with any mercantile business, but has lived with the owner of a laundry, and such labor as he has performed has been in and about that laundry; hence the government's contention that he did not in fact and in good faith enter as the minor son of a Chinese merchant, but really for the purpose of engaging in the occupation of a laborer.

The government's evidence, other than statements of defendant and his father, shows only that defendant had worked in the laundry of Ben Hop Lee, 10613 Euclid avenue, during a period of less than one year prior to his arrest. The witnesses, William Graham, John G. Harvie, W. I. Rich, Frank M. Potter, Franklin J. Savesky, George F. Wilson, Joseph Francis, and H. T. Grubbs, testified June 4, 1915. None of them had seen the defendant more than two or three times; none of them fix the time at which he was seen in the laundry at work earlier than 13 months prior to this date. The others give dates ranging from 2 or 3 months to 6 months. He was apparently, as testified to by these witnesses, in working clothes, sometimes ironing, other times handing out laundry parcels, and apparently occupying the same relation to the business as any other Chinese person there employed. Defendant was arrested April 30, 1914, and practically all of the work thus done was at a date later than his arrest.

An inspection of defendant's hands, made by the United States commissioner at the hearing May 22, 1914, and at the former hearing June, 1915, showed that the defendant's hands were calloused, as those of a person doing manual labor. The defendant's movements from the time he left Oakland, shortly after his arrival, until the time covered by the foregoing testimony, depend on his statements, those of his father, and Loo Way, owner of the laundry in question.

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Father and son have testified that the son left Oakland with the two Chinese merchants, as already stated; that when he left Oakland no definite destination was in the mind of any person; that these Chinese persons then believed that the East afforded good prospects for engaging in business; that the father furnished the son with $200 in money and intrusted him to the supervision primarily of Loo Lim. The father next heard from the son in Cleveland. All witnesses agree that he immediately took up his residence at the Ben Hop Lee laundry. About a year later Loo Lim left Cleveland and went to Boston, later returning to Cleveland, and in 1913 returning to China. Chin Check Weh remained longer in Cleveland, but within a period of 2 years he disappeared; he was not produced at the trial, and his whereabouts, counsel state, are unknown. The father says he was advised that his son had been left with a friend of Chin Check Weh.

The son testifies that he made inquiries and investigations after his arrival in Cleveland, relating to his project of engaging in business, but admits he never engaged in any mercantile business. The evidence is inconclusive and unsatisfactory touching his efforts to engage in business.

I agree with the finding made at the former hearing that defendant's statement that he remained continuously at this laundry until the time of his arrest, without laboring on his own account, and depending exclusively upon remittances from his father for support, is too improbable to be believed. The greater probability is that at some time, either immediately after his arrival or more remotely he did engage in manual labor, and that such labor was in and about the Ben Hop Lee Laundry. This finding of fact, however, is not, in my opinion, controlling in the disposition of this case.

The father's testimony on this hearing agrees with the son's testimony on the former hearing, in that they say $200 was given by the father to the son when he started East, and that the father had sent him money from time to time thereafter, aggregating from $70 to $90 per year. The ex parte statement of the father, introduced on behalf of the government at the former hearing, does not mention the $200, and does say that $80 or $90 was all the money he had sent to his son. The father in the ex parte statement was not inquired of as to the money given to his son at his departure, and, in explanation of the other statement, says that he understood the question asked and to be answered was how much money he had sent his son this year. He also testifies to frequent communications by letter during this period of absence, but no letters are introduced.

The father impressed me as a witness worthy of credit, and as a person of the mercantile, and not of the laboring, class. His appearance and manner of testifying were substantial evidence of this conclusion. His intelligence was obvious, notwithstanding the difficulty of interrogating him through an interpreter. The son's appearance also impressed me as that of an intelligent, clean-cut, young Chinese person, not of the laboring class.

From these facts, the ultimate question to be determined is whether or not defendant's entry was in good faith in the interest of the re-

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lationship of a minor son of a resident Chinese merchant, or was in bad faith and in reality as and for the purpose of immediately becoming a laborer, in evasion of the Chinese Exclusion Act. This ultimate conclusion must be drawn from the facts above found—in other words, is an inference from the other facts.

[1] The law is settled that if the entry of the Chinese person is valid—that is, as a student or merchant—he does not lose his right to remain because subsequently thereto he changes his occupation and becomes a laborer. Liu Hop Fong v. United States, 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888; Lew Ling Chong v. United States (6 C. C. A.) 222 Fed. 195, 137 C. C. A. 635; Lam Fung Yen v. Frick (6 C. C. A.) 233 Fed. 393, 395, 147 C. C. A. 329, Ann. Cas. 1917C, 232; Lew Loy v. United States (6 C. C. A.) 242 Fed. 405, 155 C. C. A. 181; Lui Hip Chin v. Plummer (9 C. C. A.) 238 Fed. 763, 151 C. C. A. 613.

[2-5] The inquiry, then, is whether or not, at the time of entry, the defendant was a minor son of a Chinese merchant, and, if a minor son of a Chinese merchant, was his real purpose then to obtain entry with a view to becoming a laborer? It is conceded that he was the minor son of a Chinese merchant. The inference that his entry was unlawful and in bad faith results exclusively from his conduct after he departed from Oakland and arrived in Cleveland. Cases are cited in which it is said that if a Chinese person seeks admission as a merchant, and immediately after admission becomes and continues a laborer, this is strong evidence tending to show that he came into the United States as a laborer. United States v. Foo Duck (9 C. C. A.) 172 Fed. 856, 97 C. C. A. 204; Lew Loy v. United States, supra.

The weight to be accorded the inference from immediate adoption of the occupation of a laborer depends upon the circumstances. If the person thus entering obtains admission as a student or merchant, and immediately engaged in the employment of a laborer, great, if not controlling, weight should be attached thereto. If, however, such admission is obtained as the minor son of a Chinese merchant, and, in point of fact, he is such minor son of a Chinese merchant, the inference is less strong. If the minor is several years under age, the inference probably could not be made. Likewise, if of age, the force of the inference diminishes in proportion as the change of occupation is remote from the date of entry.

In the present case the defendant was at least 2 years under age, as I have already found, and for 6 months after his arrival he was domiciled with his father, or in close proximity to him, and was engaged in studying and learning business conditions. In this situation there is not such close proximity of time between his admission, arriving at full age, or engaging in labor, as to warrant a strong inference that his purpose in coming to the United States and obtaining admission was to engage in manual labor. He did so engage at some time after his arrival in Cleveland; but another explanation, more probable than fraudulent entry, suggests itself for this conduct. Considering the father's undoubted status here and in China as of the mercantile class, the greater probability is that both father and son in good faith

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entertained the belief, when defendant was admitted and for some period of time after his departure for the East, that the son would adopt and follow his father's calling. Their obvious intelligence and apparent superiority to the ordinary Chinese person impresses me with the fact that defendant did not purposely and intentionally drop immediately into the laboring class, but that his doing so was the result of other conditions and circumstances.

My conclusion is that defendant entered lawfully and in good faith as the minor son of a Chinese merchant. This conclusion is emphasized by another consideration. The immigration officials at the port of San Francisco, upon his arrival, must be held to have investigated carefully his status and right to enter, consuming therein not less than one month's time, and after doing so they found that he was entitled to be admitted and issued to him the usual certificate. His right to enter or to remain is not called into question until 3½ years later, and then only because of fraud practiced in procuring admission, and not for any offense against the laws of the United States. This certificate of admission, having been produced on this trial, casts upon the government the burden of showing that the entry was not in fact for the purpose of conserving the family relation and following the occupation of a merchant, but for the purpose of immediately becoming a laborer. Liu Hop Fong v. United States, supra; Lew Ling Chong v. United States, supra; Ong Chew Lung v. Burnett (9 C. C. A.) 232 Fed. 853, 147 C. C. A. 47; Wong Yee Toon v. Stump (4 C. C. A.) 233 Fed. 194, 147 C. C. A. 200; Lam Fung Yen v. Frick, 233 Fed. 393, 147 C. C. A. 329, Ann. Cas. 1917C, 232; Lew Loy v. United States, supra; Lui Hip Chin v. Plummer, supra.

This burden the government has not sustained. Substantial evidence should be produced in order to destroy the effect of the certificate. It is not sufficient that a mere suspicion be aroused, but substantial evidence is necessary to destroy the force and effect of the original decision of the immigration officials and the certificate issued by them. If the immigration officials decide that he is not entitled to admission, the rule seems settled that the courts will not disturb such finding, if it is in any way supported by the testimony. Lem Moon Sing v. United States, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082; Fok Young Yo v. United States, 185 U. S. 296, 22 Sup. Ct. 686, 46 L. Ed. 917; United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040.

In Liu Hop Fong v. United States, supra, a Chinese person had obtained admission as a student, and proofs show that almost immediately upon arrival he became a laborer, and while, according to this fact its due weight, the Supreme Court of the United States reversed the United States commissioner and the District Court for ordering deportation on the ground that it was not sufficient to destroy the force and effect of the certificate.

In Wong Yee Toon v. Stump, supra, the Circuit Court of Appeals of the Fourth Circuit, on appeal in a habeas corpus case, reversed the judgment of the commissioner and of the District Judge, where it appeared that the minor son had been admitted after investigation

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and was in possession of a certificate, although he began work for a laundry within 2 months after his admission.

In Lew Ling Chong v. United States, supra, the Circuit Court of Appeals of this circuit reversed a judgment of the commissioner and the District Court ordering deportation in a case in which it appeared that the Chinese person had been admitted as a minor son of a Chinese merchant, and was in possession of a certificate, although the facts appear to be at least as strong as in the present case.

An order will be entered, reversing the commissioner, and discharging the defendant.

ROBINSON v. WEMMER et al.

(District Court, N. D. Ohio, W. D. November 11, 1918.)

No. 185.

1. EQUITY ⟸51(2)—JURISDICTION—CONSPIRACY—MULTIPLICITY OF SUITS.
   It is no conspiracy for two or more persons, each having a separate and independent cause of action against a third, to agree that they will simultaneously, by independent and separate suits, proceed against their adversary, for there is no other way in which they could individually make their contentions than by separate suit; hence, though such persons so agreed and employed the same attorney, it is no ground for equitable relief in favor of the person sued.
2. INJUNCTION ⟸26(4)—MULTIPLICITY OF SUITS.
   A court of equity will not entertain a bill by complainant against a large number of parties, to whom he had sold corporate stock, and who had begun separate actions to recover for fraud on the theory equity will restrain a multiplicity of suits, where proof as to nonreliance on the misrepresentations, etc., would not be binding on all the various parties.
3. COURTS ⟸328(4)—FEDERAL COURTS—JURISDICTIONAL AMOUNT.
   Where a number of persons sued complainant in the state court for fraud in the sale of corporate stock, the amounts of their several distinct claims cannot be aggregated, so as to give the federal court jurisdiction of a bill against them all to restrain multiplicity of suits.
4. COURTS ⟸491—JURISDICTION—ACQUIESCENCE.
   Where complainant filed answers in various suits in the state court, he could not thereafter maintain in the federal court a bill to restrain the suitors in state court on the ground of multiplicity of suits.
5. COURTS ⟸262(2)—EQUITY JURISDICTION OF FEDERAL COURT—REMEDY IN STATE COURT.
   One against whom numerous suits were begun in state court cannot maintain a bill in federal court to restrain multiplicity of suits, on the ground that the venue of the state court was hostile to him, but, if entitled to protection on that ground, must seek it in the state court.

In Equity. Bill by Arthur D. Robinson against Henry G. Wemmer and others. On motion to dismiss. Bill dismissed.

John L. Davidson, of Chicago, Ill., and Jas. W. Halfhill, of Lima, Ohio, for plaintiff.

Dan R. Tripplehorn and Welty & Downing, all of Lima, Ohio, for defendants.

KILLITS, District Judge. This case is before the court on a motion to dismiss the amended complaint for want of jurisdiction to en-

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tertain the same, and for the further reason, among others, that it appears from the complaint that suits are pending covering the subject-matter of the complaint in the state court, to the jurisdiction of which the complainant has submitted himself.

The complainant was interested in the promotion of a corporation, and in that capacity sold stock therein to 19 residents of the city of Lima, Ohio. The enterprise coming to grief, each of these parties, who are made joint defendants to the complaint under examination, separately sued Robinson in the state court to recover the amount he had paid for stock. The amounts involved vary from $750 to $3,075 in the several cases. In but two instances is the amount at stake of itself sufficient to meet the jurisdictional requirements of an action in this court, for it should be observed that there is a diversity of citizenship; Robinson not being a citizen of this district. Service was had in each of these 19 actions on Robinson within the city of Lima, and in each case he has set up a defense by way of answer.

[1] What we know about the nature of these state suits is to be gathered from the averments of the complaint itself, from which it appears that each of the plaintiffs therein sues to recover on the ground of fraud alleged to have been practiced upon him by Robinson. A motion similar to this was interposed to the original complaint and granted. In sustaining the motion we filed a memorandum as follows:

"It is decisive of the question before us that there is no community of interest between the several defendants in the case as planted here, plaintiffs in the state court, against the complainant here. There is an apparent community of interest, to be sure, which grows out of the fact that each of the plaintiffs in the state court predicates a claim against the defendant upon a similar state of facts growing out of transactions of almost identical nature. The claims, however, are presented in individual and independent rights; because one plaintiff might be successful, there results no adjudication of the right of any other claimant. In this respect the cases of Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, and McDaniel v. Traylor, 212 U. S. 428, 29 Sup. Ct. 343, 53 L. Ed. 584, are clearly distinguishable. In each of these cases, the interests were bound together indistinguishably. In the earlier case, Mayer, the judgment creditor, owned all the judgments, all taken against the same debtor, Marshall. The defendants to the case are none other than the solitary judgment creditor, Mayer, and the sheriff of the parish, Holmes. The situation is not comparable to the situation before us. In the latter case, the aggregation of the causes of action making up the jurisdiction of the federal court was the result of fraud; the court saying, on page 433 of 212 U. S., on page 344 of 29 Sup. Ct. (53 L. Ed. 584): 'As we have already seen, it was the fraudulent combination and conspiracy which united the claims and made the aggregate of the claims the matter in dispute.' It is no conspiracy for two or more persons, each having a separate and independent cause of action against a third, to agree that they will simultaneously, by independent and separate suits, proceed against their adversary. There is no other way in which they could individually make their contentions than by separate suit, and it means nothing that they agree together to sue, or that they employ the same attorney. The coincidence that each claimant against Robinson in the state court predicates his claim upon facts analogous to the facts relied upon by every other claimant is not enough, even when combined with an agreement for each independent claimant to sue, to permit the aggregation of these claims and either a removal to this court or an appeal to this court for injunctive relief to stop the state proceedings. The remedy sought by complainant is beyond the extraordinary powers of this court."

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Broadly, the difference between the complaint thus disposed of and the amended complaint now under attack exists in the incorporation in the latter in great detail of the history of the disagreements between the parties, together with complainant's understanding of the nature of the fraud alleged to have been perpetrated by him upon each of the plaintiffs in the several suits in question. There is also an allegation that the parties are conspiring to embarrass him by a multiplicity of suits, and that there is a prejudice against him in the local state court, growing out of the notoriety of the transactions, which will greatly embarrass him in making his defense in that venue. So far as the complaint enlightens us as to the nature of the alleged conspiracy, it seems to rest upon the fact that the same attorney represented each of the plaintiffs and that the petitions are identical in terms mutatis mutandis. It is very plain that each of these cases proceed upon the same state of facts so far as allegations involving Robinson are concerned, and that in each the same measure of recovery is depended upon.

It is alleged that all the controversies between the complainant and the defendants could be fully adjudicated in one suit in equity, to the avoidance of a multiplicity of suits, and the relief sought here is that each of the defendants may be enjoined and restrained from proceeding with their several suits pending in the state court until the further order of this court, and that upon the final hearing here the injunction may be made permanent, and that the complainant have such other and further relief as may be proper. There is no prayer that the issue between Robinson and his several antagonists be heard here together, or that the 19 plaintiffs in the state court be required either to join there in one action or to participate in a representative suit.

[2] The complainant relies for his appeal to this court upon the general proposition that equity will restrain the multiplicity of suits, and that this is an occasion where that function should be exercised, because, in the theory of the complainant, the situation is one within the third category of possible conditions in which the doctrine may be applied as defined by Pomeroy, Equity Jurisprudence (3d Ed.) § 245, where the text reads as follows:

"Where a number of persons have separate and individual claims and rights of action against the same party, A., but all arise from some common cause, are governed by the same legal rule, and involve similar facts, brought by all these persons uniting as coplaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone. The case of several owners of distinct parcels of land upon which the same illegal assessment or tax has been laid is an example of this class."

As shown by the authorities, which support Pomeroy's text as above quoted, the practice in this class of cases applies principally to situations where a suit may be brought by one in behalf of himself and others similarly situated, or where all parties having a common interest may be joined together, and where neither of the parties interested as complainants have an individual action at law. A typical case is that of Boyd et al. v. Schneider et al., 131 Fed. 223, 65 C. C. A. 209. Because of its peculiar facts, Virginia-Carolina Chemical Co.

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v. Home Ins. Co. of New York, 113 Fed. 1, 51 C. C. A. 21 (case below Home Ins. Co. of New York v. Virginia-Carolina Chemical Co. [C. C.] 109 Fed. 681), cannot be cited as in any degree justifying the complainant's position here. It will be noted that this case, however, consistent with other decisions in which the point is raised, recognizes that actions of this sort are merely ancillary to the proceedings against which they are severally directed, wherefore, as complainant here is seeking absolute relief, he is beyond the purview of the principle which he is invoking. This is made more plain when we consider the fact that he is not proceeding in a situation where he is without remedy at law. He has a plain remedy at law, namely, to defend in the actions at law brought in the state court. We are therefore of the opinion that he has not improved his position by the amendment of his complaint, but that the same reasons which required us to grant the motion to the original complaint obtain here.

In complainant's brief we are advised to consider that, no matter how palpably fraudulent were the misrepresentations of complainant to induce any party now suing him in the state court to buy stock, still he would not be liable unless as to that party it were shown that the latter relied wholly upon those representations for his influence to make the investment. It seems to us that it needs but a reference to this feature to show that the doctrine of Pomeroy does not apply here, for the reason that the rights of action of the several causes respectively do not involve similar facts. It is manifest that the proof touching the reliance or nonreliance of any one of these individual purchasers upon the complainant's alleged fraudulent misrepresentations is applicable only to the controversy between those two individuals. It could not be said that proof which would bind, for instance, Wemmer in this respect would be proof likewise affecting Steiner. It is clear, therefore, that the merits of the several controversies are entirely separable and not coincident, and therefore that an essential criterion of the right to enjoin to prevent a multiplicity of suits is absent.

[3] It will be noted that but 2 of the defendants here are pressing causes of action against the complainant in the state courts in amounts meeting the jurisdictional requirement of an action in this court. If other conditions, therefore, favor the complainant's right to the relief he seeks here and to the maintenance of this proceeding, as to the remaining 17 defendants whose several controversies with the complainant in the state court involve amounts less than $3,000, the complainant could have no standing in this court at all. It has been held that parties having causes of action against an individual coming within the limits of Pomeroy's doctrine may not invoke the jurisdiction of this court, even though other jurisdictional requirements are present, by aggregating their individual claims, each less than the jurisdictional amount, and thereby reach that amount. Wheless v. St. Louis et al., 180 U. S. 379, 21 Sup. Ct. 402, 45 L. Ed. 583. Conversely, therefore, it must be true that the complainant cannot bring these 17 parties into this court by asserting that the aggregate amount involved exceeds $3,000, and we do not think either of these 17 cases

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may be attacked in this action because each of the other 2 does, in fact, involve the jurisdictional amount.

[4, 5] It appeals to this court that complainant, having already submitted to the jurisdiction of the state court through his answers, is no longer in position to press this complaint, whether or not he might have done so originally; nor do we regard the allegation that the venue of the state court is hostile to him as one which would tend to confer jurisdiction upon this court. If he is entitled to any protection from such assumed hostility, he must press for it before some state tribunal. Of course, if the 19 suits pending in Allen county are legitimately separate actions, the multitude of them is of no consequence, so far as having a right to come into this court is concerned, for it is well argued here that there is a distinction between a multiplicity of suits and a multitude of them.

The motion to dismiss in this case is equivalent to a demurrer. So considering it, we do not regard the complaint as sufficient to make a good cause of action for conspiracy, for the reason that the allegations which are assumed to bear upon that charge seem clearly inadequate.

Other reasons why this motion should be granted are earnestly pressed to our consideration, but we have said enough to indicate here the motion is well taken, without further extending this opinion.

In re DUBOSKY.

(District Court, E. D. Pennsylvania. November 8, 1918.)

No. 4919.

BANKRUPTCY ⟸192—CLAIMS—MECHANIC'S LIEN CLAIMANT—RIGHTS OF.

Where one, who had filed a mechanic's lien claim against the property of a Pennsylvania bankrupt, filed in the bankruptcy court his claim based on the same, and the property was sold free from liens long before expiration of the two years within which the Pennsylvania statute required sci. fa. to be issued, *held*, that the right of such claimant to participate in the fund representing the property will not be denied because sci. fa. was not issued.

In Bankruptcy. In the matter of Anthony Dubosky, bankrupt. Sur certificate for review of an order of the referee disallowing the claim of C. E. Christ and others. Order reversed, with directions.

See, also, 232 Fed. 380.

Arthur L. Shay, of Pottsville, Pa., for petitioner.

John B. McGurl, of Minersville, Pa., for defendant.

DICKINSON, District Judge. The question really involved in this petition for a review can be best presented through a skeleton statement of the facts. On July 7, 1913, C. E. Christ et al. filed a mechanic's claim, the lien of which reverted to an earlier date. The claim was filed against the bankrupt as owner and contractor, and if valid admittedly

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had priority of lien to the judgment which the First National Bank of Tamaqua had secured against the bankrupt. The adjudication was entered October 13, 1913, and on February 7, 1914, the real estate against which the above mechanic's claim and judgment were respectively liens was sold under proceedings divesting both liens. On June 29, 1914, application was made to the court of common pleas in which the mechanic's claim was filed to strike it from the record, on the ground that no notice of its filing had been given in accordance with the provisions of the Pennsylvania act of assembly of June 4, 1901 (P. L. 431). Distribution of the proceeds of sale was proceeded with before the referee, before whom both the mechanic's claim and the judgment were presented as entitled to share in the distribution, each claiming a priority of lien. Objection was made to the mechanic's claim as invalid, because of the fact that the record showed the failure to give notice of the filing of the claim within the time required by the act of assembly.

The referee disallowed the mechanic's claim. On a certificate for review, the order made by the referee was reversed, and the cause recommitted to him for further proceedings. The grounds for this action were that it appeared, in conjunction with the proceedings to strike off the lien, that application had been made to the court of common pleas, in the office of the prothonotary of which the mechanic's lien had been filed, to amend the record of the date of the filing of the proof of notice referred to; the averment being made that the filing date, as it appeared of record, was a clerical error of the prothonotary. The cause was remanded, in order that the parties to the proceedings before the referee might be able to present the action of the court of common pleas on the application to correct its record. That court, being satisfied the filing date was incorrect, permitted the true date to be shown by its record. The mechanic's claim was then re-presented before the referee. The record then showed a compliance with the requirements of the act of assembly, and the objection which had been made to the allowance of the mechanic's lien claim was removed.

A new objection, however, to the claim, because of another failure to comply with the requirements of the state statute, was then interposed. This was that no sci. fa. had issued within the two-year limit of time within which the statute requires that such writ should issue, and, of course, no judgment in any such proceeding had been recovered within the limit of five years, as the statute further requires. The referee found this objection to be well taken, and disallowed the claim. The order embodying this finding has been brought before us for review.

To sharply present the point of the controversy the pertinent dates already given may be restated. July 7, 1913, mechanic's claim filed, and February 7, 1914, the real estate premises against which the said lien was filed were sold. As a mechanic's lien claim is primarily, at least, a claim in rem, a very practical difficulty is thus presented. Within the two years, at any time during which a writ of sci. fa. might issue, the premises subject to the claim were sold. The sale further took place before it would be practically possible to reduce the claim

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to judgment, or for a writ of sci. fa. even to issue, because no such writ of any value could issue until the status of the lien had been established.

In the proceedings in the court of common pleas to amend its record, action was not taken until after the sale. Whenever a sale takes place within the two-year period, one of two consequences flow. The mechanic's lien claimant loses because of this what is otherwise a perfectly valid claim, or he must proceed by sci. fa. proceedings to judgment. He must not only resort to this seemingly useless proceeding, but he must also, in some way, overcome the difficulty of sustaining a proceeding in rem against a rem which has been relieved of the operation of the lien which is the foundation of the whole proceeding. Assuming, for the purpose of presenting the point in mind, the proceeding to be one wholly and purely in rem, if a sci. fa. had issued, the purchaser of the property would have been served with process, or in any event would have had the right to intervene as defendant. He would, of course, have presented the defense of the divestiture of the lien. How could the plaintiff be awarded judgment? If there were no form of judgment which could be rendered under such circumstances, then we would have a law which denied to the claimant the recovery of what was due him because he had failed to secure judgment therefor, and the same law which thus punished him for not securing judgment would forbid him from getting judgment.

The referee has met the difficult situation thus presented by taking his stand upon the absolute declaration of the statute that the claim shall be "wholly lost" unless the sci. fa. issues and judgment is recovered, and sought to dispose of one of the obstacles in the way of the issuing of the writ by citing Mesta Mach. Co. v. Dunbar Furnace Co., 250 Pa. 472, 95 Atl. 585, in which a sci. fa. issued after bankruptcy with notice to the trustee, and supports his view of the unyielding character of the statutory requirement by citing the cases of Sterling Bronze Co. v. Syria Imp. Ass'n, 226 Pa. 475, 75 Atl. 668, and Philadelphia v. Sciple, 31 Pa. Super. Ct. 64, to which are added Hunter v. Lanning, 76 Pa. 25, Philadelphia v. Kelly, 63 Pa. Super. Ct. 133, and Kountz v. Consolidated Ice Co., 36 Pa. Super. Ct. 639. Reference is also made to the cases of Ward v. Patterson, 46 Pa. 372, Hershey v. Shenk, 58 Pa. 382, Hoole v. Cox, 21 Pa. Dist. R. 118, Kittanning Ins. Co. v. Scott, 101 Pa. 449, and Cope's Appeal, 96 Pa. 294.

These cases fully support the referee in the proposition for which he cites them. The proposition is in substance that a failure either to issue the sci. fa. or to secure judgment cannot be excused because of interposed delays, even if it be true that the delays were in large part at least "the law's delays."

It is to be observed, however, that in every one of the cases cited there was no legal impossibility interposed as an obstacle to the issuing of the sci. fa. or the recovery of a judgment. It is further to be observed that in the instant case, however, such impossibility does exist, unless we read into the act a contraction of the time from two years and five years to the seven months which intervened between the filing of the lien and the sale of the premises, or we must hold pro-

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ceedings against the rem might go on to judgment after the lien was gone. We assume there is no justification for the requirement that either a sci. fa. should have issued or a judgment have been recovered within the seven months. If the sci. fa. proceeding, therefore, be, as before stated, a proceeding wholly in rem, then a compliance with the requirements of the act was a legal impossibility, unless it can be held that the claimant can pursue the rem after it had been relieved of the lien of his claim.

Counsel for the bank, in supporting the findings of the referee, asserts that the mechanic's lien claim can be upheld only by a finding either that the failure to comply with the act was excused because of the error of the prothonotary in entering upon his record the date when proof of notice was filed, or that the time which was lost in the correction of this error should be excluded. This way of meeting the real question involved would seem to merely evade it.

If the learned referee was misled into taking this view of the question really presented, he was clearly right in disposing of it as he did, because the rulings which he cites lay down the principle that neither of the excuses indicated will avail a mechanic's lien claimant. It does not seem to us, however, that the two subsidiary questions thus put by counsel present the real question. This is, as before indicated, whether a mechanic's lien claimant can be found to have been guilty of a default, because of his failure to do a thing which it is a legal impossibility to do.

The general proposition of law upon which the argument proceeds, to wit, that the rights of a mechanic's lien claimant are purely statutory, and because of this hedged about by all the limitations and conditions imposed by statute, is well sustained by any one of the long list of cases cited. The question recurs, however, whether, when a claimant has a valid claim, which has been created by and of course recognized by the law, he shall lose it because of his failure to do something which it is impossible to do, and whether the meaning that he shall lose it can be found in the act of assembly, or whether proof before the court making distribution of the fund is not the legal equivalent of sci. fa. and judgment.

In the very clear argument which counsel has presented, the case of Howes Brothers' Appeal, 9 Pa. Super. Ct. 586, is cited as the only exception to the line of cases before referred to known to counsel. This exception, however, is very suggestive of making an exception also of the instant case, not so much on its facts as on the line of reasoning adopted by the court. In that case, no judgment had been recovered within five years, but inasmuch as the claimant had secured a verdict, and because, by virtue of the provisions of the act of 1877 (P. L. 34) that verdict, although not a judgment, was a lien, the court permitted the plaintiff to recover by entering judgment upon the verdict. The ruling might have been upheld upon the phraseology of the act of 1901, which is in the alternative of a verdict recovered or judgment entered; but it is significant that the ruling is not put upon this ground, but upon the ground that a claim is not "wholly lost" which is within the act of 1877.

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The learned counsel for petitioning creditor plants the right of his client to share in this distribution upon the proposition which, for the purpose of presenting it, may be recast in the following mold:

If there had been no error in the record, distribution would have been made well within the two-year period; the validity of the claim being then not otherwise questioned. The amendment of the record relates back to the time when that record was made, and therefore the lien was then a valid lien, and entitled to participate in the distribution. It is therefore the same as if the lien had been presented at the time it was presented, together with the record as amended, and, as the evidence had been closed, no subsequent happenings could affect the rights of the claimant, which had then become fixed in his right to share in the fund for distribution. This view is forcibly presented, but as presented it seems to be too refined for acceptance, because it rests in effect upon the doctrine that the claimant should not be penalized for the "law's delays." It would seem, on the contrary, that the consequences of these delays are to be borne by him. Substantially the same argument, however, so far as it is acceptable, is embraced in the broad view that the claimant, having filed his claim, thereby secured a lien upon the land, which was transferred to the fund, and upon proof of his claim had the right to share in the fund, because of such lien, without waiting to secure a formal judgment upon his lien, even had he had the right to secure one.

The common sense of this view is enforced by the practical consequences of holding otherwise. Where there is a fund which in other respects is ripe for distribution, and mechanics' claims against it are presented, and their validity is undisputed, must the distribution of the fund be withheld until the claimants go into another court to secure judgment, assuming, for the sake of the argument, that such judgment could be secured? Suppose, for further illustration of the practical difficulties, there should be a dispute over the justness of the claim made with respect, for instance, to the amount due, and the court making the distribution felt bound to find under the evidence that a certain sum was due. Must it refer this question to another tribunal which might make a different finding? The answer would seem to be that the court having jurisdiction of the fund, and having through it jurisdiction of all claimants upon that fund, may proceed to make distribution without waiting upon the action of any other court. If this proposition adequately presented the question before us, the question would, we think, not be raised. It, however, does not, for the reason that one of the findings involved, and which must be made, is that this claimant has a valid claim upon the fund, and he has no such claim unless he has a valid lien, and how can the lien be valid if, in the words of the Pennsylvania statute, it has been "wholly lost?"

This brings us back to the real question in the case, which is whether there was any legal necessity to issue a sci. fa. and to secure a judgment after the lien had been divested by the sale, and whether by the failure to do this the lien was lost? One aspect of the question, it seems to us, is presented in the line of cases which deal with the proposition of whether a judgment creditor, whose judgment has been

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divested by a sheriff's sale, is bound to revive his judgment at the cost of losing his claim upon the fund if he does not do so before actual distribution.

The doctrine of these cases is that, under the provisions of the acts of assembly relating to judgments and debts which are liens against the real estate of a decedent, creditors cannot participate in a fund for distribution unless their claims were at the time of sale liens against the real estate, the proceeds of the sale of which is being distributed. This carries the implication that, if then liens, they may participate, and do not lose their right, because, if the land had not been sold, they would have lost their lien against it by a failure to issue a sci. fa. In re Cake's Estate, 157 Pa. 457, 27 Atl. 773.

The analogy, we admit, is by no means complete, and not even close; but it is suggestive of thoughts, some of which are helpful and others controlling. One of them is that a creditor claimant in a bankruptcy court has the status (through the title of the trustee) of an owner, and as such has an interest in the fund for distribution, which is fixed as of the date of the vesting of that title. The same doctrine applies, generally speaking, to all proceedings dealing with claimants to a fund. Another is, and this, if sound, is controlling, that the proof of a claim which a court is distributing is the legal equivalent of a formal action brought and judgment recovered. This it ordinarily undoubtedly is. Why should such a case as the instant one be regarded as an exception to the general rule?

In Bindley's Appeal, 69 Pa. 295, such proofs before an auditor were, for the obvious reasons there so clearly pointed out, held not to be the legal equivalent of the sci. fa. proceedings required to enable a creditor of the ancestor to follow real estate into the hands of the heirs. The judgment in that case was delivered by a father of the law, whose expressed opinions of what the law was would be accepted as authoritative. We would not only hesitate; we would not presume to differ with him. It is clear, however, that he regarded the condition with which he was dealing to be an exception to the general rule. We have a like high regard for the judge who wrote the opinion in Howes' Appeal, supra. There, again, however, as we read that opinion, we find ourselves in accord, and not in conflict, with the view there expressed. There the act of 1877 was deemed to be a permit to disregard the words of the act of 1901. The recognized principles governing the distributions of a fund we regard as the grant of a like permission.

The line of reasoning followed by Judge Rice is that, in imposing conditions upon the grant of the right given to mechanic's lien creditors, we must assume the Legislature to have had in mind all the difficulties in the way of a compliance with those conditions. Noncompliance with the conditions, therefore, cannot be excused by writing into them something which is not there. When the Legislature, however, by another act (in Howes' Appeal, the act of 1877), has excused strict compliance in certain situations, noncompliance may not be an obstacle to the assertion of the right.

The practice of courts in distributing funds may make another or like exception, and the instant case is thus brought within the doctrine

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of Howes' Appeal. So, in the Bindley Case, the doctrine is recognized that proof of a claim in any court (and of course, or even a fortiori in bankruptcy cases) is accepted as the equivalent of scire facias, or other writ of summons, verdict, and judgment, although it is also there held not to apply to the fact situation presented in the case.

This leaves us at full freedom to apply the approved doctrine in the instant case. That this is universally done in practice argues for the soundness of the principle. In the distribution of funds, raised by sheriff's sales or otherwise, if the lands sold were at the time of the sale subject to mechanics' or other claims, allowance is always made upon proof of the claims. The very point involved here was presented and passed upon in Re Falls City Shirt Mfg. Co. (D. C.) 98 Fed. 593, and discussed at page 594 of the report of the case.

The view taken of the legal merits of the claim, which the referee disallowed, has been presented with great fullness, because this aspect of the question before the referee does not appear to have been presented to him, or, at least, has not been discussed in the very clearly reasoned report which he has made. This aspect of the question was, however, fully discussed at the argument before us, and no suggestion made of anything to be gained by recommitting the cause to the referee. We would have valued the aid which a discussion by him would have given us, but dispose of it as the question is presented to us.

This calls for the allowance of the petition for review, and the reversal of the order made by the referee, with instructions to further proceed with the cause in accordance with this opinion.

It is therefore so ordered.

Ex parte BLAIR. Ex parte PHILLIPS. Ex parte TEMPLETON.

(District Court, S. D. New York. October 16, 1918.)

Nos. M3-292 to M3-294.

1. CONSTITUTIONAL LAW ⟸46(1)—CONSTITUTIONALITY OF ACT—NECESSITY OF DETERMINATION.

It is an almost universal rule of the courts not to decide constitutional questions until the necessity for decision arises in the record before the court.

2. HABEAS CORPUS ⟸27, 30(1)—FUNCTION OF WRIT.

Generally the writ of habeas corpus will not issue, unless the court under whose warrant the petitioner is held is without jurisdiction, and it cannot be used to correct errors.

3. HABEAS CORPUS ⟸32—CONSTITUTIONALITY OF STATUTE.

Petitioners who refused, without invoking the Fifth Amendment, protecting against self-incrimination, to obey a subpœna duces tecum, or to answer questions propounded to them in a grand jury investigation, under Act Cong. June 25, 1910, as amended by Act Aug. 19, 1911, and Act Aug. 23, 1912 (Comp. St. 1916, §§ 188-198), of corrupt practices in a senatorial primary election cannot, having been committed for contempt, secure release on habeas corpus on the ground that the statute was unconstitutional.

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Applications for habeas corpus by Frank W. Blair, Thomas P. Phillips, and Allan A. Templeton. Applications denied.

Martin W. Littleton, of New York City, for petitioners.

Francis G. Caffey, U. S. Atty., of New York City, S. R. Rush, Sp. Asst. Atty. Gen., of Omaha, Neb., and Oliver E. Pagan, of Washington, D. C., for the United States.

HENRY D. CLAYTON, District Judge. These three cases were argued together; each rests upon the same facts, and each presents the same questions of law.

The facts, and they are not disputed, but appear of record, essential to an understanding of the questions presented, are as follows: Blair, Phillips, and Templeton, residents of the city of Detroit, in the state of Michigan, were each duly served with subpœnas at Detroit, requiring them to appear before the United States grand jury sitting in the Southern district of New York, at New York City. The subpœna to Blair, and the one to Templeton as well, was a subpœna duces tecum, requiring in the case of each of them that they produce before the grand jury certain records of the Truman H. Newberry senatorial committee described in the subpœnas.

The witnesses appeared separately before the grand jury in obedience to the process and were duly sworn. Each witness separately was then asked certain preliminary questions as to his residence, occupation, etc., and each was then asked questions touching the matter then before the grand jury, to wit, an inquiry among other things, concerning supposed violations of section 125 of the United States Criminal Code, Act March 4, 1909, c. 321, 35 Stat. 1111 [Comp. St. 1916, § 10295]), which relates to perjury; and the so-called federal Corrupt Practices Act (Act Cong. June 25, 1910, c. 392, 36 Stat. 822), as amended by Act Aug. 19, 1911, c. 33, 37 Stat. 25, and further amended by Act Aug. 23, 1912, c. 349, 37 Stat. 360 (U. S. Comp. St. 1916, § 188). This act defines political committees, requires the keeping and filing of certain financial statements, limits the amount of money that may be expended by candidates for nomination and election to the offices of Representative and Senator in Congress, forbids certain acts and promises by candidates and committees, and provides punishment for the violation of the act. The act also contains the following provision (section 8):

"Every statement herein required shall be verified by the oath or affirmation of the candidate, taken before an officer authorized to administer oaths; and the depositing of any such statement in a regular postoffice, directed to the clerk of the House of Representatives or to the secretary of the Senate, as the case may be, duly stamped and registered within the time required herein shall be deemed a sufficient filing of any such statement under any of the provisions of this act." Comp. St. 1916, § 195.

The inquiry before the grand jury, and about which the testimony of the witnesses was sought, had to do with the verification in the Southern district of New York, and the filing of reports to the secretary of the United States Senate by Truman H. Newberry, a candi-

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date for the Republican nomination to the office of United States Senator at the primary election held in and under the laws of the state of Michigan in August, 1918, which office is to be voted for at the general election in November, 1918. The witnesses were informed that this was the object of the grand jury investigation, that the purpose of the prosecution was not to charge them with any offense, and that, if the answers to the questions tended to incriminate or degrade the witness, the law would not require them to answer.

Each of the witnesses then refused to answer the questions asked concerning the matter under investigation on the grounds set out in a written statement read to and left with the grand jury in each case. This written statement was to the effect that the reason they did not answer the questions was because the grand jury and the court were without any jurisdiction to inquire into the manner and method of the conduct of a campaign in Michigan for a party nomination, through the means of a primary election, for United States Senator; that said federal Corrupt Practices Act as amended is unconstitutional, and that no federal court or federal grand jury in any state has the constitutional authority to conduct an inquiry under said act regarding a primary election for the nomination of a United States Senator; and that they made their statements upon advice of counsel. The witnesses were thereupon each separately asked by counsel for the United States whether they refused to testify for the reason that so to do would incriminate them, to which question each witness replied that he would make no other answer than a reference to the reasons for his refusal as set forth in the written statement read to and left with the grand jury. The witnesses Blair and Templeton also refused, for the same reasons, to produce the documents and papers called for in the subpœnas duces tecum served on them.

On October 10, 1918, the grand jury presented the witnesses to the court, Judge Edward E. Cushman presiding, for contumacy in having refused to answer the questions. The court, after hearing the argument of counsel for the petitioners, including the argument as to the unconstitutionality of the act, and also the argument of counsel for the United States, ordered the witnesses to go again before the grand jury and answer the questions.

On October 11, 1918, the witnesses were called again before the grand jury, and counsel for the government again propounded the questions relating to the matter then before the grand jury. The witnesses each again, for the reasons stated by them when they first appeared before the grand jury, declined to answer the questions or to produce the documents and papers called for in the subpœnas duces tecum. Thereupon the matter and the witnesses were again presented by the grand jury to the court.

The matter was heard by the court, Judge Cushman presiding, and he adjudged the witnesses in contempt for failure to answer, and remanded them to the custody of the United States marshal, to be committed to the Ludlow Street Jail until they should comply with the order of the court directing them to answer the questions asked by the grand jury.

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The witnesses each now petition the court for a writ of habeas corpus, and each alleges that he is unlawfully restrained of his liberty, and without due process of law, and in violation of the rights of petitioner secured to him under the Constitution of the United States. Each petitioner alleges that he is restrained solely under the authority of the order of the court of October 11, 1918, committing the petitioner to the custody of the marshal for an alleged contempt in refusing to answer certain questions propounded to him before and in the presence of the grand jury. The petition in each case avers:

"Petitioner is restrained of his liberty solely under and by virtue of said order of commitment and not for any other cause or reason."

Paragraph 11 of each of the petitions alleges:

"On information and belief: That the Congress of the United States has no jurisdiction to enact laws regulating, controlling, or in any manner affecting the holding of primary elections for the nominations by political parties of candidates for the office of United States Senator to be voted for at succeeding general elections to fill said office, or regulating, affecting or controlling in any manner the conduct of candidates for such nomination at said primary elections. That neither the United States grand jury nor the District Court of the United States for the Southern District of New York has any power or authority to inquire into the method or manner of holding primary elections in the state of Michigan or elsewhere, or to inquire into, indict, or try any person for an alleged violation of said act of Congress, hereinbefore described, which attempts to regulate the conduct of candidates for the nomination for the office of United States Senator at such primary elections. That said act of Congress is unconstitutional and void, so far as it relates to primary elections, and that the arrest and detention of the petitioner is without due process of law and in violation of his constitutional rights. That under the facts hereinbefore set out petitioner was not guilty of contempt in refusing to answer the questions asked him before said grand jury, and that said court had no jurisdiction or power to adjudge petitioner guilty of contempt, and said order of commitment is null and void."

[1] The application for the writ coming on to be heard, the United States moved to discharge and dismiss the writ of habeas corpus, and to recommit the petitioners to the custody of the marshal, for the reason and upon the ground that, under the facts and circumstances stated in the petition and shown by the record, said writ, in legal effect, is a writ of error.

Counsel for petitioners has ably and earnestly urged that the act in question is unconstitutional, in so far as it relates to the selection through primary elections of candidates for the office of United States Senator and the office of Representative in Congress, and while it may be said that the government has not made satisfactory answer to his contention, yet this case, as will be seen, does not render it necessary to pass upon that question now. As was said by Mr. Justice Peckham in Baker v. Grice, 169 U. S. 284, 292, 18 Sup. Ct. 323, 326 (42 L. Ed. 748):

"It is a matter of common occurrence—indeed, it is almost the undeviating rule of the courts, both state and federal—not to decide constitutional questions until the necessity for such decision arises in the record before the court."

The question in the instant case goes to the validity of the order adjudging the petitioners in contempt and committing them to jail

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for their refusal to testify after having been directed so to do by the court.

[2] The Supreme Court has repeatedly held that the hearing on habeas corpus is not in the nature of a writ of error, nor is it intended as a substitute for the functions of the trial court. Jurisdiction under the writ is confined to determining from the record whether the petitioner is deprived of his liberty without authority of law. Harlan v. McGourin, 218 U. S. 442, 31 Sup. Ct. 44, 54 L. Ed. 1101, 21 Ann. Cas. 849. As was said by Mr. Chief Justice Fuller, speaking for the Supreme Court in the case of In re Chapman, 156 U. S. 211, 215, 15 Sup. Ct. 331, 332 (39 L. Ed. 401):

"The general rule is that the writ of habeas corpus will not issue unless the court, under whose warrant the petitioner is held, is without jurisdiction; and that it cannot be used to correct errors [citing cases]. Ordinarily the writ will not lie where there is a remedy by writ of error or appeal [citing cases], yet in rare and exceptional cases it may be issued although such remedy exists. Ex parte Royall, 117 U. S. 241 [6 Sup. Ct. 734, 29 L. Ed. 868]; New York v. Eno, 155 U. S. 89 [15 Sup. Ct. 30, 39 L. Ed. 80]."

The case of Henry v. Henkel, 235 U. S. 219, 35 Sup. Ct. 54, 59 L. Ed. 203, decided by the Supreme Court in 1914, appears to the court to be decisive authority, under the circumstances of these cases, that the writs of habeas corpus should not be issued and the petitioners discharged from custody. In that case the petitioner, Henry, was summoned before the committee on banking and currency of the House of Representatives of the United States, which committee, under a resolution of the House, was then investigating the financial affairs and activities of national banks and other corporations. He answered many of the questions asked by the committee, but declined to answer certain other questions, not because the answers would tend to incriminate him, but because he "considered it dishonorable to reveal the names of his customers." He was reported to the House, and that body directed that the facts be laid before the grand jury for the District of Columbia. This was done, and Henry was indicted. He was arrested in New York, and when taken before the United States commissioner demanded an examination, and moved for his discharge upon the ground that the commissioner was without jurisdiction, since it appeared on the face of the complaint that he was not charged with any offense against the United States. The commissioner ordered him held for a removal warrant from the District Judge. Henry then applied to the District Judge for a writ of habeas corpus, and on the hearing introduced all the testimony that had been submitted to the commissioner, and asked for his discharge on grounds similar to those presented to the committing magistrate. The District Judge discharged the writ and held the petitioner. An appeal was taken to the Supreme Court, where the same contentions were made in Henry's behalf, and the insistence was made that the resolution of the House of Representatives did not authorize the inquiry in which Henry refused to testify; that the facts charged did not constitute an offense against the statute, or, if so, that the statute was void. Mr. Justice Lamar, speaking for the court, said (235 U. S. 227, 228, 35 Sup. Ct. 56, 59 L. Ed. 203):

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"When a person under arrest applies for discharge on writ of habeas corpus the issue presented is whether he is unlawfully restrained of his liberty. Rev. Stat. § 752 [Comp. St. 1916, § 1280]. But there is no unlawful restraint where he is held under a valid order of commitment, so that in strict logic the inquiry might extend to the legal sufficiency of the order. In view, however, of the nature of the writ and of the character of the detention under a warrant, no hard and fast rule has been announced as to how far the court will go in passing upon questions raised in habeas corpus proceedings. In cases which involve a conflict of jurisdiction between state and federal authorities, or where the treaty rights and obligations of the United States are involved, and in that class of cases pointed out in Ex parte Royall, 117 U. S. 241 [6 Sup. Ct. 734, 29 L. Ed. 868], Ex parte Lange, 18 Wall. 163 [21 L. Ed. 872], New York v. Eno, 155 U. S. 89 [15 Sup. Ct. 30, 39 L. Ed. 80], and In re Loney, 134 U. S. 372 [10 Sup. Ct. 584, 33 L. Ed. 949], the court hearing the application will carefully inquire into any matter involving the legality of the detention and remand or discharge as the facts may require. But, barring such exceptional cases, the general rule is that, on such applications, the hearing should be confined to the single question of jurisdiction and even that will not be decided in every case in which it is raised. For otherwise the 'habeas corpus courts could thereby draw to themselves, in the first instance, the control of all prosecutions in state and federal courts.' To establish a general rule that the courts on habeas corpus, and in advance of trial, should determine every jurisdictional question, would interfere with the administration of the criminal law and afford a means by which, with the existing right of appeal, delay could be secured when the Constitution contemplates that there shall be a speedy trial, both in the interest of the public and as a right to the defendant.

"The question has been before this court in many cases—some on original application and others on writ of error; in proceedings which began after arrest and before commitment; after commitment and before conviction; after conviction and before review. The applications were based on the ground of the insufficiency of the charge, the insufficiency of the evidence, or the unconstitutionality of the statute, state or federal, on which the charge was based. In some of the cases the applicants have advanced the same arguments that are here pressed, including that of the hardship of being taken to a distant state for trial upon an indictment alleged to be void.

"But in all these instances, and notwithstanding the variety of forms in which the question has been presented, the court, with the exceptions named, has uniformly held that the hearing on habeas corpus is not in the nature of a writ of error nor is it intended as a substitute for the functions of the trial court. Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court. If the objections are sustained or if the defendant is acquitted he will be discharged. If they are overruled and he is convicted he has his right of review. Kaizo v. Henry, 211 U. S. 146, 148 [29 Sup. Ct. 41, 56 L. Ed. 125]. The rule is the same whether he is committed for trial in a court within the district or held under a warrant of removal to another state. He cannot, in either case, anticipate the regular course of proceeding by alleging a want of jurisdiction and demanding a ruling thereon in habeas corpus proceedings [citing many cases].

"The last of these decisions (Ex parte Royall, 117 U. S. 241 [6 Sup. Ct. 734, 29 L. Ed. 868]) is particularly in point, not only because of the applicability of its reasoning to the present case, but because of the fact that the writ was there denied even though the statute, on which the charge was based, was ultimately held to be void. Royall v. Virginia, 116 U. S. 572, 579, 583 [6 Sup. Ct. 510, 29 L. Ed. 735]; Same v. Same, 121 U. S. 102, 104 [7 Sup. Ct. 826, 30 L. Ed. 883]; In re Royall, 125 U. S. 696 [8 Sup. Ct. 1392, 31 L. Ed. 855]."

[3] But the present case is even stronger than the Henry Case, because here the question of the constitutionality of the act is sought to

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be raised by a witness before the grand jury, and not by a defendant. Nor does the witness invoke the protection of the Fifth Amendment, which declares that "no person * * * shall be compelled in any criminal case to be a witness against himself." Unless the testimony sought to be elicited from the witness would tend to incriminate him and expose him to prosecution, he must answer the questions propounded. Hale v. Henkel, 201 U. S. 43, 66, 26 Sup. Ct. 370, 50 L. Ed. 652. Certainly, under the facts of these cases, the petitioners, the witnesses before the grand jury, cannot, as the sole ground for their refusal to answer the questions, be heard to say, after they have been advised of their rights and ordered by the court to answer the questions, in justification of their failure to answer, that they had been advised that the act, violations of which were being investigated by the grand jury, is unconstitutional. They can only justify their refusal to answer by showing that the answers would incriminate them. As was said by Mr. Justice McKenna in Nelson v. United States, 201 U. S. 92, 115, 26 Sup. Ct. 358, 365 (50 L. Ed. 673):

"These writs of error are not prosecuted by the parties in the original suit, but by witnesses, to review a judgment of contempt against them for disobeying orders to testify. Being witnesses merely, it is not open to them to make objections to the testimony. The tendency or effect of the testimony * * * is no concern of theirs. The basis of their privilege is different from that and entirely personal. * * *"

That is, they are protected against self-incrimination. It cannot be doubted that the decision of the Supreme Court in the Nelson Case would have been the same, had the witnesses based their refusal to testify on the ground of the unconstitutionality of the statute under which the investigation was being had.

It is not alleged or claimed that there is any irregularity in the organization of the grand jury, and its legality is not questioned.

Here we have a legal grand jury, proceeding in a lawful and orderly manner to make certain investigations. Witnesses are legally summoned, appear, and are duly sworn. They are advised as to the matter under investigation, the charge, and they are advised of their right to refuse to answer if the answers would tend to incriminate them. They do not claim any such privilege. The grand jury has presented them; the court has heard the matter and ordered that they testify; they have again refused to testify for the same reasons, and were committed for a contempt. Under these facts there can be no doubt that the order of commitment is valid, and that the petitioners are not unlawfully restrained of their liberty.

It may not be inappropriate to say that the court does not doubt the statement made in the argument that the witnesses are reputable bankers and business men, and that to require them to bring to New York from Detroit, Mich., where they reside, the numerous books and papers called for by the subpœnas duces tecum, would be to impose great hardship upon them. But this objection relates to the matter of inconvenience and hardship, to the wisdom or unwisdom of the acts of Congress having to do with the regulation of primary elections under the laws of a state. That the act of Congress may visit inconvenience and hardship upon the citizens, and that the act of Congress may be

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unwise, suggest matters not to be dealt with by the courts. And, as I have held, the constitutionality of the act of Congress cannot be challenged in this proceeding. I may say, also, that it is not my province to make the law of habeas corpus. I cannot add to nor can I subtract from it. It is my duty to declare the law governing this trial as I find it.

It results, from what has been said, that the writ of habeas corpus in each case must be dismissed and discharged, and each petitioner be remanded to the custody of the marshal; and such order will accordingly be entered.

SWANN v. AUSTELL et al.

(District Court, N. D. Georgia. October 3, 1918.)

1. COURTS ⇐189(13)—FEDERAL COURTS—JURISDICTION.
   While the federal court will not interfere in the administration of estates of decedents, where it is necessary for the court to interfere with the actual administration, etc., *held*, the necessary diversity of citizenship and jurisdictional amount existing, that the federal court could entertain a suit looking to the determination of plaintiff's rights in the estate of a deceased person, where the management, etc., was not affected.

2. WILLS ⇐802(2)—ELECTION—ACCELERATION OF REMAINDER.
   Where a widow renounced the will, which gave her a life estate, etc., and was assigned dower, *held* that, as the husband's will providing that children in being at death of wife should take in remainder, etc., showed an intention that only those of the testator's blood should take, remainders in the dower cannot be deemed accelerated, so as to allow a spouse of a child dying before the widow to take.

3. WILLS ⇐853—ACCELERATION OF REMAINDER.
   To work an acceleration of a remainder, the particular estate as a whole must terminate, and even then the acceleration results only from the presumed intent of the testator, and will not take place, if contrary to such intent.

4. COURTS ⇐365—FEDERAL COURTS—STATE DECISIONS.
   In determining rights under a will, decisions of the courts of the state of the testator's residence, wherein the property was located, are controlling.

5. JUDGMENT ⇐743(2)—CONCLUSIVENESS—TITLE TO LAND.
   Where plaintiff claimed property on the ground that, as testator's widow renounced the will and dower was assigned, remainders to children were accelerated, *held*, that the record of a case to which the heirs and executors were parties, involving disposition of property in which the widow would otherwise have had a life interest, was not admissible.

In Equity. Bill by Alfred R. Swann against W. W. Austell, as executor, and others. Bill dismissed.

Turner, Kennerly & Cate, of Knoxville, Tenn., and Anderson, Rountree & Crenshaw, of Atlanta, Ga., for plaintiff.

C. T., L. C. & J. L. Hopkins and King & Spalding, all of Atlanta, Ga., for defendants.

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NEWMAN, District Judge. Alfred Austell, Sr., a resident of Fulton county, Ga., died on the 7th day of December, 1881, leaving a last will and testament dated February 1, 1878, which was duly probated in the court of ordinary, Fulton county, Ga., at the January term, 1882. At the time of his death there survived him, as heirs at law, his widow, Mrs. Francina C. Austell, and his four children, W. W. Austell, Mrs. Leila Austell Thornton, Mrs. Janie Austell Swann, and Alfred Austell, Jr., between whom, by the terms of the will, his property was divided.

After the probate of said will, Mrs. Francina C. Austell, the widow, filed her petitions in the superior courts of Fulton, Campbell, and Douglas counties, in each of which property belonging to the estate of the deceased was located, objecting to the will and renouncing her rights thereunder, and praying that dower be set apart to her in lands and tenements owned by the testator at the time of his death.

Upon her application, filed in the superior court of Fulton county, a decree was rendered on the 3d day of November, 1882, fixing the particular parcels of land which had been admeasured to her, and giving her as dower the home on Marietta street, and that part of the property known as the "Trout House lot," which was located on Line street, now Edgewood avenue, which was described to have approximately 100 feet frontage on North Pryor street and a like frontage on said Line street; and upon the petition filed in Campbell and Douglas counties, dower was also admeasured and decrees entered thereon, setting apart a part of the land in Campbell county, known as the "Latham plantation," and a part of the land in Douglas county, known as the "Gorman plantation." Subsequently an agreement was entered into between all parties at interest, under which the widow surrendered all of her claim of dower in the Douglas county plantation, which had been specially devised by the testator to Alfred Austell, Jr., and was granted, in lieu thereof, the remainder of the Campbell county plantation, which had not already been set apart as dower.

Immediately after the renunciation of the will and the taking of dower by the widow, the executors filed a bill in the superior court of Fulton county relating to the rights of the widow and the children in the "Trout House" property, under which a verdict and decree was rendered in November, 1886, referring in terms to the entire "Trout House lot," including that which had been theretofore set apart as dower, holding that the widow had no interest in this property, and that the executors should sell same at public auction and divide the proceeds among the four children. In pursuance of said decree, however, the executors sold only that part of the property referred to which was not set apart as dower; that is, that part which fronted on Decatur street and ran back along North Pryor street about 140 feet, to an alley which separated this part of the Trout House lot from that which had been set apart as dower.

No question is made here as to the residue of the estate, or any property belonging to the estate, except that set apart to the widow as her dower, as stated above.

On April 9, 1893, Mrs. Janie Austell Swann, one of the children of the testator, died testate, bequeathing her entire estate, of every char-

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acter, except certain unimportant devises and bequests, to her husband, James Swann. James Swann died in April, 1903, also leaving a will, by which whatever interest he had acquired from his wife in and to any of the dower property was devised to his brother, Alfred R. Swann, who is the plaintiff here.

Mrs. Francina C. Austell, the widow, died in May, 1917, having held and enjoyed the dower lands up to the time of her death. Upon her death there still survived her three of the children of the testator, namely, W. W. Austell, Mrs. Leila A. Thornton, and Alfred Austell, Jr.

The contention here is that, when Mrs. Austell, the widow, renounced her right under the will and took dower, the rights of the remaindermen under the Austell will were accelerated, and that fee-simple title at once vested in the remaindermen to the property as to which there was a remainder, when the particular estate was in Mrs. Austell. The further contention then is that Mrs. Janie Austell Swann, by the terms of the will, took, by acceleration, a vested interest in the property in which the widow was given a life estate, which interest passed by her will to her husband, James Swann, who devised it to Alfred R. Swann, the plaintiff here.

The question of jurisdiction is raised in this case, on the ground that the estate is still being administered in the court of ordinary of Fulton county, and answers have been filed which make the questions hereinafter discussed.

[1] Of course, it is well understood that federal courts will not interfere in the administration of estates of decedents, where it is necessary for the court, through its officers, to lay its hands in any way upon the property, or to interfere with the actual administration of the estate. Where a case is made inter partes, the necessary diversity of citizenship and the jurisdictional amount existing, a federal court can hear a case looking to the determination of the rights of the plaintiff in and to the property of the estate of a deceased person, without interfering in any way with the possession of the property or the management of the estate. I have reached the conclusion that a decree could be entered in this case determining the rights of the plaintiff, in the event the court should agree with him about the same, and should conclude that he is entitled to recover against the defendants on the case here made by him.

Mrs. Janie Austell Swann died in 1893, and James Swann, her husband, died in 1903, and both died testate, as stated above.

[2-4] The question arising in this case is rather unusual, and quite interesting and important. The plaintiff claims an acceleration of the remainder interest of Gen. Austell's children by reason of the widow renouncing her rights under the will and electing to take dower in the estate. He has brought to the attention of the court a number of authorities which he claims support his position that there was such an acceleration in this case, and consequently that he has a one-fourth interest in the property, the title to which, it is contended, passed to Mrs. Swann, by reason of such acceleration.

Gen. Austell, by his will, disposed of the three pieces of property

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which are for consideration here. One was the home place on Marietta street, in Atlanta, Ga., one was what was called the "Trout House lot," fronting on Decatur street, and running back along North Pryor street to Line street, and the third was a Campbell county farm, known as the Latham plantation.

As to his home place he said this, in the first item of his will:

"After the payment of all my just debts, I give, bequeath and devise, to my beloved wife, Francina, the dwelling house and lot, whereon and wherein I now reside, which fronts on Marietta street in the city of Atlanta, in said county and state, being on the south side of said street, and is bounded on the west by the lot of the First Presbyterian Church of Atlanta, on the east by the lot of C. Kontz, except that portion of said lot which fronts on the right of way of the Western & Atlantic Railroad, and extends back from said right of way to the back line of said lot of said First Presbyterian Church.

"To have, hold, use, and occupy, as a home for her and our children for and during the natural life of my said wife, or until she shall marry again.

"Upon the happening of either of which events said property shall go to and belong to my children that may be living at the time of the death or marriage of my said wife, share and share alike, or if any of my children shall be dead, at that time, leaving children surviving them, such last mentioned children shall take the share of their deceased parent.

"And I expressly devise and direct that the said dwelling house and lot shall not be incumbered by, or subject to the payment of any debt or debts, she, my said wife, may contract, or any contracts she may make, but shall remain, during her life, or widowhood, a secure and unmolested home and residence for her and my said children, while they reside with her, and under her maternal care and protection; not meaning by this, however, that she shall be compelled to have any of our children live with her, unless she shall so desire."

The meaning of this item is very plain. The home place on Marietta street was to go to Mrs. Austell as a home for life, or widowhood, with remainder after her decease, or if she married, to their child or children then living—that is, living at the time of Mrs. Austell's death or marriage—or to the child or children of any deceased child or children.

Mrs. Austell renounced the will and elected to take dower, which was admeasured to her in the home place on Marietta street, the rear of the Trout House lot, that is, the part fronting on Line street, now Edgewood avenue, and running back along North Pryor street to an alley, and also in and to the farm in Campbell county, known as the Latham plantation.

Gen. Austell disposed of the Trout House property in the second item of his will, which, with the directions he gave as to this, is as follows:

"It is my will and desire, and I hereby devise and direct that my executors hereinafter named, shall not sell, during the life of my said wife, any of my store houses, or other houses, on the lot known as the 'Trout House' lot, on the corner of Decatur and Pryor streets, in said city of Atlanta, fronting on Decatur street one hundred feet, more or less, and extending back at right angles with Decatur street, and on Pryor street, to Line street, but they may build, out of any funds that may come into their hands, if they deem it best, other store houses on the part of said lot adjoining the building known as the Austell corner.

"I direct my said executors to collect the rents of the storehouses, or other houses, as may be on said 'Trout House' lot, and out of the rents so collected, that they pay my said wife the sum of two thousand dollars, payable in

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equal quarterly payments, for each and every year of her natural life, whether she marries again or not.

"And my executors are directed to take the receipt for the same from herself alone and to pay it to no other person.

"My executors are further directed, after paying my said wife the sum of money aforesaid, to divide the balance equally between my said children, and after the death of my said wife to sell the said store houses and lot and divide the proceeds of such sale among my children, share and share alike, the child or children of any deceased child of mine to take the share of their deceased parent."

The Latham plantation is disposed of in the ninth item of the will, which is as follows:

"I further will and direct that all the residue of my estate, of whatever kind or nature, whether real, personal or mixed, not hereinbefore disposed of shall be sold, or converted into money, by my executors, at such time and place and under such circumstances, as they may deem best, by public sale, such reasonable notice of time and place of sale as they may deem best, to be given by publication and the proceeds to be equally divided between my children, share and share alike."

It appears from this that no life estate vested in Mrs. Austell by the will except her life estate in the home place on Marietta street. Both as to the "Trout House" lot and as to the farm in Campbell county, no life estate was created in any one. On the contrary, as to both of these places, the direction of the will was, first, as to the "Trout House" lot, that the rents should be collected and as much as $2,000 annually paid to his wife, and, as to the Latham plantation, it was to be converted into money, at the discretion of the executors, and the proceeds divided between his children. So I am unable to see how the doctrine of acceleration can affect at all the property covered by these two items of the will. The only property here to which his contention can apply, if it applies to that, is the home place on Marietta street.

In determining how far the doctrine of acceleration of remainder interest applies to this place, let us get first what was the intention of the testator as to this property. The Supreme Court of Georgia, in Toombs v. Spratlin, 127 Ga. 762, 773, 57 S. E. 59, 60, says this:

"To work an acceleration of a remainder, the particular estate as a whole must terminate. And even then the acceleration results, not from any arbitrary rule, but from the presumed intent of the testator, and will not take place if contrary to his expressed intent."

The provision of the will as to this home place is:

"Upon the happening of either of such events [that is, the death or marriage of Mrs. Austell] said property shall go to and belong to my children that may be living at the time of the death or marriage of my said wife, share and share alike, or if any of my children shall be dead, at that time, leaving children surviving them, such last mentioned children shall take the share of their deceased parent."

The tenth item of the will is as follows:

"In any item of my will, where a division of property is directed to be made, between my children, I hereby declare it to be my will and desire that if any of my children should be dead, at the time such division is to be made, leav-

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ing any child or children surviving them, that such surviving child or children shall take the portion of their deceased parent.

"And in the event any of my children shall die, before the division of any part or the whole of my estate, as provided for in this, my will, leaving no issue, or surviving children, then it is my will and desire that the portion of my estate that would have otherwise gone to such deceased child or children, shall be divided between my other surviving child or children, share and share alike."

The latter part of this item is the important part here; that is, the portion which provides how the property shall go in the event any of his children should die leaving no child or children. It is perfectly clear from this, as to all of his property, Gen. Austell desired, as to a certain portion of the estate, that same should be sold and divided as provided in the will, and, as to property which would become available for distribution upon the death of his wife, it should be similarly divided, that is, among his children, and, if any child should die leaving descendants, to the descendants of such child in lieu of the parent, and, if any of his children should die leaving no child or children, then to the other children. This provision by Gen. Austell as to his desire with reference to his property and his intention runs all through the will and is too clear to be mistakable.

Construing the clause in the will with reference to the home place in the light of the rule I have stated from the case of Toombs v. Spratlin, supra, in which the Supreme Court of the state has said that acceleration results not from any "arbitrary rule," and will not take place contrary to the testator's express intent, it seems to me that the intention of Gen. Austell in this will is too plain to be questioned. Of course, it is a Georgia case, and Georgia property, and a Georgia administration, so that necessarily the views of the Supreme Court of the state are not only important and persuasive, but really controlling.

The view that I take of this clause of Gen. Austell's will is, I think, strengthened by the decision of the Supreme Court of the state in two cases where this will was before the court. The first of these is the case of J. M. High & Co. v. Austell, 133 Ga. 427, 65 S. E. 884, and the other is the case of City of Atlanta v. Austell, 146 Ga. 456, 91 S. E. 478. While not a great deal is shown as to what was decided in the report of the cases, from what seems to have been conceded by both counsel in their argument before this court, the question now before this court was argued in one of those cases at least, and must have been considered by the court.

Two other cases have been before the Supreme Court of Georgia in which this will was brought to the attention of the court. The first is the case of Swann v. Garrett, 71 Ga. 566, and the other is the case of Austell v. Swann, 74 Ga. 278. In the first case, Swann v. Garrett, I do not think it affects the question here, first, because the decision was made by a divided court; and, second, because the decision whether the fee in the property covered by the ninth item of this will vested at once in those who were to take under that item seems to me to be immaterial to a decision of the question then before the court, which was the distribution of the property covered by the ninth item of the will in kind, instead of by a sale of the property and a division of the

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money arising from the sale. This is clearly borne out by an examination of Judge Jackson's dissenting opinion, because his dissent is based upon entirely different grounds; that is, on the ground of whether it is advisable to divide property in which an infant heir has a share in kind between the heirs, or whether it should be sold and the proceeds divided. That is all that Judge Jackson refers to in his dissenting opinion, and does not seem to have given any serious consideration to the other question, as to whether or not the estate vested under the ninth item of the will, but simply refers to the question, apparently, of the advisability of selling, instead of a division of the property in kind.

The case of Austell v. Swann, supra, it seems to me is wholly immaterial to anything before this court.

Counsel for the plaintiff here relies upon a case decided in this court some years ago, the Case of Haslett, 116 Fed. 680. It is claimed that the rule adopted and announced by the court in that case would control in their favor in this case. I do not think so. I think the Case of Haslett was an entirely different case from this. Haslett evidently intended, by the deed he made, that title should vest in his children, because he provided that his wife should be trustee for them during their minority, and should be authorized to sell, if necessary, and convey title to their remainder interest, as well as her own life estate. Gen. Austell evidently did not intend that his home should be molested in any way until after the death or possible marriage of his widow. He intended it to remain as a home for Mrs. Austell and such children as she might desire to live with her.

Quite a number of authorities have been cited by counsel for both sides in this case, and I have gone through them; but I do not see, in the view I take of the case, that a discussion of them by me would be essential in any way to a decision of the case. I concede the doctrine of acceleration of remainder interests in proper cases, but I do not think it is applicable here. I think the intention of Gen. Austell is too plain from this will to be ignored, and that should govern in its construction.

[5] Objection is made to the admission in evidence of so much of the record as is available in the case of W. J. Garrett et al. v. Alfred Austell et al. The pleadings in the case are lost, but the verdict of the jury has been obtained. It appears from what we have of the record that the executors were authorized to sell the front part of the Trout House property (that is, the Decatur street end), and divide the proceeds among the children, all being in life at that time, and it seems the property was sold under this decree. Apparently the verdict applied to the whole of the Trout House property, but it is conceded by all of the parties here that it was a mistake, and was never intended to apply, and never was actually applied, to anything except the Decatur street end of the lot.

The decree seems to recognize what was undoubtedly true; that is, that when Mrs. Austell had taken dower, and it had been admeasured to her in the property which has been heretofore referred to, there was no longer any reason why the front part of the Trout House lot, which was unaffected by her dower, should not go to the children at once.

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Mrs. Austell had no interest, after she took dower, in the rents of the front part of the lot, and, indeed, had no interest of any kind, so it was perfectly legitimate, all parties being before the court, the executors, apparently, and all other parties at interest, that a verdict should be rendered and a decree entered, on a proper showing before the court that it was advantageous to sell the property and distribute the proceeds, that a sale should be made. I do not see how this affects in any way whatever the question now before the court.

Being entirely satisfied, after a thorough examination of this case and of the legal questions involved, that the plaintiff here has no rights in and to any part of this estate, because Gen. Austell's intention is perfectly clear, and that is that the property was to go, in any event, to the children of his own blood, no decree can be rendered in the plaintiff's favor, a decree may be entered dismissing the bill, with costs.

UNITED STATES ex rel. ROMAN v. RAUCH et al.

(District Court, S. D. New York. September 18, 1918.)

CERTIORARI ⟸4, 9—SELECTIVE SERVICE ACT—CLASSIFICATION—REVIEW OF BOARD.

Certiorari, which, under Rev. St. § 716 (Comp. St. 1916, § 1239), a federal court may issue wherever appropriate, will not be issued to review classification by a local board under the Selective Service Act, because it is an executive body, because there is no power in the court to substitute its opinion on a question of fact for that of the board, and because there is remedy by habeas corpus, which is not a discretionary writ, as is certiorari.

Certiorari by the United States, on the relation of Isadore Roman, against Adolph Rauch and others, as members of the Local Board on Classification, under Selective Service Act May 18, 1917, for Division No. 157, City of New York. Denied.

Aaron A. Feinberg, of New York City, for relator.

Francis G. Caffey, U. S. Atty., of New York City, opposed.

HOUGH, Circuit Judge (orally). The question presented by this record is purely one of law. Whether rightly or wrongly an actual writ of certiorari has issued, and to that writ a return has been made, accompanied by an answer to the petition for the writ. In the United States court the questions that are presented by such a record are perhaps in my humble opinion somewhat different from what they would be or are in any and every state in the Union, because there is probably no state which has not enlarged, limited, or created judicial jurisdiction in the matter of certiorari by statute, which the United States has never done, except in so far as certiorari is used substantially as a method of appeal from various tribunals to the Supreme Court of the United States under the act of 1891 (Act March 3, 1891, c. 517, § 6, 26 Stat. 828 [Comp. St. 1916, § 1217]).

The sole source of general authority for the issuance and use of the writ of certiorari in the United States courts is section 716 of the Re-

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vised Statutes (Comp. St. 1916, § 1239), which is still law. That section in substance gives to all federal courts of record—the well-known courts at the time of the passage being the Supreme, the Circuit, and District Courts—the right to issue the usual writs wherever the same should be appropriate. In other words, we have to look to the history of the common law for whatever general power in respect of certiorari we possess. I think it is rather curious that there are not more reported decisions and authorities on the subject, but there are enough and sufficiently recent for my purpose. I am frank to say that I was brought up, a considerable number of years ago now, to accept as final what was said, for example, in this respect by the Circuit Court of Appeals for the Third Circuit in Borden's Condensed Milk Co. v. Baker, 177 Fed. at page 911, 101 C. C. A. at page 191, where that court said:

"It only remains to add that the writ of certiorari is not available in the federal courts of law, except where it is necessary to be used in aid of their jurisdiction."

That, until recently, I had supposed was the accepted doctrine, thought to be based on the ruling of the Supreme Court in the Vallandigham Case, 68 U. S. (1 Wall.) 243, 17 L. Ed. 589. But I doubt whether the view that the writ in the federal court is only auxiliary to some other head of jurisdiction can now be fully accepted. I think the language I am about to read has been repeated several times by the Supreme Court. I read from McClellan v. Carland, 217 U. S. at page 278, 30 Sup. Ct. at page 503, 54 L. Ed. 762, where the court said:

"I think this writ [that is, the writ of certiorari] has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to the act of * * * 1891, * * * had been ordinarily used as an auxiliary process merely; yet, whenever the circumstances imperatively demand that form of interposition, the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice"

—but without the slightest definition of what is meant by the expression "in furtherance of justice."

In my judgment this is the clearest remark on the subject that the Supreme Court has made, although since volume 217 the same language has been repeated several times. There can be no doubt that the writ of certiorari may, for instance, be granted by this court as an accompaniment to a writ of habeas corpus; this would be an example of the certiorari in aid of the jurisdiction in habeas corpus. But in this case, according to the record that is before me, the writ of certiorari is prayed for flatly as an original, independent process, upon the ground that it is an appropriate method of the District Court for exercising supervision over the local board under the Selective Draft Law. This attempt, in my judgment, suggests four points, as follows:

First. Is any original certiorari a possible thing in the District Court where it is not used in aid of another jurisdiction?

I do not find it necessary to record my opinion on this subject. I think it very doubtful.

Second. The inquiry is, assuming that there is any right to issue the writ other than as auxiliary to the exercise of another jurisdiction, is

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there anything in the nature of the body or board proceeded against to forbid the exercise of such jurisdiction?

Here I may say that I do not think that anything in the decision of our Circuit Court of Appeals in Angelus v. Sullivan, 246 Fed. 54, 158 C. C. A. 280, deals with this subject. It was there said that in some appropriate manner the District Court might correct the local board; but I am not concerned about that. I am only concerned with the question whether the independent writ of certiorari is an appropriate method of exercising such supervision. In my judgment it is not a suitable method of proceeding against a local board created by the Selective Service Law (Act May 18, 1917, c. 15, 40 Stat. 76), and it is not for a reason which, with very abundant citations of authority, is set forth in the text-books as follows:

"In order to use the writ of certiorari, the question sought to be raised by the writ must relate to a judicial function. What is a judicial function," says the writer, "does not depend solely upon the mental operation by which it is performed or the importance of the act; regard must be had to the organic law and to the division of the powers of government. It is not enough to make a function judicial that it requires discussion, deliberation, thought, and judgment; it must be the exercise of discretion and judgment within that subdivision of the sovereign power which belongs to the judiciary or at least which does not belong to the legislative or executive departments."

In my judgment, it is perfectly true that the action of a local board in passing upon a question of fact as to whether a man is a citizen or an alien nondeclarant or an alien declarant is, after a fashion of speech, a judicial act. But that phrase is inaccurate. It is not an act which is within the power, function, or nature of the judicial department of any country; it is a function of the executive department; it is so by its nature, and it is so by the act of Congress.

But, even if I am in error about that, then the whole line of decisions growing out of the Chinese Exclusion Acts and the Immigration Laws are applicable. By those several statutes the power of ascertaining any questions of fact with regard to persons who were in or desired to enter this country was committed to administrative boards, and it has been uniformly held, not on certiorari, but on habeas corpus under the Immigration Law, and on appeal from the commissioners under the Chinese Exclusion Act, that it was perfectly proper for Congress to put this inquiry as to facts absolutely and conclusively in the hands of the executive to the exclusion of the judiciary. The lower courts have held that, where no facts appear supporting the executive conclusions, error of law was committed. That I apprehend is the point made here by the relator.

Assuming that that is the point, I do not think it advances the matter of jurisdiction, because I am inclined to hold and do hold that at common law—and it is by the common law that this matter must be decided—the writ of certiorari is ineffective to investigate any question of fact; the return is taken for absolute verity. Every petition in this case shows complete jurisdiction in the local board, and what is complained of is only a finding of fact on evidence which (like all evidence) includes the demeanor, behavior, and apparent credibility of witnesses.

The third thought suggested by this record is really a variant of the

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second. Does this petition, plus the record, present any matter that is reviewable by certiorari, assuming that process to be applicable as against an executive board? I think this is substantially the same question as the second.

The fourth and last thought suggested is this: A writ of certiorari is by all the authorities and by the whole history of the common law a matter of last resort. This remark does not apply to a statutory writ. I am speaking about the common-law or customary writ in saying that it is applied when nothing else will do. It is an extraordinary writ; it is only justified when there is no other method of procuring justice to be done.

Is this such a case; that is, one of last resort? What is wanted now is but the transfer of a name from one list to another. Roman is not under any duress; he is not a soldier; he is not called for service; his status has not yet been changed. It is true he feels himself inconvenienced, because he is more likely to be called for service out of class 1 than out of class 5. If there is illegality in holding him to service, it can be shown on habeas corpus; but as the matter stands to-day the rule applies that the writ is discretionary and not of right; in this respect it wholly differs from a habeas corpus. Therefore, if I assumed or held, first, that there was clear power in the District Court to use a writ of certiorari as independent and original process; second, that such original process might be directed against an executive board; and, third, that this particular board had probably erred in a matter of law—I should decline to issue the writ as a matter of discretion.

In conclusion, it is held that no opinion is expressed as to the general right of the District Court to issue independent writs of certiorari for any purpose other than to test jurisdiction; second, that there is no jurisdiction to issue such a writ against a local board created by the selective draft statute, because it is an executive body; third, there is nothing in this record to show any error on the part of the board for division No. 157, except one of fact, and there is no power in this court to substitute its own opinion upon a question of fact for that of said local board; and, fourth, because under the circumstances shown the writ should be denied as a matter of discretion.

Ex parte MIKELL.

(District Court, E. D. South Carolina. October 29, 1918.)

1. HABEAS CORPUS ⇐1, 53—NATURE—PETITION—SUFFICIENCY.
The writ of habeas corpus is of the highest remedial character, intended to summarily protect the liberty of the citizen from unlawful detention, and the petition is of informal character; a simple application, stating that the party is unlawfully confined, being in most cases sufficient.

2. HABEAS CORPUS ⇐53—PETITION—SUFFICIENCY.
A petition for habeas corpus, stating that petitioner was unlawfully and wrongfully confined under order of the commander of a military camp, etc., *held* sufficient.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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3. STATUTES ⊂=219—CONSTRUCTION BY SECRETARY OF WAR.
The construction placed by the Secretary of War on article 2, Articles of War (Rev. St. § 1342, as amended by Act Aug. 29, 1916 [Comp. St. 1916, § 2308a]), is not conclusive; but the construction is for the courts specially, in so far as it affects the relations between the armies and civilian population.

4. WAR ⊂=82—MILITARY LAW—CIVILIAN EMPLOYÉS—"IN THE FIELD."
A civilian stenographer, employed as a clerk during war at a camp or cantonment in the United States, is not subject to military law, under article 2, Articles of War (Rev. St. § 1342, as amended by Act Aug. 29, 1916 [Comp. St. 1916, § 2308a]), for he is not serving with an army in the field, there being no hostilities in the United States; and this is true, despite the language of Act April 16, 1918.
[Ed. Note.—For other definitions, see Words and Phrases, In the Field.]

Application by William E. Mikell for habeas corpus. On rule to show cause. Application granted, and writ issued.

H. N. Edmunds, of Columbia, S. C., for petitioner.
Wm. L. Martin, Capt. F. A., Judge Advocate, M. J. Dougherty, 2d Lieut. F. A., Asst. Judge Advocate, and J. Waties Waring, of Charleston, S. C., Asst. U. S. Atty., for Maj. Hines.

SMITH, District Judge. In this matter an application was presented on behalf of the petitioner, William E. Mikell, on the 10th of October, 1918, stating that he was unlawfully and wrongfully confined in imprisonment under the orders of the commanding officer of Camp Jackson, near Columbia, in this district, of which camp the commanding officer was Brig. Gen. Robert M. Danford, and that the police department was in charge of Maj. F. H. Hines, under whose particular charge the applicant was.

On reading the petition, it appeared to the court that the better practice would be, in lieu of issuing a writ nisi at this time, to issue a rule, so it might appear whether the case was a proper one in which a writ should issue, without going to the expense at this time of having the applicant transported from the place of his confinement, and brought before the judge, in the city of Charleston, S. C.

An order to show cause was thereupon issued on the 10th day of October instant, requiring Brig. Gen. Robert M. Danford, in command at Camp Jackson, or Maj. F. H. Hines, in command of the police department of the camp wherein the applicant alleged that he was unlawfully confined, to show cause before the court on the 19th day of October, 1918, at 12 o'clock m., why a writ of peremptory habeas corpus should not issue forthwith from this court.

This rule and a copy of the application were duly served, and on the 19th day of October, at the appointed hour, Maj. F. H. Hines, as the party having possession of the body of the applicant, appeared before the court, and filed a demurrer, and return, and the cause was thereupon heard fully; counsel appearing both for the applicant and for the respondent, Maj. Hines.

[1] The demurrer interposed is hereby overruled. The petition for a writ of habeas corpus has always been of an informal character.

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The writ of habeas corpus is a writ of the highest remedial kind, intended to summarily protect the liberty of the citizen from unlawful detention; and a simple application to the court, stating that the party is unlawfully confined, is in most cases sufficient.

[2] The petition in this case, in the opinion of the court, was ample to advise the respondents that the petitioner claimed that they had him in their physical possession and were unlawfully detaining him, and for the circumstances of this case that would seem to be sufficient. It appears from the admitted facts of the return of Maj. Hines and the statements made in open court, agreed to by the counsel for both sides, that the applicant, William E. Mikell, is not and never has been in the actual military service of the United States.

[3, 4] It appears that on July 22, 1917, he was employed by the military authorities at Camp Jackson, Columbia, S. C., in the capacity of a stenographer. Thereafter, about March, 1918, upon his application, he was employed by the constructing quartermaster of Camp Jackson in the position of field auditor. The scope of that employment was that he was to audit or check up the vouchers and accounts of a contractor, or contractors, engaged in the construction of work of a constructive kind, at Camp Jackson. On September 25, 1918, he was discharged from the employment of the government, and arrested by the military authorities on charges that he had rendered false and fraudulent claims against the United States, or connived and colluded with the rendering of false and fraudulent claims against the United States. Thereupon, by the military authorities, he was arrested and placed in confinement in the military prison stockade at Camp Jackson, and the said authorities refused to release him, and propose to try him by court-martial.

The question therefore is: Is he subject to trial by court-martial, or is he entitled to a trial in the courts of the land of competent jurisdiction for any crime that he may have committed? The contention of the counsel for the respondents is that he is subject to the jurisdiction of the military authorities and trial by court-martial.

This is based upon the language of section 1342 of the United States Revised Statutes, as amended by Act August 29, 1916, c. 418, § 3 (Comp. St. 1916, § 2308a), declaring what shall be the Articles of War, at all times and in all places governing the armies of the United States (39 Statutes at Large, p. 650). Article 2 of the Articles of War thereby enacted refers to persons subject to military law; and subdivision (d) of that article is as follows:

"All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles."

The position of the counsel for the respondents is that William E. Mikell is a person serving with the armies of the United States "in the field," and as such is subject to military law. For this respondents cite the construction claimed to have been put upon this clause by the Secretary of War, and maintain that such construction is con-

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clusive. Such a contention could not be admitted by this court for a moment. The construction of the meaning of a statute of Congress is for the courts of the land, especially in so far as it affects the relation of the armies of the United States, with the rest of the people of the United States. The construction of the Secretary of War may be held as applicable in all matters among persons controlled by the Articles of War, or regulations thereunder, within the scope of the authority given him; perhaps it may be said, also, in matters where third persons are concerned, where the matter is limited to the question of what is the rule under the Articles of War among persons admittedly subject to the Articles of War. In all matters, however, pertaining to the people at large and to the effect of the language contained in the statute with relation to people who are not admittedly subject to military law, any construction put by the Secretary of War on the statute has no more effect than the opinion or the construction given by an individual. It may be persuasive in argument to the court as the construction given by a person acquainted with the subject, but it has no controlling effect whatsoever.

Were the authority given to the President himself to make rules and regulations upon any subject, he might conclusively construe his own rules and regulations; but the question whether the subject-matter was within the scope of his authority, or subject to his rules and regulations, would still be a judicial one. Under the Constitution of the United States, the departments are wholly distinct, and the question as to what is the law is a distinctively judicial one.

The construction of the language of an act of Congress is for the courts of law, and where a lower court may err in its construction, this is to be corrected by an appeal to the higher. Were it otherwise, the mere construction of the Secretary of War might render the provisions of the Articles of War applicable to the entire people of the United States, upon the theory that his construction is to govern.

The question, thus, for the court to determine upon this investigation, is whether William E. Mikell is, under the language of the statute in subdivision (d), just quoted, a person subject to military law, and therefore to be tried by court-martial. This is to be ascertained by the ordinary rules of construction, adopted and followed by courts of competent jurisdiction; and a glance at the language of the article will show that practically the whole question depends upon the meaning of the words "in the field"; that is to say, whether "in the field" means in the field of war or hostilities, or whether it means anywhere in the United States, at which there may be a military camp or post of the armies of the United States.

An examination of the language of this subdivision alone is instructive. The first clause covers a period when the country may be at peace. It provides that all retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States shall be subject to the Articles of War. Then comes the next clause, which is limited to a period when the country may be at war, and declares that in time of war all such retainers and persons accompanying or serving

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with the armies of the United States "in the field," both within and without the territorial jurisdiction of the United States, are subject to those articles.

"There is no doubt that the present is a time when this country is at war. Now, is a camp or cantonment of the United States, within the state of South Carolina, a place where the armies can be said to be "in the field"?

The ordinary meaning of the words "field," or "in the field," with regard to military operations, mean in the actual field of operations against the enemy; not necessarily the immediate battle front, nor necessarily the immediate field of battle, but the field of operations, so to say; the field of war; the territory so closely connected with the absolute struggle with the enemy that it is a part of the field of contest.

The word "field" is sometimes figuratively and poetically used to mean the actual struggle itself; as you would say, a man exerted himself stoutly "in the field," which would mean that he did so in the actual conflict. It is sometimes used, also, to denote the wider sphere or area of strategy, where you speak of "strategy of the field," but always in connection with some direct antagonistic effort against the adversary. It would never be used ordinarily, so to say, to mean the territory of either warring party, wholly and entirely removed from the scene of hostilities. The British armies in South Africa during the Boer war were trained and prepared in Great Britain, but, whilst in preparation in Great Britain, no one would have spoken of them as "in the field."

In case of internecine conflict, such as the late War between the States, or of an armed rebellion, then there might be an actual field of combat, or of hostile operations, within the territorial jurisdiction of the United States and in such case, as to all persons serving with the armies of the United States, within its territorial jurisdiction, in close enough contiguity to its armies to be a part of the general war operations, they might be said to be serving in the field.

Even, however, within the territorial jurisdiction of the United States, it has never been maintained that during the War between the States, when the battle field extended from Virginia to Louisiana, a person on the Pacific Slope could be said to be serving "in the field." To so hold would be to mean that the entire United States—that is to say, its entire territorial jurisdiction—was "in the field," for camps and cantonments may be scattered over the entire United States.

The operations of furnishing to and serving in those camps are coextensive with the territorial limits of the United States. A train full of soldiers may leave a distant point in Idaho or Montana for a training camp in Maine or Florida. Is the engineer or the trainmen who conduct that train in the position of persons or retainers serving "in the field"? Manifestly not.

The court cannot but hold the conclusion unreasonable that, with a battle front 3,000 miles away, separated by an immense ocean from the United States, with peace within all the territorial limits of the United States, with martial law nowhere prevailing therein, and with all of the courts of the country open for the administration of public

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justice, all people in any way connected with or doing work for a military official or camp of the United States in this country may be claimed to be serving "in the field."

For the construction of the language of the act of August, 1916, as presumptively furnishing a guide to the court as a statute passed in pari materia, reference is made by counsel for respondents to Act April 16, 1918, c. 53, entitled "An act to provide quarters or commutation thereof to commissioned officers in certain cases." This last act would not strictly be an act in pari materia, as to aid in the construction of the words "in the field." The act of August, 1916, is one which regulates the relations of citizens generally with regard to the Articles of War. The act of April, 1918, was simply to make suitable provision for officers by allowing certain commutations. Even so, the language leaves the matter wholly unaffected. The last act reads:

"During the present emergency every commissioned officer of the army of the United States, on duty in the field, or on active duty without the territorial jurisdiction of the United States, who maintains a place of abode for a wife, child, or dependent parent," etc.

It is at least ambiguous whether the words "in the field" there are not to be used in connection with the words "or on active duty," so as to mean in the field within the territorial jurisdiction of the United States, or in the field, which now imports being without the United States as well as being on active duty (although not in the field) without the United States. In the printed copy of the statute, there is no comma after the words "or on active duty"; so it may be said this is ambiguous, but in any event it would leave it as it stood before. It is definite neither way.

This act, as quoted by respondents in their brief filed, appears to be quoted erroneously, as it has the words "on active duty *within* the territorial jurisdiction of the United States"; whereas the printed statute has it "*without* the territorial jurisdiction of the United States."

The respondents further cite and rely upon the case of Ex parte Gerlach (D. C.) 247 Fed. 616. In that case, Gerlach, an employé of the United States Shipping Board, went to Europe as mate on the steamship McClellan, a vessel in use as a military transport. He was discharged in Europe and sent back on the vessel El Occidente, an army transport, to New York, but volunteered to stand watch and for several days did this, but finally refused to continue. For this disobedience to the order of the army officer in command of the transport, he was tried by court-martial and sentenced to five years' imprisonment.

In the first place, the Gerlach Case was very different in the facts from this case. Gerlach was on the ship, which was a ship of the United States, in command of an officer of the United States, and had volunteered to act in the performance of military service of a naval character while on board of that ship. In the present case, the applicant, Mikell, is admittedly a civilian. He has never occupied any military position, or expressly entered into any military service. The duty he was performing was of a purely civil character. He was simply acting as an auditing clerk to check up the vouchers and accounts of a civilian

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contractor, who was employed by the government to do construction work. He was no more in the military service than was the contractor who might be employed to do the construction work. He was working for the United States, perhaps; but his connection with the military forces of the United States was only under the military department of the United States, which was used in this construction work by the government for the purpose of attending to the supervision of that construction and the disbursement of the moneys to be paid for it.

The military department was acting on behalf of the government for this purpose only as an agent, and the constructive work itself was not necessarily of a military character, although intended for the military purposes of an encampment character.

In the present case, martial law has not been proclaimed, all the courts of the country are open, the field of actual war is thousands of miles removed from this district, and peace prevails wholly within the territorial jurisdiction of the United States. There is military preparation there, but no military conflict.

Furthermore, upon consideration of the Gerlach Case, the captain of the ship would, if necessary, under general maritime law, have been authorized to require the services of Gerlach to save the ship, for such service as he could reasonably perform. In exigencies threatening the destruction of a ship, every one on board is subject to the master's discipline and orders, and must obey; and if the exigency requires it, the vessel being within the area of submarine menace, and a watch being necessary for its preservation, the master in command of the vessel might have required the services of Gerlach, and have punished him for disobedience.

It appears, however, from the report of the case, that he was not punished for these reasons, but he was undertaken to be tried by a court-martial, and was punished as a person accompanying or serving with the armies of the United States, in the field, upon the ground that the words "in the field" do not refer to land only, but to any place, on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted; that in this case Gerlach was on an army transport and peril from submarines existed when he refused to stand watch; that the captain in charge of the vessel had, in the opinion of the court, the right to call upon all persons on board, to protect the transport in any way that seemed best, in view of the danger. As to this last, that would seem to be entirely the case that the captain of the transport had the right to call upon all persons on board to protect the transport in any way that would seem best, in view of the danger; but that would not follow from the fact that Gerlach was subject to the Articles of War, but from the general maritime law.

The circumstances in the Gerlach Case are very much stronger than the present, but even in that case, as a matter of reasoning, this court is not prepared to say that it would regard the reasoning or the result of that case as controlling.

Under all the circumstances of the present case, it appears to the court that the applicant, William E. Mikell, is not a person serving

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with the armies of the United States "in the field," within the terms and scope of the act of August 29, 1916; nor is he subject to trial by court-martial for the crime that he is alleged to have committed. That crime is one under the laws of the United States, for which he could be tried in the civil tribunals of the United States, and there is no reason why he should not be there tried.

It is therefore ordered and adjudged that the return to the rule to show cause in this case is insufficient, and it is overruled. It is further ordered and adjudged that a writ of peremptory habeas corpus do forthwith issue from this court, directing the respondent Maj. F. H. Hines to have and produce the body of William E. Mikell before this court, in Charleston, at the United States courthouse, on the 4th day of November, 1918, at 12 m., then to be released and discharged from military confinement without day, unless good cause be on that date and time to the contrary shown to the court.

SMYTHE v. INHABITANTS OF NEW PROVIDENCE TP.

SAMMIS v. SAME.

(District Court, D. New Jersey. October 28, 1918.)

1. LIMITATION OF ACTIONS ⊂=22(5)—STATUTE APPLICABLE—ACTION ON INTEREST COUPONS.

   Actions upon interest coupons attached to negotiable bonds are governed by the statute of limitations applicable to the bonds to which they are, or were, attached, except that limitation begins to run from the maturity of the coupon, and not of the bond.

2. LIMITATION OF ACTIONS ⊂=34(1)—ACTION ON MUNICIPAL BONDS.

   The rule that a general statute of limitations does not apply to an action on a liability created by statute is limited to cases where the liability rests directly upon a statute, and not on any contract of the parties, and is not applicable to an action on municipal bonds, although issued under statutory authority.

3. LIMITATION OF ACTIONS ⊂=48(6)—ACCRUAL OF RIGHT OF ACTION—ACTION ON MUNICIPAL BONDS.

   The rule that, where municipal bonds are payable from a particular fund to be created by the debtor, limitation does not begin to run against an action thereon until the fund has been provided, does not apply to bonds payable by general taxation, although the statute requires the creation of a sinking fund.

4. LIMITATION OF ACTIONS ⊂=22(7)—BONDS—EFFECT OF OMISSION OF SEALS—"SEALED INSTRUMENTS."

   Municipal bonds, which the statute, under authority of which they were issued, required should be under the seals of those directed to execute them on behalf of the municipality, and which recite that such seals were affixed, although in fact they were not, being valid, notwithstanding the omission, are, for the purpose of the application of the statute of limitations, "sealed instruments."

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sealed Instrument.]

At Law. Actions by Roland M. Smythe and by Elinor G. Sammis against the Inhabitants of the Township of New Providence. On demurrers to twelfth, thirteenth, sixteenth, and seventeenth pleas in

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the Smythe suit, and to twelfth, thirteenth, and sixteenth pleas in the Sammis suit. Sustained in part, and overruled in part.

Erwin & Erwin, of Jersey City, N. J., and Albert Massey and Carroll Sprigg, both of New York City, for plaintiffs.

McCarter & English, of Newark, N. J., for defendant.

HAIGHT, District Judge. The main questions raised by the demurrers are: (1) Whether any of the provisions of the New Jersey statute of limitations (3 Comp. Stat. p. 3162 et seq.) are applicable to these suits; and (2) if so, whether it is the first or the sixth section thereof, or both. In reaching a solution of these, certain subsidiary questions arise, which will appear as they are hereafter discussed.

[1] 1. As it is sought to recover both the amount due on the bonds and the coupons attached thereto, a primary question arises—whether the statute of limitations affects the suits, so far as the coupons are concerned, differently than it does so far as the bonds are concerned. It has been settled by a line of decisions of the United States Supreme Court that, as respects the usual statutes of limitations, ordinary interest coupons (such as those upon which this suit is partly based), attached to negotiable bonds, are to be considered as the same grade of contract as the bonds, or, in other words, that the same provision of the statute of limitations as is applicable to the bonds is applicable to the coupons, except that the statute begins to run from the date of the maturity of the coupons, respectively, and not from the date of the maturity of the bonds to which they have been respectively attached, and this irrespective of whether the coupons have been detached from the bonds or remain attached thereto. City v. Lamson, 9 Wall. 477, 483, 19 L. Ed. 725; Lexington v. Butler, 14 Wall. 282, 296, 20 L. Ed. 809; Clark v. Iowa City, 20 Wall. 583, 586, 22 L. Ed. 427; Amy v. Dubuque, 98 U. S. 470, 25 L. Ed. 228; Koshkonong v. Burton, 104 U. S. 668, 673, 26 L. Ed. 886.

The contention of counsel for the defendant that the case last cited has varied the rule clearly announced in the preceding cases—that coupons are controlled by the same statute of limitations as the bonds to which they were or are attached—is based on a misapprehension of what was held in that case. It was specifically stated by Mr. Justice Harlan, on page 673 of 104 U. S. (26 L. Ed. 886), that, at the time of the passage of an act of 1872 (which limited actions on municipal bonds and coupons to six years after they became due, respectively), the suit as respects the coupons was not barred, because 20 years (the time limited in the previous statute for beginning actions on sealed instruments) had not then expired. The action on certain of the coupons was held to be barred solely by virtue of the act of 1872. It follows, therefore, that, if either of the before-mentioned provisions of the New Jersey statute of limitations is applicable to the bonds, the same provision applies to the coupons; that, if neither is applicable to the bonds, neither applies to the coupons; and that the times when the statute begins to run against the coupons are the dates that they matured or were payable, respectively.

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[2] 2. It is insisted by the plaintiff that neither of the before-mentioned provisions of the statute of limitations is applicable to these suits, for two reasons. It is first urged that these suits are based on a liability created by statute, and consequently that the statute of limitations does not apply. It is undoubtedly well settled, and has been long established, that where a liability is created, not merely by the act of the parties, but by the positive provisions of the statute, a statute of limitations framed, as is the New Jersey act, after the original statute of 21 James I, is not applicable. Angell on Limitations, § 80, and cases to be hereafter referred to. The defendant does not question the rule, but denies that it is applicable to these cases. A short analysis of the decisions upon which the plaintiffs rely, and a comparison of the facts upon which they were based with the facts in this case, will, I think, clearly demonstrate that defendants' contention is correct.

In Robertson v. Blaine County, 90 Fed. 63, 32 C. C. A. 512, 47 L. R. A. 459 (C. C. A. 9th Cir.), the bonds upon which the suit was brought had been issued by Alturas county. Subsequently the Legislature of Idaho abolished that county and another, and consolidated the two, giving to the consolidated county the name of Blaine, and provided that the latter county should be responsible for all of the debts of the original counties. It was held in a well-considered opinion, where all of the leading authorities are referred to, that the Idaho statute of limitations did not apply, because the liability of the defendant (Blaine county), or the cause of action against it, had been created by statute; that independently of the statute there was no obligation upon Blaine county to pay the debt of its predecessor, Alturas county, nor, independently of the statute, could any action be maintained thereon against Blaine county. Hence it will be seen that the liability, so far as the defendant in that action was concerned, was one created distinctly by statute, and the act of the parties was merely incidental.

Bullard v. Bell, Fed. Cas. No. 2,121, 1 Mason, 243 (C. C. N. H.), was a suit by the holder of a dishonored bank note against a stockholder of the bank. The liability of the stockholder to answer for the debts of the bank was created by statute. No act of the parties had created the liability.

In Cowenhoven v. Freeholders, 44 N. J. Law, 232, the plaintiff sued to recover fees due him, under a statute, as county judge of Middlesex county. The inapplicability of the statute of limitations was placed expressly on the ground that the action was founded on the statute, and not on a contract of any kind; there never having been any contract whatever between the defendant and the plaintiff.

The plaintiff, in Outwater v. Passaic, 51 N. J. Law, 345, 18 Atl. 164, sued for salary due him, as city treasurer, by an ordinance passed in pursuance of a statute. His claim was held not to be barred by the statute of limitations, for, as Chief Justice Beasley said:

"The plain reason that it is not a debt which has arisen under a contract, either express or implied. The obligation to pay these moneys is the creation of the statute directing the election of the officer, and the admeasurement of his salary by ordinance."

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The suit in Smith v. Jersey City, 52 N. J. Law, 184, 18 Atl. 1050, was to recover excess moneys paid on an assessment for local improvements, and the liability was expressly held to rest upon a statute, and hence that the statute of limitations was not applicable. To the same effect were the decisions in McFarlan v. Morris, etc., Banking Co., 44 N. J. Law, 471, and Lehigh Valley Railroad Co. v. McFarlan, 43 N. J. Law, 605.

In Parisen v. N. Y. & Long Branch R. R. Co., 65 N. J. Law, 413, 47 Atl. 477, the suit was to recover an amount which had been awarded by commissioners appointed to fix the value of lands taken for the right of way of the defendant. The cause of action was expressly given by the statute. It was held that the award was not such a one as was contemplated by that provision of the sixth section of the New Jersey statute of limitations, which mentions suits based upon awards under the hands and seals of arbitrators.

It is thus apparent that in all of these cases the liability or cause of action was given by, or rests exclusively upon, a statute, independent of any act of the parties. In the cases at bar the suits are based upon the bonds of the defendants. It is true that they were executed by virtue of statutory authority, but the statute does not impose the liability. Without the action of the commissioners, no bonds could have come into existence, and no liability or cause of action could have arisen against the defendants. It was only after certain things had been done that the bonds could be issued, but the liability was created by the act of the commissioners in issuing the bonds.

If the plaintiffs' argument were sound, none of the ordinary statutes of limitations would run against any municipal bonds, because all such bonds are issued pursuant to statutory authority. It needs no argument to demonstrate the fallacy of any such contention, because municipal bonds are subject to the statute of limitations, a rule which is recognized in all of the cases of which I have ever heard. See, for instance, the United States Supreme Court cases before cited, the cases to be hereafter referred to in discussing the plaintiffs' second point, and the cases collected in volume 2 of the fifth edition of Dillon's Work on Municipal Corporations, p. 1325.

The Supreme Court of New Jersey, in Morrison v. Township of Bernards, 36 N. J. Law, 219, has held that a suit may be maintained on bonds issued pursuant to the same statute as that under which the bonds in this case were issued, thus recognizing, I think, considering the circumstances under which the question arose, that it is the act of the parties that creates the liability, and not the statute. If strength is to be found for plaintiffs' contention in his argument that it will be necessary, before the suit on the bonds can succeed, to show that the statute was complied with in all its respects prior to the issue of the bonds (which I am not ready to admit), it is sufficient at this time to refer to the opinion of the Supreme Court of the United States in Bernards Township v. Morrison, 133 U. S. 523, 526, 10 Sup. Ct. 333, 33 L. Ed. 766, the effect of which is to clearly demonstrate that the cause of action on bonds issued, pursuant to this statute, rests upon the bonds, and not upon the statute which authorized their issuance. I

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conclude, therefore, that the plaintiffs' causes of action do not rest upon a statute, in any such sense as to bring them without the provisions of the New Jersey statute of limitations.

[3] 3. It is next urged on behalf of the plaintiffs that the act under which the bonds in suit were issued provides for the creation of a particular fund for the payment and retirement of the bonds and the interest coupons, and there is invoked the rule, stated in Lincoln County v. Luning, 133 U. S. 529, 533, 10 Sup. Ct. 363, 364 (33 L. Ed. 766), that—

"When payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided."

To demonstrate the applicability of that rule to this case, plaintiffs rely solely upon the authority of Robertson v. Blaine County, supra. It appears from the statement of facts in that case that the statute authorizing the issuance of the bonds provided that—

"The board of county commissioners of said county shall, at the time of levy of county taxes, include therein a levy of sufficient tax to meet the interest and principal of said bonds as the same shall become due, and the tax so levied shall be known as the 'Courthouse Bond Tax,' and shall be collected as other taxes are collected, and shall constitute a separate fund, and shall be used for no other purpose. And for the payment of said bonds, principal and interest, all of the taxable property of said county is hereby pledged."

It must be admitted that if the "particular fund" referred to in that case was that created by the above-quoted act, then that decision is an authority for the plaintiffs' contention, because if that statute created, within the meaning of the rule before mentioned, "a particular fund," then the statute under which the bonds in suit in this case were issued likewise created a "particular fund." The latter provided for reporting annually by the commissioners, who executed and issued the bonds, to the township committee the amount required to pay the principal and interest, if any, due or to become due and payable during the next ensuing year, and required that the township committee should levy and collect, at the same time and in the same manner as other taxes are collected, such sums of money as should be reported to the township committee by the commissioners, and should pay the same to the latter, which should apply them to the payment of the principal and interest on the bonds, or so much thereof as should remain unpaid after the commissioners had applied the dividends arising from the stock which the bonds were issued to purchase. It further required the commissioners to provide, within five years from the issuing of the bonds, for the annual payment of at least 5 per cent. of the same, so as to insure their final liquidation within 25 years, and for that purpose directed that they should annually apply the surplus dividends on the stock over and above the amount necessary to pay the interest on the bonds, and if the amount of surplus dividends and the amount received by the commissioners for the sale of the stock, which they were authorized to sell, should not be sufficient for the annual payment of the 5 per cent., that then the deficiency should be reported by the commissioners to the township committee, to be levied and raised annually, in the manner provided for "paying the interest" on the bonds. It

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also provided that at the expiration of 25 years it should be the duty of the board of assessors of the township, unless the payment for the bonds was otherwise provided for, to cause to be assessed, levied, and collected, on the real estate in the township, at the time and in the manner as other taxes were assessed and levied, the sum due on the bonds issued pursuant to the act, together with interest, or so much thereof as should remain unpaid, "by reason of the deficiency of the dividends and sale of said stock," and that the amount to be so raised should be determined by the report of the commissioners to the township committee, as before authorized.

It is necessary to consider, therefore, if the decision in Robertson v. Blaine County is based on the statute above quoted, and not on another statute which is not specifically set forth in the report of the case (which latter would seem to be the fact from the remarks of the court on page 71 of 90 Fed., 32 C. C. A. 512, 47 L. R. A. 459), whether Robertson v. Blaine County can be sustained on principle or authority, or both. If it can be, then it would seem to follow, under the rule announced in Lincoln County v. Luning, supra, that the defendant should have coupled with its pleas of the statute of limitations an allegation that the fund provided by the statute for the payment of the bonds and the interest had been created. By reference to Lincoln County v. Luning, and the discussion in that case of Underhill v. Sonora, 17 Cal. 173, and Freehill v. Chamberlain, 65 Cal. 603, 4 Pac. 646, it will be seen that the "particular funds" out of which the bonds were to be paid were quite different from those out of which the bonds were to be paid either in this case or in Robertson v. Blaine County.

In Lincoln County v. Luning, the county having defaulted in the payment of its interest coupons, the Legislature passed another act, providing for the registration of overdue coupons, and imposed upon the treasurer the duty of thereafter paying the coupons "as money came into his possession applicable thereto, in the order of their registration." The coupons in suit, which, the court remarks, "by the general limitation law would have been barred," were presented as they fell due to the treasurer for payment, and payment was refused, because the interest fund was exhausted. Thereupon the treasurer registered them, in accordance with the later act. Mr. Justice Brewer said that the later act, coupled with what was done by the treasurer pursuant thereto,

"amounted to a promise on the part of the county to pay such coupons as were registered, in the order of their registration, as fast as the money came into the interest fund, and such promise was by the debtor accepted."

It was held in Freehill v. Chamberlain, as Mr. Justice Brewer says, that—

"Where the statute provides for the issuing of bonds of a city, with interest coupons payable as fast as the money should come into the treasury from special sources designated by the act, the statute of limitations does not commence to run against the coupons until the money is received in the treasury in accordance with the terms of the act."

To the same effect was the decision in Underhill v. Sonora. The underlying principle, I think, upon which it was decided in those cases, and others which hold the same (they are very few), that the stat-

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ute of limitations would not run until the fund had been provided, was that the cause of action would not exist until the fund had been created.

Further support is found for this view in Schoenhoeft v. Board of Commissioners, 76 Kan. 883, 92 Pac. 1097, 16 L. R. A. (N. S.) 803, 14 Ann. Cas. 100, where the distinction between suits on ordinary municipal bonds which are to be paid out of money raised from taxes, and suits on municipal warrants, payable out of certain funds, only when a treasurer has sufficient money in the fund to pay them, is pointed out, as well as is the distinction between most of the cases relied upon in Robertson v. Blaine County and the case which was then before that court. The fundamental difference is, as I gather it from that decision, whether a cause of action exists before the particular fund has been created. That was the basis of the decision in King Iron Bridge Co. v. Otoe County, 124 U. S. 459, 463, 8 Sup. Ct. 582, 31 L. Ed. 514.

In Bodman v. Johnson County, 115 Iowa, 296, 88 N. W. 331, it was held that, where there was statutory authority to make additional assessments to pay for the cost of county ditches, the statute of limitations ran against warrants payable out of the "ditch fund," from the date of their issue, and not from the date when there were assets actually in the fund from which they were payable; that, as it was the duty of the county to raise the necessary funds, and as it had the authority to do so, the plaintiff was not justified in postponing the bringing of his action until the funds were actually on hand. Of course the statute of limitations has never been held to begin to run until the cause of action accrues, but the moment it does accrue the statute begins to run.

The broad rule stated by the Supreme Court in Lincoln County v. Luning, must therefore, I think, be read in the light of the facts of that case, and be considered to mean that the statute does not begin to run until the "particular fund" has been provided, when the existence of that fund creates the cause of action. If the decision in Robertson v. Blaine County is broader than that, then I do not think it is supported by authority, nor does reason justify it. This is manifest, I think, from a consideration of the act under which the bonds in suit were issued, taken in connection with the general rules to be hereafter referred to. It is true that the act provided for the creation of a fund to pay the principal and interest out of the dividends accruing from the stock which the bonds were issued to purchase, as well as from a sale of the stock itself. But it further provided for the raising of any deficiency by general taxation.

There is no pretense in this case that payment of these bonds or coupons was refused on account of lack of funds to pay them. If it can be said that these bonds and coupons were to be paid out of a "particular fund," within the meaning which plaintiffs seek to ascribe to the remarks of the Supreme Court in Lincoln County v. Luning, then it can be said with equal force that any municipal bond, for the payment of which the statute provides for the creation of a sinking fund or other fund to be raised by general taxation, without limiting the right to sue on the bonds before the fund is created, is a "particular

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fund," and hence, in any such case, the statute of limitations would not apply to a suit on the bonds, where the municipality had neglected to assess the taxes necessary to meet the bonds. But that would be contrary to the general rules that suit may be instituted on municipal bonds and coupons when they mature, and that the statute of limitations begins to run from the date when the cause of action accrues; it would also seem to be at variance with that line of federal authorities which hold that, before mandamus will issue to compel the assessment of a tax, a bondholder must obtain a judgment on the bonds. See Heine v. Levee Commissioners, 19 Wall. 655, 657, 22 L. Ed. 223 and cases there cited. As the bonds and coupons in suit were payable at stated times, and as the statute which authorized their issuance provided, as the ultimate means for their payment, for the raising of money in the ordinary way, by the levying and collection of taxes, I am unable to perceive any reason why the general rule that a cause of action arises on such bonds and coupons at the dates of their maturity respectively, does not apply.

[4] 4. The next question is whether section 1 or section 6 of the New Jersey statute of limitations applies. Section 1 limits actions to 6 years, and section 6 to 16 years. The former embraces actions founded on contracts "without specialty," as did the original act of James I, and the latter actions, among others, "upon any single or penal bill for the payment of money only, or upon any obligation with condition for the payment of money only." While the quoted clause of the last-mentioned section does not in so many words refer to instruments under seal, the courts of New Jersey have given to the terms used their well-recognized legal significance, and have construed that clause to cover actions "upon sealed instruments for the payment of money only." Elsasser v. Haines, 52 N. J. Law, 10, 22, 18 Atl. 1095, 1100. Therefore bonds under seal are within the provisions of the sixth section, and if the seals hereinafter mentioned had been affixed to the bonds upon which these suits are based, there would be no doubt as to the applicability of that section. However, while the bonds are in the usual form, and recite that the persons who executed them (commissioners appointed pursuant to the statute which authorized their issuance [P. L. N. J. 1868, p. 915]), "have hereunto set our hands and seals," they do not in fact bear such seals. The statute directed that they should be "under their [the commissioners'] hands and seals," not under the seal of the municipality whose obligations they were.

I have already held on the authority of Draper v. Springport, 104 U. S. 501, 26 L. Ed. 812, when the question was raised by demurrers to the declarations, that the absence of the seals of the commissioners did not invalidate the bonds. The question to be decided, therefore, is whether municipal bonds, which the statute, under the authority of which they were issued, required should be under the seals of those who were directed to execute them on behalf of the municipality, and which recite that such seals were affixed, although in fact they were not, and which notwithstanding are valid and binding obligations of the municipality, are to be considered, for purposes of the application of the statute of limitations, as contracts "without specialty" (simple

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contracts), or as obligations under seals (specialties). I think that, if the bonds in suit were those of an individual or a private corporation (not issued pursuant to express legislative authority, defining the form in which they should be issued), they could not, under the weight of authority, be considered as sealed instruments, notwithstanding that they recited that they were given under the seal of the obligee. Overseers of Hopewell v. Overseers of Amwell, 6 N. J. Law, 169; Perrine v. Cheeseman, 11 N. J. Law, 174, 19 Am. Dec. 388; Taylor v. Glaser, 2 Serg. & R. (Pa.) 502, 503; Comley v. Ford, 65 W. Va. 429, 64 S. E. 447, 450; Bouvier's Law Dictionary, page 1020; and by inference Corlies v. Vannote, 16 N. J. Law, 324. See, contra, Slade v. Bennett, 133 App. Div. 666, 118 N. Y. Supp. 278, 280, and Oconto County v. MacAllister, 155 Wis. 286, 295, 143 N. W. 702, 704.

But these are municipal bonds, issued pursuant to a statute which expressly directed the manner in which they should be executed, and they are valid obligations, notwithstanding the omission of one of the statutory requirements. The Legislature contemplated that they should be specialties, and in every respect, save the seals of the individual commissioners, they are such in form. It was said by Mr. Justice Bradley in Draper v. Springport that "the seals could have added nothing to the solemnity of the instruments." If that be so, if the instruments are as solemn as they could have been had the seals been affixed, it is difficult to perceive why they are not, to all intents and purposes, sealed instruments. To say that the seals could have added nothing to the solemnity of the bonds, but that the bonds are, nevertheless, simple contracts, is, I think, to express an irreconcilable contradiction. A simple contract is never spoken of in legal parlance as a "solemn instrument," while a contract under seal—a specialty—is. In view of the before-mentioned decision of the Supreme Court, I think that it must be held that the statute which authorized the bonds to be issued has fixed their grade or character, to the same extent as if the statute had specifically said that the bonds to be issued should be considered for all purposes as specialties, and that the omission of the individual seals of the commissioners, who executed them on behalf of the municipality, has not changed that grade or character.

To hold otherwise would be to permit those charged with the execution of a statutory duty, by dispensing with what the Supreme Court has held to be an unessential requirement, so far as the validity of the bonds is concerned, to transform what the Legislature contemplated should be a specialty into a simple contract. Such a result should not be permitted, if it can be avoided. Of course, it was as fully within the power of the Legislature to prescribe the grade of contract which the bonds should be as it was to define the formality with which they should be executed. I apprehend that, had the statute required that the bonds should be under the seal of the municipality, rather than the individual seals of the commissioners, the Supreme Court's decision in Draper v. Springport in respect to the validity of the bonds would have been different than it was. In such a case a suit could not have been maintained on the bonds, and the question now presented could not have arisen. Some support for the views above expressed is found,

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I think, in the remarks of the Supreme Court of Wisconsin, in Oconto Co. v. MacAllister, supra, to the effect that—

"The mere omission of a scroll or flourish after the names of the signers would be quite a flimsy ground of distinction, and cannot outweigh the consideration that the statute required a bond which imports a sealed instrument, that the instrument is in the form of a bond, and that it is expressly stated to be sealed with the seals of the signers."

My conclusion, therefore, is that the suits, so far as they are based on the bonds and coupons which did not mature within 16 years from the beginning of these actions, are barred by the statute of limitations, and that the suits, so far as they are based on those which did mature within that period are not barred. This results in the sustaining of some of the demurrers and the overruling of the others. An order drawn in accordance with these conclusions will be signed.

In re WEISBERG.

(District Court, E. D. Michigan, S. D. October, 1918.)

No. 2405.

1. BANKRUPTCY ⟸418(1)—EFFECT OF DISCHARGE.
A discharge in bankruptcy does not automatically relieve the bankrupt from a debt, even if scheduled and provable, but may be pleaded by him in defense to an action thereon; its effect in the particular case to be determined by the court in which the action is brought.

2. BANKRUPTCY ⟸391(1)—POWERS OF COURT—STAY OF ACTIONS AGAINST BANKRUPT.
The power of the bankruptcy court to protect a bankrupt against claims in another court is limited to the period before the question of his discharge has been decided.

3. BANKRUPTCY ⟸391(1)—CONTEMPT OF BANKRUPTCY COURT—LEGAL PROCEEDINGS AGAINST BANKRUPT.
A creditor of a bankrupt, though having a dischargeable claim, does not become guilty of contempt of the bankruptcy court merely by taking proceedings in another court to enforce his claim, where no order forbidding such action has been made, and especially when the creditor had no knowledge of the bankruptcy proceedings.

In Bankruptcy, in the matter of Julius Weisberg, bankrupt. On petition of bankrupt to punish a creditor for contempt. Petition denied.

Benjamin & Betzoldt, of Detroit, Mich., for petitioner.
C. Lucian Bancroft, of Detroit, Mich., for respondent.

TUTTLE, District Judge. This is a petition by the bankrupt, asking that the respondent, one of his creditors, be punished for contempt of court in ignoring a discharge in bankruptcy granted to the bankrupt by this court, and garnishing certain money belonging to petitioner and on deposit in a bank, and praying that respondent be ordered to return such money to petitioner.

The petitioner was duly adjudicated a voluntary bankrupt herein, in August, 1916. Among the debts owing by the bankrupt was an indebtedness to one Frank Majuchowsky, the respondent, on a judgment

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rendered by one of the justices of the peace for the city of Detroit against the bankrupt as indorser on a worthless check, amounting to $41.75. This debt, with the name and address of the creditor, was duly scheduled. It appears that the proper notices of the bankruptcy proceedings were mailed to respondent; but there is no proof or sworn statement that they or any of them were received by him, and he swears in his affidavit that he never received any of such notices, or knew of such bankruptcy proceedings. Respondent duly obtained his discharge from this court in November, 1916.

In June, 1917, respondent caused to be filed in the justice's court in which he had obtained the judgment mentioned an affidavit of garnishment under the state practice, showing the recovery by him of said judgment, and stating that he had not received payment thereof, and that the garnishee defendant, the Wayne County & Home Savings Bank, had in its hands, money belonging to the petitioner herein, and was indebted to said petitioner, in an amount equal to the sum due to respondent on such judgment. Thereupon, in accordance with the practice in the state court, the garnishee defendant paid to the said justice's court this amount, which was thereafter paid over by the court to respondent. No notice of these bankruptcy proceedings was given to said bank or justice of the peace prior to the receipt and payment of such money, nor was any such notice filed in the justice's court. It does not appear, nor is it claimed, that petitioner received notice of the garnishment proceedings, or had any knowledge thereof, until after this money had been paid to the respondent. It was not necessary, under the state practice, that he should have received such notice; garnishment proceedings of this kind, based on judgment, being ex parte. It appears to be conceded that the claim of respondent against petitioner, represented by said judgment and scheduled as already indicated, was a provable debt, subject to discharge by the bankruptcy proceedings.

The question presented is whether the action of the respondent in collecting his judgment against the petitioner by these garnishment proceedings constituted, under all the circumstances, a contempt of this court, in view of the fact that the petitioner had previously obtained his discharge in bankruptcy herein. No case has been cited, and I have discovered none, involving precisely the same question. After careful consideration, however, of the situation and of the rights and duties of the parties in the premises, I am of the opinion that petitioner has not sustained the burden of showing that respondent has been guilty of the contempt of court alleged.

[1] In the first place, the discharge in bankruptcy granted to petitioner did not automatically relieve him from even the provable debts previously owed by him and duly scheduled. It is true that such discharge afforded him a complete defense to an action brought to recover any such debt, but in order to avail himself thereof it would be necessary for him to plead the discharge in such action, and failure to do so would render him amenable to whatever judgment the court might render against him in that action. Dimock v. Revere Copper Co., 117 U. S. 559, 6 Sup. Ct. 855, 29 L. Ed. 994; Boynton v. Ball, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. Ed. 985.

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Nor has the bankruptcy court, in which such discharge has been granted, jurisdiction to determine the effect thereof in a state court in which an action against the former bankrupt is pending, or to interfere with the proceedings in that court. Questions as to the effect therein of such discharge must be left to the decision of the court in which the action is pending. In re Rosenthal (D. C.) 108 Fed. 368; Hellman v. Goldstone, 161 Fed. 913, 88 C. C. A. 604; In re Lockwood (D. C.) 240 Fed. 161.

[2] The power of the bankruptcy court to protect a bankrupt against claims in another court is limited to the period before the question of his discharge has been decided. Section 11a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 549 [Comp. St. 1916, § 9595]) provides as follows:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."

If the bankrupt desires to obtain the benefit of his discharge in an action brought against him for the recovery of a debt affected by such discharge, he may, by properly pleading and proving the discharge, in the court where the action against him is pending, secure a permanent stay of proceedings in such action, even after judgment therein. Boynton v. Ball, supra.

[3] Considering, therefore, the nature and effect of a discharge in bankruptcy, and bearing in mind that such discharge does not release the bankrupt from any of his debts, unless it be expressly pleaded as a defense in an action for the recovery of such a debt, I am of the opinion that a creditor of the bankrupt, though having a dischargeable claim against the latter, does not become guilty of contempt of the bankruptcy court merely by taking proceedings in another court to enforce such claim, even with knowledge that the bankrupt has obtained his discharge. The bankruptcy court not having forbidden such creditor to institute and carry out such proceedings, it cannot be said that a creditor who takes such action has committed a contempt.

Furthermore, even if it be assumed that such action on the part of a creditor of a discharged bankrupt might, if taken with full knowledge of all of the bankruptcy proceedings, constitute such contempt of court, yet, in the present case, there is no evidence, beyond the mailing of the proper notices, to show that the respondent knew of the granting of this discharge, or of any other of the proceedings herein, or understood the nature thereof.

Certainly he would not be guilty of contempt of this court in disregarding its orders or proceedings of which he was without knowledge. Garrigan v. United States, 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295 (C. C. A. 7). Before the respondent in such a case can properly be punished for contempt of court, the evidence relied on to prove him guilty thereof should be positive, clear, and convincing. General Electric Co. v. McLaren (C. C.) 140 Fed. 876; Hanley v.

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Pacific Live Stock Co., 234 Fed. 522, 148 C. C. A. 288. The showing by petitioner in the present case is not of that character.

The petition must be denied.

In re BALDWIN.

(District Court, S. D. New York. April, 1918.)

BANKRUPTCY ⟸407(1)—GROUNDS FOR REFUSAL OF DISCHARGE—FALSE STATEMENT.

Objections to the discharge of a bankrupt sustained, on the grounds that he made a materially false statement in writing as a basis for credit and knowingly concealed property.

In Bankruptcy. In the matter of Willard C. Baldwin, bankrupt. On motion to confirm report of special master on objections to discharge. Confirmed in part, and discharge denied.

Saul S. Myers, of New York City, for Broadway Trust Co.

Smith & Bowman, of New York City (Harold H. Bowman, of New York City, of counsel), for objecting creditor.

H. Howard Babcock, of New York City (Wm. S. Bennet, of New York City, of counsel), for bankrupt.

AUGUSTUS N. HAND, District Judge. This case comes before me on a motion to confirm the report of the special master in so far as it sustains the first, third, and fourth specifications of objections to a discharge, and to reject it in so far as it finds that the second specification has not been established. The principal question argued is whether a statement in writing furnished by the bankrupt on September 13, 1912, was false. The financial statement was as follows:

Assets.		
Cash on hand and in bank	$ 4,781 22	
Accounts receivable	12,344 38	
Bills receivable	2,677 66	
Merchandise, cash value	20,945 00	
Fixtures	1,000 00	
Liabilities.		
Accounts payable		$ 3,985 73
Bills payable		7,552 14
		$11,537 87
Net worth		30,210 39
	$41,748 26	$41,748 26

Willard C. Baldwin.

On the back of the paper containing the foregoing statement is this indorsement:

September 13, 1912.

My financial condition is as good this day as it was at the time of making statement within. Willard C. Baldwin.

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The original statement, which was given December 31, 1911, and was reaffirmed September 13, 1912, did not include the claim to any surplus which there might be arising out of certain property which had been transferred many years before to L. J. Callanan to secure certain creditors of a firm in which the bankrupt had an interest. The latter knew of this claim at all times, but says he did not realize that his interest was worth about $30,000 until he was told by Mr. Callanan in the summer of 1912 that it would yield that amount. The bankrupt had met with losses since the original statement of December 31, 1911, was rendered to about the amount of this claim so that he had no net worth on September 13, 1912, upon the basis of the former statement; but if the Callanan claim, which was omitted December 31, 1911, was included September 13, 1912, it would be sufficient to bring his assets up to the worth appearing in the old statement.

The bankrupt's counsel urges that his creditors were not interested in anything except what was his net worth, and that he correctly stated on September 13, 1912, that his financial condition was as good as it was at the time of making the former statement, because the Callanan claim would just about offset the shrinkage. If in his written indorsement of September 13, 1912, he meant that his actual financial condition was as good on that day as when he had rendered the original statement, that was obviously untrue, because the Callanan claim existed at all times, and the bankrupt had lost over $30,000 in business between the rendering of the original statement and September 13, 1912. Therefore his actual financial condition was worse to that extent. If the bankrupt meant that his financial condition was as good on September 13, 1912, as it was set forth in the former statement, even that was quite problematical, and the statement could not be regarded as a truthful disclosure by the bankrupt of the real situation. That an equity in security transferred 10 years before to pay creditors—an equity which has never up to this time yielded anything—could be regarded by the bankrupt as a proper substitute for the liquid assets mentioned in the original statement is most unreasonable. Mr. Callanan was a well-known, responsible merchant. If there was any such equity, or if anybody believed there was any such equity, in the property in the hands of Mr. Callanan, the proof of it would be more clear. As I have said above, nothing has been realized to this very day. I think the argument that the statement of September 13, 1912, was not false, while plausible, is without real substance.

Moreover, it is perfectly evident that the bankrupt's original financial statement of December 31, 1911, was false in respect to bills payable. It was apparently only based on bills payable for merchandise, and omitted both the Gatti-McQuade notes, aggregating $9,539.12, and notes held by Mrs. Harte amounting to $2,000. The statement of accounts payable was apparently equally untrue. The first specification, that the bankrupt made a materially false statement in writing, is, for the foregoing reasons, fully sustained.

The second specification, which the master did not regard as established, should likewise be sustained, namely, that the bankrupt made a false oath before Commissioner Gilchrist when he testified that his

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indorsement, dated September 13, 1912, on the back of the financial statement was true. The foregoing reasoning seems clearly to establish that the second specification was well taken.

The third specification should also be sustained, namely, that the bankrupt, with intent to conceal his financial condition, failed to keep books of account. He not only kept a sort of record which a man doing a large business could hardly keep in a way consistent with honesty, but there is no pretense that he did not omit from his regular books the checks held by Mrs. Harte.

The master likewise appears to have been correct in sustaining the fourth specification of knowingly concealing property. The net worth of the bankrupt, according to the statement of September 13, 1912, was $30,210.39. This net worth must be taken to be exclusive of any consideration of the old and worthless Callanan claim. In other words, while the confirmatory statement of September 13, 1912, may give the bankrupt reasonable latitude as to the amount of assets and liabilities, provided the net worth is the same, yet the assets must, I think, be regarded as of the same general nature as those set forth in the statement of December 31, 1911. Irrespective of this, I do not think that such a vague asset as the Callanan claim, which never realized anything, can be seriously taken into account. If that be so, then the bankrupt on September 13, 1912, had a net worth of $30,000, representing the value of comparatively quick assets over liabilities. All the trustee finally realized was $4,581.33, while the liabilities at the time of bankruptcy, which was only five months later than September 13, 1912, when the financial statement was made, amounted to $55,406.09; in other words, his financial condition had changed for the worse by about $80,000. This is in no reasonable way accounted for, and indicates, if the financial statement is to be believed, a fraudulent concealment of assets.

The report of the master is sustained as to objections 1, 3, and 4, and reversed as to objection 2, and the bankrupt's discharge is denied.

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Ex parte SHORT.

(District Court, N. D. California, First Division. September 5, 1918.)

No. 16417.

1. ARMY AND NAVY ⟸20—SELECTIVE DRAFT ACT—CLASSIFICATION—POWERS OF BOARD.

While the action of the local board becomes final against a registrant under the Selective Draft Act (40 Stat. 76), unless appealed from in five days, a local board, having given a registrant a classification to which his questionnaire showed he was not entitled, may correct the error some months later.

2. ARMY AND NAVY ⟸20—SELECTIVE DRAFT ACT—"ORDAINED OR REGULAR MINISTER."

Registrant, whose questionnaire showed his ministerial work ended shortly after registration and before filing the questionnaire, *held* not entitled to deferred classification under the regulations defining an "ordained or regular minister" as a person who has been ordained, etc., or one who as his customary vocation preaches, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Ordained Minister.]

In the matter of the application of the wife of William Short for a writ of habeas corpus to secure his discharge from the custody of military authorities. Writ denied, and Short remanded to the custody of military authorities.

Wm. T. Kearney, of San Francisco, Cal., for petitioner.

John W. Preston, Sp. Assist. Atty. Gen., and Casper A. Ornbaun, both of San Francisco, Cal., for respondent.

DOOLING, District Judge. The wife of William Short seeks his discharge on habeas corpus from the custody of the military authorities. The record shows that Short, who will be designated herein as the registrant, on January 14, 1918, returned to his local exemption board his questionnaire, in and by which he claimed exemption as "a regular or ordained minister of religion." In support of such claim he stated:

That "he had been admitted to Unitarian ministerial fellowship in January, 1916, at Palo Alto, Cal., and that on June 5, 1917, he was minister of Palo Alto Unitarian Church."

To the question, "State place and nature of your religious labors now," he returned no answer; but in response to the question, "Give all occupations at which you have worked during the last 10 years, including your occupation on May 18, 1917, and since that date, and the length of time you have served in each occupation," he answered:

"Unitarian minister 1 year and 10 months. From May 18 to June 25, Unitarian minister, time included above. Chairman Northern California branch Peoples' Council (temporarily) 5 months. Student for balance of time during 10 years."

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Upon these answers he was placed in class VB; that is to say, in the class of a regular or duly ordained minister of religion.

On June 6, 1918, a letter was sent to the local exemption board by the United States attorney, stating that registrant—

"registered for the draft at Palo Alto on June 5, 1917. At that time he was acting as a minister in the Unitarian Church of that town, but shortly thereafter resigned from the church and has not been connected in any way with any church since, but has, on the contrary, devoted his time to the activities of the Peoples' Council, which organization is decidedly unpatriotic in my opinion. I believe that Short should be reclassified and compelled to do military service, other things being equal."

Also the intelligence officer of the War Department advised the board by letter as follows:

"This is to advise you that investigation of Wm. Short discloses that he has not practiced his profession as a minister since July 1, 1917, and his classification should therefore be changed."

Upon receipt of these letters the local board on June 6, 1918, reclassified him placing him in class 1A, and duly notified him of that fact.

From this reclassification he appealed to the district board, which on June 15th denied the appeal.

Thereafter, and on July 19, 1918, he was arrested and on July 20, was by the local board for division No. 1 in San Francisco, certified as a deserter, and delivered to the commanding officer of the United States army, and now is in the custody and under the control of such officer. These are the facts as disclosed by the record. The only questions of any importance which they present are: (I) As to the power of the local board to change its ruling upon registrant's classification practically five months after such classification was made; and (II) was such change made arbitrarily and in disregard of the evidence presented and of the registrant's rights?

[1] The action of the local board becomes final as against the registrant under the regulations, unless appealed from within five days, but does not become final as against the government at any time. If the local board has made an error in a registrant's favor, and awarded him a deferred classification to which his questionnaire shows he was not entitled, I find nothing in the law or the regulations which would prevent the board from correcting that error, if and when it is called to its attention. The result of such procedure would only be that for the period of time during which the error remained uncorrected the registrant would enjoy a deferred classification and an exemption from duty to which he was not entitled, a situation about which he could not be heard to complain.

[2] An examination of registrant's questionnaire shows that that is exactly what happened here. It shows that on June 5, 1917, when he registered he was a regular minister of religion, had become such by being admitted to Unitarian ministerial fellowship in January, 1916, at Palo Alto; that the place and nature of his religious labors on June 5, 1917, was minister of Palo Alto Unitarian Church.

As to the place and nature of his religious labors on January 13, 1918, the date of his questionnaire, no statement is made; but it ap-

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pears that the whole period of his activities as a Unitarian minister was 1 year and 10 months, and that a portion of that period was from May 18 to June 25, 1917, or, in other words, that he was engaged in his ministerial work for only 38 days after the passage of the Selective Service Law; that for 5 months, presumably the 5 months immediately preceding January 13, 1918, his occupation was chairman of the Northern California branch of the Peoples' Council, which work apparently he took up within 2 months after June 25, 1917, the last date that his questionnaire shows him to have been engaged in a ministerial occupation.

The law exempts "regular or duly ordained ministers of religion," and the regulations define a duly ordained minister of religion as:

"A person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and teach the doctrines of such church, sect, etc."

Registrant at no time came within this definition. A regular minister of religion is defined to be:

"One who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister."

Nor did registrant, at the time he filed his questionnaire in January, 1918, bring himself within this definition. His last service as a minister had been in June, 1917, and since then his occupation was not that of a minister, but chairman of the Peoples' Council. Nor did his affidavit, presented on June 10, 1918, to the local board, show that he had again taken up the occupation of a minister, so that the most that appears from the record here is that registrant from January 21 to June 6, 1918, enjoyed an exemption to which he was not at all entitled. It is my opinion that it was not only well within the power of the local board, but that it was also its plain duty, properly to classify registrant when its attention was called to the error which it had made, and particularly when the facts upon which the correction was based appeared of record in registrant's own statement.

Registrant has suffered no injury at the hands of the local board, and the writ of habeas corpus is therefore discharged, and he is remanded to the custody of the military authorities.

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THE NEW LONDON.

THE EGERTON.

(District Court, E. D. New York. October 19, 1918.)

COLLISION ⊜82(2)—STEAM VESSELS IN FOG—EXCESSIVE SPEED.

A steamer, which was out of her course in Long Island Sound in a fog, *held* solely in fault for a collision with a tug and her tow, on the ground that she was running at excessive speed.

In Admiralty. Suit for collision by the Egerton Towing Company against the steamer New London, with cross-libel by the Central Vermont Transportation Company against the steam tug Egerton. Decree for libelant.

Foley & Martin, of New York City (W. J. Martin, of New York City, of counsel), for Egerton Towing Co.

Haight, Sandford & Smith, of New York City (Henry M. Hewitt, of New York City, of counsel), for the New London.

CHATFIELD, District Judge. On the morning of September 9, 1915, the New London, a steamer 270 feet long, struck the Egerton, a tug 73 feet long, somewhat aft of amidships on the starboard side. The New London ground along, with her guard and the supports breaking down the house of the Egerton, until the New London and the Egerton were clear. Then the New London, backing, but at the same time apparently still having way, came in contact with the barges in tow of the Egerton, which were on a short hawser of 10 or 15 fathoms, and by the backing of the New London's engines these scows swung around to the other side of the New London and got in difficulties under the guard, from which the force of extricating one of the scows broke the windlass attachments of the New London.

According to the testimony, the New London gave a signal to reverse just before striking the Egerton, and the Egerton, which just before collision had stopped her engines and had then not much way, gave a signal to go ahead, so as to throw her stern out of the reach of the New London, and then again stopped, but by so doing she obtained headway enough to help in actually passing the New London.

There is one point of difference between the witnesses, in that the Egerton's witnesses testify that the New London struck nearly head on, and by so doing they place the Egerton more nearly across the course of the New London. This must be taken into account in considering the testimony that the New London was over close to the Old Hen buoy and the Sands Point shore, for a boat of her length could not have been coming on a course straight out, so as to strike the Egerton at this angle, unless she had been substantially on shore just before. It is apparent from the testimony that the New London had been running on a course from Captain's Island. She had held this course, which was S. W. by W. ½ W., for over 45 minutes. This should have brought her to a point where the siren on Execution Rocks would be

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heard, and she should pass this siren about a quarter of a mile to the south.

After the collision, and when the fog lifted, the New London (which had anchored) and the Egerton were actually about one-quarter of a mile further to the south, and not far from the Sands Point buoy. The witnesses differ somewhat as to just how far to the north and east of this buoy the boats were at the time; but it seems to be quite apparent that, if the New London had not anchored at this spot, they would have drifted onto the buoy, and they were then very close to it, and very nearly on a line between Sands Point and the Old Hen buoy.

The examination of a large chart showing this compass course from Captain's Island to Execution Rocks makes it also plain that the Edgerton, in following her course from the Gangway buoy to the Sands Point buoy, would be more or less on a parallel course to that of the Sound steamers, and less than a quarter of a mile to the south. It is also settled by the testimony that the Egerton did pass the Sands Point buoy at a short distance, not more than 100 feet, on her starboard. She then took a course which should have brought her about the same distance north of the Old Hen buoy, and the issue on the testimony of the witnesses in the case is whether the Egerton pursued this course, or whether in some way she deviated to the north, so as to meet the New London, which was somewhat to the south of her compass course. In fact, the captain of the New London says she was a little south of where she should have been. The New London claims she had not changed her wheel, and had been following a compass course ever since she ran into the fog. She had been running under one bell for some minutes after the fog shut in, and had been moving in the beginning of the flood tide since something like half past 5, when the tide turned, at the point where she then was further to the east. It seems to be apparent that the effect of the tide, which sets to the westward and to the south, would carry the New London to the south of her course, unless allowance were made therefor, and that this allowance was customarily made by moving the helm so as to hold true, on the range as well as on the course, until Execution Rock and the horn thereon were located; but, if there was an excess drift to the south in the fog, and no allowance made therefor, the New London would be nearly to the Old Hen buoy.

The issue, therefore, is one of fact. The New London was off her course, and seems to have been hunting for the horn on Execution Rock, when the Egerton was heard close at hand. Both boats were sounding fog signals, but the New London had not stopped when doubt as to her course and position became apparent. In fact, she did not reverse until close to the Egerton.

The New London had run some time longer than usual before getting opposite Execution Rock, and this is explained by the longer course which she must have followed, and by her reduced speed after the fog shut down. She was therefore lost in the fog, and should have navigated accordingly. Instead of so doing, she proceeded as if she had heard the Execution Rock horn, and the libelant claims that she had changed her course to run past Gangway Rocks. The horn was

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never heard on the New London, and the evidence does not justify a finding that the collision was far enough to the eastward to explain that fact. On the contrary, the tide had not changed long before the collision at this point and the New London anchored soon after the collision. Thus the boats could not have drifted far to the west, and the witness who rowed out in a boat from the Old Hen buoy went in the direction of Sands Point buoy for 10 or 15 minutes. This witness started about 7:30, when he heard a crash in the fog, and his testimony corroborates that of the master of the Sagamore, who passed before 7:35 a boat close on his starboard hand, and, as he recollects, within 100 feet or so east of the Sands Point buoy. He heard nothing of the collision, and his attention was not called to the matter until he saw the Egerton later in the day. But his testimony is definite enough to locate the Egerton near the Sands Point buoy and to fix the approximate time of collision as later than that given by the New London.

On the other hand, the Egerton had proceeded some 8 minutes from the Sands Point buoy. She ordinarily took 15 minutes to run to the Old Hen buoy, and had been running 5 minutes under one bell after passing the Sagamore. This would bring the Egerton well over toward the Old Hen buoy, and considerably to the east of the point where the boats were anchored when the fog lifted. Thus, in accord with all the other testimony, the Egerton must have been further east than the point marked by her captain on the chart, and she may, in passing the Sagamore, have changed her course, so as to be further to the north than her usual path. She was on a compass course N. E. ½ E., and could not have been out in the ordinary path of the New London.

It will be found, therefore, that the New London was out of her course, and in a position where she should not have proceeded as if her location had been clearly ascertained. She approached the Egerton at a speed which, even if the Egerton was then to the north of her usual course, made the New London the burdened vessel, and did not stop, when moving with the flood tide, until collision was inevitable. The Egerton was moving against the tide, and was evidently going slowly until hooked up to avoid collision, and was sounding fog signals which should have warned the New London, if that boat had realized her position.

Fault must therefore be placed upon the New London, and the libelant may have a decree.

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In re LILLER.

(District Court, N. D. West Virginia. November 21, 1918.)

BANKRUPTCY ⟨=186(1)—FRAUDULENT TRANSFER OF PROPERTY—SUBROGATION.
A family corporation, organized by a bankrupt when insolvent, to which he transferred his property in an attempt to place it beyond the reach of creditors, and which borrowed money and paid off certain judgment liens on the property, occupies no better position with respect to the property than the bankrupt, and is not entitled to subrogation to such liens.

In the matter of W. A. Liller, bankrupt. On petition of the W. A. Liller Building Company to revise order of referee. Affirmed.

Charles N. Finnell, of Keyser, W. Va., and Horace P. Whitworth, of Western Port, Md., for petitioner.
Harry G. Fisher, of Keyser, W. Va., for trustees.

DAYTON, District Judge. Upon a former hearing in this matter I adjudged the W. A. Liller Building Company to be a colorable holder only for the bankrupt, Liller, and not an "adverse claimant" of his property—this for the reason that this corporation had been formed by Liller, when insolvent, for the purpose of conveying to it his property, with design to hinder, delay, and defraud his creditors; it being admitted that the stock of said corporation was largely subscribed and held by Liller, and nominal shares only by his near relatives. I held the referee rightly, by summary order, directed the trustee to take possession of the property from such corporation and sell it. This ruling of mine was affirmed by the Circuit Court of Appeals (247 Fed. 90, 159 C. C. A. 308), upon the opinion filed by me. In the opinion, among other things, it was said:

"The contention made, that in order to take over this property the corporation went into bank, and borrowed $2,500, and paid off outstanding executions issued upon judgments rendered more than four months before bankruptcy proceedings, whereby this property became exempt, does not strike me as sound under the rulings of New River Coal Land Co. v. Ruffner Bros. (two cases) 165 Fed. 881, 91 C. C. A. 559 (C. C. A. 4th Ct.), and Graham Mfg. Co. v. Davy-Pocahontas Coal Co., 238 Fed. 488, 151 C. C. A. 424 (C. C. A. 4th Ct.), to the effect that the bankruptcy court's jurisdiction is exclusive; and I think they exclude the idea that the bankrupt and a corporation formed by him to purchase the property, as this one was, shall be permitted to determine whether such sale shall stand or not. It is for the bankruptcy court to determine that question, and, where creditors demand a sale of it, I cannot see how it can be well refused. The question as to whether the bank making this loan, or a surety paying it, is entitled to subrogation to the liens of the executions, and entitled to payment out of the proceeds of sale, as I understand, by the referee's decree, is not determined, but reserved, and therefore I make no expression as to that, only determining that, if he should sustain such subrogation, the common creditors are entitled to have the property sold, in order that it may be determined whether it will bring a surplus for their benefit, and in order that the property itself will not suffer dissipation, deterioration, and loss pending the determination of their contest against the right to subrogation in case they determine to contest it."

⟨=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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When the case went back to the referee, the W. A. Liller Building Company filed its petition, alleging it had borrowed $2,500 of The People's Bank of Keyser, and had with the money so borrowed paid off execution liens existing more than four months before Liller's bankruptcy, and praying subrogation to such liens as against the proceeds arising from the sale of the property.

The referee has held it not entitled to such subrogation, and to revise his ruling and order to this effect the company has filed this petition. Although the bank does not join therein, it is admitted the sum of $2,500 borrowed from it has not been repaid it, and tender is made in its petition by the company that subrogation may be made in the name and favor of the bank.

Subrogation originally was limited to transactions between principals and sureties, and while the modern tendency is to broaden its application, yet it is only applicable in cases wherein a party has been compelled to pay a debt for which another is primarily answerable. It is never allowed one who would thereby reap advantage in any way from his own wrongdoing, nor to relieve a party from the consequences of his own unlawful act. As against creditors of the grantor, a fraudulent grantee stands in the grantor's place, and has no right, by way of subrogation or otherwise, superior to that possessed by his grantor. The doctrine of subrogation is an equitable one, and he who seeks it must come into court with clean hands. McNeil v. Miller, 29 W. Va. 480, 2 S. E. 335; Clevenger v. Miller, 27 Grat. (Va.) 740; Bates v. Swiger, 40 W. Va. 420, 21 S. E. 874; German Bank v. United States, 148 U. S. 573, 13 Sup. Ct. 702, 37 L. Ed. 564; Railroad Co. v. Soutter, 13 Wall. (80 U. S.) 517, 20 L. Ed. 543; In re Mead, 16 Fed. Cas. 1274, No. 9,365.

Applying those principles to the facts in this case, it seems clear the referee rightly denied subrogation. The former adjudication held this corporation to have been formed by Liller in combination with near relatives as nominal stockholders, for the purpose of putting his property out of his hands, but not without his control, in fraud of the rights of his creditors. This former adjudication, affirmed by the appellate court, is conclusive of the fact; and the charge in this petition that a new issue of fact is raised, requiring additional evidence to be heard by the referee, is without merit. This crucial fact having been thus judicially ascertained, it inevitably follows that to allow this corporation to be subrogated to the execution liens paid off by it before Liller was adjudged bankrupt would be, in practical effect, to allow Liller to be reimbursed for debts he was legally and morally bound to pay, and of which the law at the time was compelling payment.

No one would contend that if Liller, in personam, before proceedings in bankruptcy instituted against him, had borrowed the money and paid off these execution liens, he would subsequently, out of his bankrupt assets, be entitled to reimbursement. It inevitably follows that his fraudulent alter ego, the corporation, can be in no better position than he himself could be. This would be true in case the corporation's stock, instead of being practically all owned by him, had been held by

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independent parties, provided it had engaged in the scheme to defraud his creditors. When any one, with such unlawful purpose in view, buys the property of a debtor, he does so at his peril. If his fraudulent purpose is exposed, he must lose his money invested in the transaction, or at least be postponed in payment thereof out of the purchased property, until the debts of all other creditors are satisfied. This is the penalty he must pay for his moral turpitude. He cannot with clean hands come into a court of equity, asking either reimbursement or subrogation. Equity, good conscience, and public policy all demand this be so.

But it is insisted that the bank, loaning the money, was entirely innocent of all fraudulent design or purpose, and therefore the rule should not be enforced against it. That it was so innocent is fully conceded. That it is entitled to subrogation, either upon the prayer of Liller, the building corporation, or itself (if it saw fit to make it), is not true—this for the reason that its loan to the corporation was a wholly independent transaction, in no way connected with Liller, his debts, or his property. There was no obligation upon it at the time to either pay or see paid these execution liens. It was neither a purchaser of the property incumbered by them nor even, so far as disclosed, a junior lien holder against it. Its transaction was solely with the corporation, whereby it loaned to it its money with such surety as was satisfactory. It took no lien upon the corporation's property, and no assignment of the execution liens, and because the corporation in fact had no property, but that which it claimed was in fact Liller's, gives it no such connection or right thereto as would supersede the rights of Liller's creditors. As stated heretofore herein, subrogation is only an inherent right to one who has been required to pay a debt for which another is primarily answerable.

Upon argument, the suggestion was made that, inasmuch as the building company was only the "colorable holder" of the property for Liller—in other words, Liller's other self—that the bank would be entitled itself, or any sureties bound for the loan, to prove its debt and have it participate in the distribution of assets as an unsecured creditor. This question has not been presented, or at least has not been passed upon by the referee, and therefore I do not pass upon it. It may depend upon facts not before me, such as whether proof of claim to this end was filed within the time required, and, if not, whether such grounds for not doing so exist that would permit the filing thereof now.

The ruling and order of the referee complained of must be affirmed.

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DE PAUW UNIVERSITY et al. v. PUBLIC SERVICE COMMISSION OF OREGON et al.

(District Court, D. Oregon. July 8, 1918.)

1. WATERS AND WATER COURSES ⊂=217—COMPANIES SUBJECT TO REGULATION AS PRIVATE CORPORATIONS—"PUBLIC UTILITY."

A private corporation owning an irrigation system, though authorized by its articles of incorporation to engage in the business of selling water to the public, does not thereby become a "public utility," subject to regulation by the Public Service Commission, organized under Laws Or. 1911, p. 483, where such company has never in fact either sold, or held itself out to sell, water to the public generally, but only to purchasers of irrigable land from it, in fulfillment of private contracts, at a specified contract price.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

2. CORPORATIONS ⊂=394 — PUBLIC UTILITY—REGULATION—CHARTER AUTHORITY.

The charter authority of a corporation to become a public utility is a mere naked authority to do business as such, and until its business is so pursued such charter does not make the corporation a public utility subject to regulation.

3. WATERS AND WATER COURSES ⊂=217 — APPROPRIATION — DEDICATION TO PUBLIC.

That a private corporation appropriated water for "general rental, sale, and disposition for the purpose of irrigation, etc.," did not make the appropriating corporation or its successors in interest a public utility, without a subsequent act of dedication of the water so appropriated to public use.

In Equity. Suit by the De Pauw University and others against the Public Service Commission of Oregon and Frank J. Miller and others, as members of said Commission and as individuals. On its merits, decree for complainants.

See, also, 247 Fed. 183.

This is a suit by the plaintiffs, as bondholders, and by the trustees under a mortgage securing an issue of $100,000 of bonds by the J. F. Luse Company, an Oregon corporation, against the Public Service Commission of Oregon and the individual members thereof, to secure an injunction restraining the commission and its members from enforcing an order of the commission reducing the rates charged by the J. F. Luse Company for water furnished to persons who had purchased land from it, with certain rights to water guaranteed to it by the contracts and deeds for the land so sold, from $3.50 per acre to $1 per acre, on the ground that such order of the commission was and is void for want of jurisdiction, in that the J. F. Luse Company is not a public utility and that the rate fixed by the commission is confiscatory.

In September, 1908, the Sutherlin Land & Water Company acquired a large tract of irrigable land in Douglas county, with the intention of subdividing and selling the same. Both this company and its successor, the J. F. Luse Company, were authorized by their several charters to sell water to the public; but there was no evidence that either of said companies ever sold or contracted to sell any water to the public generally, nor did either of said companies ever sell any of such water to any person other than purchasers of land from them, except that the J. F. Luse Company made a contract with the city of Sutherlin to permit it to use certain of the surplus water of its

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system for a consideration of $500 a year while the city was engaged in securing a different supply for itself. In order to irrigate the land, the Sutherlin Company acquired by purchase and appropriation the right to divert water from the Calipooia river and other sources, and during the years 1908 to 1912 constructed an irrigation system and carried the water to and upon these lands.

Thereafter, and in November, 1912, the Sutherlin Land & Water Company conveyed to the J. F. Luse Company all of the land then remaining unsold, and also its interest in uncompleted contracts of sale and the water rights and irrigation system, and the Luse Company agreed to and did assume all of the obligations of the Sutherlin Company, especially with respect to providing water for the parcels of land so theretofore sold. The Luse Company thereupon, in order to fund its indebtedness for the money expended in the construction of the system and otherwise, issued a series of bonds, amounting to $100,000, secured by a mortgage on the irrigation system and on the charges for water under the deeds and contracts that it had made with land purchasers; the mortgage being made to the Northwestern Trust Company of St. Paul and Ira C. Oehler, as trustees, after which the bonds were sold to the plaintiffs, De Pauw University, Luse Land & Development Company, Limited, and others.

Thereafter certain of the purchasers of land from the J. F. Luse Company, who had contracted for water, and by their contracts of sale, or their deeds, as the case might be, had agreed to pay an amount equal to $3.50 per acre for water from the irrigation system, filed a petition with the Public Service Commission, alleging that the J. F. Luse Company was a public utility, and that such rates were unreasonable, discriminatory, and illegal, and asking the commission for a hearing to fix and establish a reasonable rate. In this proceeding, the Trust Company, as trustee, and certain of the bondholders, applied for and were granted leave to intervene, and did intervene, denying that the J. F. Luse Company, or its predecessor, the Sutherlin Company, was a public utility, and alleging that the commission had no jurisdiction to fix rates to be charged by the Luse Company for the water, or to interfere with the rates specified in the purchasers' deeds and contracts of sale.

Hearings were had before the commission, and it finally overruled the contention of interveners and entered an order reducing the rate that the J. F. Luse Company might charge for water from $3.50 to $1 per acre. Whereupon this suit was instituted to restrain the enforcement of that order. The evidence taken at the trial was uncontradicted to the effect that the J. F. Luse Company, though authorized by its charter to sell water to the public, never in fact had done so, and that it had never sold any water from its system, except the surplus water sold to the city of Sutherlin, to any one except those entitled to water under and by virtue of the sales contracts and deeds.

Edgerton & Dohs, of St. Paul, Minn., and Carey & Kerr and Charles A. Hart, all of Portland, Or., for plaintiffs.

George M. Brown, Atty. Gen., and J. O. Bailey, Asst. Atty. Gen., of Salem, Or., and B. L. Eddy, of Roseburg, Or., for defendants.

BEAN, District Judge (after stating the facts as above). [1] The evidence as taken on the trial shows clearly that neither the plaintiff nor its predecessors in interest were ever engaged in the business of selling or furnishing water to all who might apply within a given area, nor did either of them ever hold themselves out as ready and willing to do so. They were engaged in selling their own land, agreeing to furnish water on certain terms and conditions to the purchasers, and no others. They merely undertook to furnish water in fulfillment of a private contract with certain individuals selected by them, and not to

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the public generally, and therefore were not public utilities, and subject to the jurisdiction of the Public Service Commission. See opinion on motion to dismiss (247 Fed. 183).

[2, 3] The fact that under their articles of incorporation the several companies might have engaged in the business of a public utility does not ipso facto make them so. The chartered authority did not mark the nature of the operating companies. It is merely a naked authority to do business, but until it is pursued in a certain way it did not make the companies public utilities. Del Mar Water, Light & Power Co. v. Eshleman, 167 Cal. 666, 140 Pac. 593. Nor does the fact that the notice of appropriation of the water states that it was appropriated for "general rental, sale and disposition for the purposes of irrigation, etc.," alone make the appropriating corporation or its successor in interest a public utility. For, as stated by the Supreme Court of California in a similar case (Thayer v. Cal. Development Co., 164 Cal. 117, 128 Pac. 21):

> "The property does not become impressed with a public use or trust until after the owner has first acquired it and then dedicated it to the use. The acts of acquisition and of dedication, respectively, are distinct from each other. Technically the latter must follow the former, and cannot precede or accompany it. An 'appropriation of water,' under the Code, is therefore not ipso facto a dedication or appropriation to public use. The additional act of dedication is as necessary to the creation of a public use in a water right so acquired as it would be if the right was acquired by conveyance or in any other manner, or as in the case of any other property dedicated to public use."

It follows, therefore, that the Public Service Commission was without jurisdiction to fix the rates to be charged by the plaintiff, and plaintiff is entitled to decree as prayed for in the complaint.

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THE CHEROKEE. THE HUGO. THE SUSAN A. MORAN.

(District Court, S. D. New York. October, 1918.)

1. COLLISION ⊂⊃64—STEAMER WITH TOW—CROSSING COURSES—FAULT OF STEAMER AND TUG—COURSE AND SPEED.
For collision of steamer with tow of tug, on crossing courses, steamer and tug *held* at fault; the steamer, the privileged vessel, for failing to hold her course and speed, and the tug for failing to keep out of the way.

2. COLLISION ⊂⊃57—FAULT—FAILURE TO MAKE OUT LIGHT.
The responsibility for failure of steamer, colliding, on clear night, with tow of tug, on crossing courses, to make out the side light, of regulation size and properly trimmed, on tug, *held*, as between steamer and tug, with steamer, whatever the reason for the failure.

3. COLLISION ⊂⊃61—STEAMER WITH TOW—FAULT OF TOW—SIDE LIGHTS—CUSTOM.
Tow of outgoing tug, with which steamer collided, *held* at fault in not having side lights outside of harbor limits, as required by statute, notwithstanding custom not to change lanterns on staffs at ends to side lights, on crossing harbor line.

4. COLLISION ⊂⊃65—CONTRIBUTING FAULT—VIOLATION OF STATUTE—BENEFIT OF DOUBT.
As to whether fault of tow, with which steamer collided, in not having side lights as required by statutory rule, contributed, the benefit of the doubt must be given the steamer.

In Admiralty. Suit by the Cherokee against the Hugo; the Susan A. Moran being impleaded. Decree for libelant.

Libel in rem by the scow Cherokee against the Danish steamer Hugo for a collision at sea, about three miles south of a line drawn between Ambrose Light and the Scotland Lightship. The Hugo impleaded the tug Susan A. Moran, which was towing the scow.

The Hugo was bound for New York on the evening of December 5, 1916. She passed Seagirt, about seven miles off shore, on a course north by east three-quarters east, and continued for a time not stated, later changing to a course due north, until about 4 miles from the line between the lightships, where she was bound to pick up a Sandy Hook pilot. At that time her master, Hansen, came upon the bridge and changed her course one point east, north by east. Not long thereafter he made out, about two points on his port bow, the three towing lights of the Moran, bound from the Scotland Lightship south-southeast for the dumping grounds, with two scows in tow, of which the first was the Cherokee, on about 200 fathoms of hawser. The men on the Hugo did not, and perhaps could not, make out the starboard side light of the Moran, though they say they looked for it a number of times. They therefore concluded that the towing lights were of a tug inbound, which had dropped its tow, which they could also not make out. The Hugo ported one point, so as to lay a course north-northeast; her idea being to go to starboard of the tug, thus passing under her stem.

Meanwhile the Moran and her tow were in fact constantly drawing nearer, and her lights crossed the bows of the Hugo and bore on her starboard bow. Still the Hugo failed to make out the Cherokee, which carried no side lights, as required by the International Rules, but only two hand lanterns on staffs forward and aft. Having the Moran abeam, the Huge finally, and too late, made out the Cherokee about 300 feet off her port bow, and collided with her, doing the damage in question.

As the Moran began to draw nearer, the Hugo reduced to half speed, and shortly thereafter to slow. She continued at each of these speeds for about

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three or four minutes, and a short time before the collision, and upon seeing the Cherokee, reversed, but not soon enough to check her speed altogether. Her explanation for failing to see the side lights of the Moran is that the pilot boat had been playing the searchlight upon her in the hope of getting a call for a pilot.

The Moran's story is that she saw the Hugo some miles off on her starboard bow, first making out only her red light. Thinking to go under her stem she ported slightly, but not long enough to change the direction of the tow. At that time the Hugo shut out her red light and showed her green, at which the Moran starboarded back upon her original course till the time of the collision. The Hugo, she says, held her course clear of the tow, starboard to starboard, until abaft her beam, when with a sheer to starboard she turned into the Cherokee.

Pierre Brown, of New York City, for the Cherokee.
D. Roger Englar, of New York City, for the Hugo.
Samuel Park, of New York City, for the Moran.

LEARNED HAND, District Judge (after stating the facts as above). [1] It is clear that both steamers are at fault; the Hugo for failing to hold her course and speed, and the Moran for failing to keep out of the way. I attach no value to the Moran's testimony of the Hugo's change to port and then to starboard. She attributed her own movement across the Hugo's bows to changes in the latter's course, a natural enough mistake at night. At first she saw the red light, which warned her of her duty to keep out of the way, and this duty she did not observe. Her porting I question, in view of the Cerberus' testimony, which was in her wake, and whose master says that she made no change whatever. If there was any change, it was not noticeable, and altogether insufficient. Once across the Hugo's bow, she naturally saw only her green light thereafter.

[2] The Hugo's first change from north to north by east I do not charge her with; the vessels had not at that time begun to navigate with regard to each other, but all her subsequent movements were wrong; that is, her further change to north-northeast and her changes of speed. Confessedly these were not on the theory that she was the privileged vessel on crossing courses, as was the fact. She did not make out the Moran's green light, and I am ready to take her explanation that the searchlight blinded her, a most reprehensible feature to the whole affair. Still I do not understand that this is urged as an excuse for her. The Moran's light was there; it was of regulation size and properly trimmed. If the Hugo was blinded, she should have stopped dead at once. Whatever the reason for failing to make out the side light on a clear night, the responsibility as between the two vessels is hers.

[3] There remains, therefore the fault of the Cherokee, which carried no side lights as prescribed. Some argument is made of the long custom not to change lights after crossing the harbor line. I need hardly say that no custom can avail against the statute. Deep sea mariners need not charge themselves with local regulations outside of harbors. That is one reason for taking on pilots. They are not to be held to a knowledge that hand lanterns upon staffs indicate a tow in

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the wake of a tug. Looking for side lights, they will almost certainly be confused by the appearance of great numbers of tiny lanterns on the surface of the water, as was the case here, for a number of tows were following the Moran down. Whether the requirement to carry only side lights be onerous or not, it must be observed outside harbor limits; else entering vessels cannot possibly navigate to the harbor limits with safety. I cannot understand how this universal rule of the sea can be for a moment questioned.

[4] Hence the scow can escape only on the assumption that her fault did not contribute. This position appears to me to be speculative. I do not believe that the scow was blanketed by the Cerberus, as the Hugo supposes; but, if she had carried regulation side lights, the steamer might have seen them, or might not. Who can say beyond a a reasonable doubt that she would not? Mr. Brown seizes upon certain passages in Hansen's deposition to show that he said it would have made no difference. These do not give a fair understanding of his meaning. What he said was that lights like the hand lanterns, if carried as sidelights, would have been worse than the lanterns themselves. That I can well believe, but it does not follow, and he is careful to insist that it did not follow, that regulation side lights could not have helped. It is true that he did not see the Moran's green light, and the chances, perhaps, are that he would not have done better with the Cherokee's, if she had carried one; but how can it be asserted beyond peradventure? Under the accepted test for violations of statutory rules, I must give the Hugo the benefit of the doubt, and hold the Cherokee at fault with the tugs. Certainly the Hugo was looking for a green light on the possible tow, as well as on the tug.

The libelant will take a decree for one-third damages against each steamer, and without costs.

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SAN FRANCISCO & P. S. S. CO. v. SCOTT, Collector of Internal Revenue, et al.

(District Court, N. D. California, Second Division. September 3, 1918.)

No. 15782.

1. INTERNAL REVENUE ⇐9—INCOME TAXES—"DEPRECIATION"—DEDUCTIONS.
Under Act Aug. 5, 1909, § 38, imposing excise taxes to be computed on the net income of corporations, and providing for deduction from the gross income of expenses for maintenance, etc., and losses, etc., including a reasonable allowance for depreciation, a corporate shipowner is entitled to deduct necessary repairs; that item not being included in "depreciation," which means the lessening in value due to obsolescence, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Depreciate.]

2. WORDS AND PHRASES—"MAINTENANCE."
"Maintenance" of a business means the upkeep, or preserving the condition of the property to be operated, and includes the cost of ordinary repairs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maintenance.]

At Law. Action by the San Francisco & Portland Steamship Company against John J. Scott, Collector of Internal revenue, etc., and another. Judgment for plaintiff.

Charles J. Heggerty, of San Francisco, Cal., for plaintiff.
Ed. F. Jared, Asst. U. S. Atty., of San Francisco, Cal., for defendants.

BEAN, District Judge (sitting by special assignment). This action is to recover certain amounts paid by the plaintiff under protest as excise taxes levied under Act Cong. Aug. 5, 1909, § 38 (36 Stat. 112, c. 6), for the years 1910 and 1912.

In its returns plaintiff included in its deductions for ordinary and necessary expenses, paid out for the maintenance and operation of its business and property, for the year 1910 $17,088.77, and for the year 1912 $25,371.40, being amount expended in each of such years for making "ordinary and necessary" repairs to the deck department, engine department, and commissary department of its steamers, and also $59,642.11 for 1910 and $79,350.96 for 1912, for depreciation of such steamers, being 5 per cent. of the book value thereof.

It is admitted that the deductions for depreciation are reasonable and should be allowed, but the commissioner ruled that the cost of making ordinary and necessary repairs was not a proper item to be included in the operation and maintenance expenses, but was covered by the deductions for depreciation, and required plaintiff to pay taxes thereon, which it did under protest, and hence this suit.

[1, 2] The question thus raised does not seem to have been directly decided in any reported case to which my attention has been called, or which I have been able to find, although the cost of repairs and

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upkeep was assumed in Grand Rapids & I. Ry. v. Doyle (D. C.) 245 Fed. 792, to be an item properly included in operating and maintenance expense. Under the law the tax is to be laid on net income and such net income is to be ascertained by deducting from the gross income (1) all the ordinary and necessary expenses actually paid within the year out of income in the "maintenance and operation" of the business and property; (2) losses actually suffered, not covered by insurance, including a reasonable allowance for depreciation, if any. (3), (4), and (5) are items not material here. It will thus be seen that the deductions allowed are to include, not only ordinary and necessary amounts actually paid out in the operation of the property, but also the amounts paid out in the maintenance thereof, and in addition a reasonable sum for depreciation, if any. Now, the operation of a business or property includes payment for labor and materials which go into the actual operation thereof, while maintenance means the upkeep or preserving the condition of the property to be operated, and therefore, in my judgment, includes the cost of ordinary repairs necessary and proper from time to time for that purpose. "Depreciation," as used in the statute is not to be confused with ordinary repairs. It is intended to cover the estimated lessening in value of the original property, if any, due to wear and tear, decay, or gradual decline from natural causes, inadequacy, obsolescence, etc., which at some time in the future will require the abandonment or replacement of the property, in spite of ordinary current repairs.

It follows that the tax complained of was illegally exacted, and the plaintiff is entitled to judgment for its recovery. Findings may be prepared accordingly.

THE O'BRIEN BROTHERS.

Petition of O'BRIEN BROS., Inc.

(District Court, E. D. New York. October 19, 1918.)

1. DEATH ⟸85—DAMAGES—PECUNIARY LOSS.
   Code Civ. Proc. N. Y. § 1904, providing for recovery of damages for pecuniary injury from death, does not limit the damages to a loss of revenue, but provides for damages for such loss as can be reduced to a pecuniary basis, which is peculiarly the province of the jury.
2. DEATH ⟸95(2)—HUSBAND AND WIFE ⟸209(3)—INJURY OR DEATH OF WIFE—HUSBAND'S RECOVERY.
   A husband's recovery for injury to or death of his wife is not limited to the amount the wife would be prevented from earning, but must be estimated from the standpoint of the deprivation which the husband suffers, as estimated in cash.
3. ACTION ⟸53(2)—INJURIES TO WIFE—ACTION BY HUSBAND AND WIFE.
   A husband's suit for loss of services of his wife through physical injury may be maintained at the same time with that of the wife for injury sustained by her.
4. ADMIRALTY ⟸118—APPEAL—REVIEW—DAMAGES.
   A verdict of the jury, assessing damages for the death of a married woman, should not be disturbed, when there is any evidence on which

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it can be supported; and the same rule should be applied when the damages are assessed by a commissioner in a shipowner's proceeding to limit liability.

In Admiralty. In the matter of the libel and petition of O'Brien Bros., Incorporated, owners of the steamtug O'Brien Brothers, for limitation of liability. On exceptions to awards for damages caused by the death of two married women. Report of commissioner confirmed.

See, also, 252 Fed. 185.

Foley & Martin, of New York City, for petitioner.

Uterhart & Graham and Charles A. Ludlow, all of New York City, for claimants.

CHATFIELD, District Judge. Exception has been taken to awards of $5,000 and $6,000, respectively, for damages caused by the death of two women who lost their lives in the accident out of which this limitation of liability proceeding has grown. The claim in each case was made by the husband as administrator.

This form of action is established by the provisions of the New York Code of Civil Procedure, giving to the administrator the entire cause of action, and including therein the damages suffered by the husband, where he survives.

The claimants by exceptions seek to present the rule set forth in Mitchell v. N. Y. Central & H. R. R. Co., 2 Hun (N. Y.) 535, affirmed on the ground of contributory negligence in 64 N. Y. 655, and in Austin v. Metropolitan Street Railway Co., 108 App. Div. 249, 95 N. Y. Supp. 740, in each of which cases the court held that, in the absence of all proof of earning capacity or pecuniary value, lost through the death of the deceased, a jury was not empowered to award more than nominal damages.

It may be assumed that where there is no proof of any sort, there would be nothing upon which to base an award. But it is difficult to think of a case which could get to a jury, without some evidence from which the jury could determine whether or not the death was a loss which could be estimated in pecuniary terms.

[1] The New York statutes provide for damages for the pecuniary injury. This does not mean simply loss of revenue; it means, on the contrary, loss reduced to a pecuniary basis, and this is particularly the province of the jury. Section 1904, Code of Civil Proc. N. Y.

[2-4] When a husband sues for loss of services of a wife, through physical injury, the action may be maintained at the same time with that of the wife for injury sustained by her. Both suits would be left to the jury to determine the pecuniary damage suffered. But this does not limit the loss of the husband to the amount which the wife is prevented from earning. In most instances the wife has been earning nothing, except as she assisted the husband, and the measure of damage in that sense is frequently represented by the cost of hiring some one to take her place. In the case of death, the husband's damage cannot be measured by the loss of his wife's earning capacity, but

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must be estimated from the standpoint of the deprivation which he suffers, as estimated or valued in cash. If the jury fix this value, then the damage suffered is a pecuniary damage. In other words, the statute gives the right to recover the actual monetary damage which the jury finds represents in their opinion the pecuniary value of the injury. If there is any evidence on which this can be based, it is within the jury's province to fix the amount and the verdict should not be disturbed. When this amount is fixed by a commissioner, the result is the same.

The present case shows ample evidence to support the finding that the lives of these two wives were of value, and that their loss resulted in actual damage, which has been estimated in pecuniary terms in the amounts stated.

The report of the commissioner will be confirmed.

DEUEL v. CHICAGO, B. & Q. R. CO.

(District Court, S. D. California, S. D. October 18, 1918.)

No. 97.

1. RAILROADS ⇐3—ACTION FOR INJURY TO RAILROAD EMPLOYÉ—EMPLOYERS' LIABILITY ACT.
   An action for injury to a railroad employé, while assisting in raising an engine, which had fallen into the pit of a turntable used by defendant in turning its engines employed in interstate traffic, one purpose of the work being to clear the track for such traffic, is one arising under the federal Employers' Liability Act (Comp. St. 1916, §§ 8657–8665), and under section 6 of said act, as amended by Act April 5, 1910, § 1 (Comp. St. 1916, § 8662), is not removable from a state court.

2. REMOVAL OF CAUSES ⇐102—MOTION TO REMAND—EFFECT OF DECISION OF STATE COURT.
   That a state court granted a petition for removal of an action for injury to a railroad employé does not affect the duty of the federal court to remand the cause, where it appears that it is one arising under the federal Employers' Liability Act (Comp. St. 1916, §§ 8657–8665), and not removable.

At Law. Action by Hiram P. Deuel against the Chicago, Burlington & Quincy Railroad Company. On motion to remand to state court. Motion granted.

Thos. Scott and Thos. Scott, Jr., both of Bakersfield, Cal., for plaintiff.

James E. Kelby, of Los Angeles, Cal., for defendant.

BLEDSOE, District Judge. [1] The motion to remand to the state court in this case I believe to be well taken. The plaintiff was injured while assisting in the raising of one of defendant's engines, which had fallen into a pit in which a turntable of defendant, "used for the purpose of turning its engines and locomotives used by it in interstate traffic," was situated and operated.

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In this view of the case, the labor of plaintiff in the removal of the engine from the pit was a clearing of a part of defendant's track used for interstate traffic, or it was the repair of an instrumentality of defendant used in interstate traffic. Under such circumstances, the case falls within the decisions in Southern Railway Co. v. Puckett, 244 U. S. 571, 37 Sup. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69, and Pedersen v. Delaware, Lackawanna & Western Railway Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153.

If the labors of plaintiff had been confined to a repair or raising of the engine merely, and had not had to do with the ultimate task and purpose of clearing a portion of its track permanently devoted to interstate commerce, the decision in Minneapolis & St. Louis Railway v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54, would have been controlling. However, I am of the opinion that that case is clearly distinguishable, for the reasons hereinabove adverted to.

[2] Defendant makes the point that since, under the act of Congress (Compiled Statutes 1916, §§ 8657–8665), the state courts and the federal courts have concurrent jurisdiction in actions arising under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65), the action of a state court in removing a case to a federal court on the ground of diversity of citizenship, presumptively thereby determining that the action is not one prosecuted or prosecutable under the federal act, is conclusive, and that this court may not, in any wise, sit in appellate judgment, so to speak, upon the state court's conclusions. No authority is cited in support of this contention, and apparently it is in direct opposition to the uniform practice obtaining in such proceedings. I am persuaded it is the duty of the federal courts to remand cases arising under this particular statute no less than in other instances, where they have been erroneously removed. See Kansas City Southern Railway v. Leslie, 238 U. S. 599, and the cases cited therein with approval, appearing on page 602 et seq., 35 Sup. Ct. 844, 59 L. Ed. 1478.

The motion to remand to the superior court of Kern county is hereby granted.

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WATERSON, BERLIN & SNYDER CO. v. TOLLEFSON.

(District Court, S. D. California, S. D. October 23, 1918.)

No. D–78.

COPYRIGHTS ⇐87—DAMAGES FOR INFRINGEMENT—MUSICAL COMPOSITION.

Damages recoverable for infringement of a copyright for a musical composition are governed by the provision of Copyright Act, § 25b (Comp. St. 1916, § 9546), that "damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250." The provision of subdivision 4, fixing the damages in such case at "$10 for every infringing performance," is intended to apply, within the above limits, where a large number of infringing performances are shown, and no actual damages are proven.

In Equity. Suit by the Waterson, Berlin & Snyder Company against Chris Tollefson. Decree for complainant.

Philip Cohen, of Los Angeles, Cal., for plaintiff.
Thomas A. Sanson, of Los Angeles, Cal., for defendant.

BLEDSOE, District Judge. Plaintiff sued for an infringement of its copyright arising out of the performance of the musical selection known as "Joan of Arc, They are Calling You." Defendant was the owner and operator of a motion picture house in Los Angeles, and the selection above named was performed by his pianist in his house on at least one occasion in the month of March of this year.

An answer was filed containing allegations which the court concluded at the hearing raised no issue, and, the defendant not appearing, judgment was ordered as if by default. The only question in the case is as to the amount of damages to be awarded to the plaintiff for the single infringement alleged and shown. No actual damages were proven.

As before stated, the infringement complained of concerns the performance of a "musical composition," as distinguished from other infringements referred to in section 25 of the Act of March 4, 1909 (35 Stat. 1081, c. 320 [section 9546, Compiled Statutes 1916]). I confess that, on the first reading of this statute, I was of the opinion that $10, being the sum specifically mentioned in clause "fourth" of the section cited as recoverable for such an infringement, should be the amount allowed as liquidated damages, in the absence of proof of actual damage. However, upon more careful study of the section and consideration of its various terms, and more particularly upon considering and reading the section as it appeared previous to its amendment in 1909, I am of the opinion that this is one of the "other cases" referred to in clause "b" of section 25, supra, and that the minimum damages to be awarded for the infringement shown should be $250.

The provision for an allowance of "ten dollars" must be held to apply where a large number of infringements have been shown; this figure may be used by the court as a basis for its computation of the entire damages by assessing each infringement at $10, if such method

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of computation, under all the circumstances, "shall appear to be just"; but in the event the total number of infringements, computed on the $10 basis, do not amount to $250, nevertheless, pursuant to the mandatory terms of the statute contained in the provision last above referred to relating to "other cases," the court may not award damages in a sum less than $250. So, also, no matter how many separate infringements may be proved, no "actual" damages being shown, the court may not mulct the defendant in damages in excess of the maximum sum mentioned, to wit, $5,000.

This construction of the statute is supported by the well-considered opinion in Westermann v. Dispatch Printing Co., 233 Fed. 609, 147 C. C. A. 417, and finds support, also, in the decision of the United States Supreme Court in Brady v. Daly, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109.

Plaintiff's counsel will therefore prepare a decree awarding damages in the sum of $250, the minimum amount named in the statute, and for attorney's fees in the sum of $100.

LEO FEIST, Inc., v. AMERICAN MUSIC ROLL CO.

(District Court, E. D. Pennsylvania. October 18, 1918.)

No. 1637.

COPYRIGHTS ⇐87—SUIT FOR ROYALTIES—DAMAGES.

In fixing punitive damages, which under Copyright Act, § 1 (e) (Comp. St. 1916, § 9517), may be awarded in a suit to recover royalties from the user of a copyrighted musical work who fails to pay or report as therein required, the intent and acts of defendant should be considered.

In Equity. Suit by Leo Feist, Incorporated, against the American Music Roll Company. On proceedings after remand, concerning allowance of counsel fees and punitive damages.

Sundheim & Sundheim, of Philadelphia, Pa., and Gilbert & Gilbert, of New York City, for plaintiff.

Leighton P. Stradley and Howard M. Long, both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The decree in this case was reversed (251 Fed. 245, —— C. C. A. ——), with direction to this court to exercise its discretion concerning the allowance of a reasonable counsel fee and punitive damages under section 1, clause (e), Act March 4, 1909, c. 320, 35 Stat. 1075.

The controversy in the case has been upon the question whether the use by the defendant of the plaintiff's copyrighted musical compositions was under the compulsory license provisions of the act, as contended by the plaintiff, or under a voluntary license, as contended

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by the defendant. That question has now been decided in favor of the plaintiff.

I am of the opinion that the plaintiff should be allowed a reasonable counsel fee. If the fee asked by plaintiff's counsel, $750, were awarded, the court would be applying, in fixing the amount of the fee, the punitive provisions of the act, which apply only to damages. The fee, to be a reasonable one, must be based upon the professional services rendered in the preparation and trial of the case and in the appellate proceedings.

The amount of royalties due, as fixed by the former decree, is $373.-74. The amount in controversy has its bearing upon the amount of the fee. No complicated questions of law or fact were involved. In my judgment, a fee of $150 is adequate and reasonable.

Passing to the question of damages, they may be imposed in case of failure to pay within 30 days after demand. The court may, no doubt, take into consideration the intent and acts of the defendant in failing to make payment and its willful disregard of the provisions of the act. The defendant was in default in failing to render monthly reports and to make payment within 30 days after demand. There was nothing in these features of the case indicating an intention of concealment or piracy in the use of the copyrighted works. In fact, the liability of the defendant for the statutory 2 cents royalty was consistently admitted throughout the transactions. Moreover, there is nothing upon the record to show bad faith of the defendant in defending against the application of the compulsory license provision, and, if punitive damages were based upon the resistance of the defendant to liability to punitive damages, the court would be punishing the defendant for setting up what the court, in its former decision, considered to be a good defense against such liability, but which has been held to be error in law.

Punitive damages will therefore be awarded, based upon failure to make payment within 30 days after demand, and, in aggravation thereof, failure to make monthly reports. The sum of $100 is, in my judgment, an ample allowance for damages, and will be awarded.

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UNITED STATES v. ECHOLS.

(District Court, S. D. Texas, Houston Division. October 29, 1918.)

No. 609.

CRIMINAL LAW ⇐87—CRIME INDUCED BY OFFICER.

A defendant cannot be convicted of a crime which he was incited and induced to commit by a government officer for his entrapment.

Criminal prosecution by the United States against F. A. Echols. Dismissed.

John E. Green, Jr., U. S. Atty., of Houston, Tex.

HUTCHESON, District Judge. In this case it appears to the court, upon inquiry, both of the defendant and of the government witnesses, that the offense charged was committed by the defendant as a result of an entrapment planned and carried out by an officer of the law for the purpose of inducing the defendant to commit an offense, so that he might be prosecuted therefor.

The point involved in this case is simple, and is settled by the authorities. It is clearly the law that, while it may be true that the mere aiding of one in the commission of a criminal act by a government officer, or agent, does not preclude the conviction of the party committing the crime, yet, where the officers of the law have incited or induced the commitment of the crime, and lured the defendant on to its commission, the law will not authorize a verdict of guilty.

This case presents a most flagrant violation of that rule. Here the defendant, while in a state of partial intoxication, was accosted by a military police officer, who, in return for the friendly salutation of the defendant, asked the defendant to procure him a drink, and this with the purpose and design on the part of the officer that a crime should be committed, in order that he might arrest the defendant therefor. A simple statement of the circumstances is sufficient to rebut any claim of responsible criminality on the part of the defendant, even were authorities lacking to sustain the rule. Sam Yick et al. v. United States, 240 Fed. 65, 153 C. C. A. 96; Woo Wai et al. v. United States, 223 Fed. 412, 137 C. C. A. 604.

This rule does not proceed from or rest on any limitation of the right of the officers of the law to obtain evidence of crime in any manner possible, nor is it a defense to a prosecution that the officer participated in the commission of a crime, if the genesis of the idea, or the real origin of the criminal act, sprang from the defendant, and not from the officer; or, as the differentiation is well stated in 12 Cyc. 160:

"The fact that a detective or other person suspected that the defendant was about to commit a crime, and prepared for his detection, as a result of which he was entrapped in its commission, is no excuse, if the defendant alone conceived the original criminal design."

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But this statement in no manner authorizes government officers, employed to prevent crime and apprehend criminals, to thus conceive and set on foot the commission of an offense merely in order to make an arrest. The Circuit Court of Appeals for the Ninth Circuit has well stated the matter in Woo Wai v. United States, 223 Fed. 415, 137 C. C. A. 607:

"We are of the opinion that it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case, taking the testimony of the defendants to be true, and that a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes. Some of the courts have gone far in sustaining convictions of crimes induced by detectives and by state officers. * * * But it is to be said, by way of distinguishing such cases from the case at bar, that in all of those cases the criminal intention to commit the offense had its origin in the mind of the defendant. * * * In the case at bar, the suggestion of the criminal act came from the officer of the government."

In what is here stated there is no intention to excuse persons who yield to temptation, or to hamper or limit the acts of officers of the law in detecting crime by any means or device; but the zeal to detect crime ought not to be so vigorous as to induce officers to originate and procure the commission of the very offenses which they are enjoined to prevent. No faithful officer of the law will be hampered, nor will any criminal be aided, by the observance of this rule. Its disregard, however, may, and likely will, subject to persecution and conviction weak and spineless persons, who find it hard to resist temptation; and the government, through the zeal for conviction on the part of the arresting officer, may become the means of the ruin of its citizens, instead of their safeguard and protection. Such a possible result at once establishes the unimpeachable wisdom of the rule of public policy here enunciated, and requires that the plea of guilty, which the defendant offered to make, be by the court refused, and the case dismissed, which is accordingly now done.

ROSENBLUM v. ROSENBLUM.

(District Court, E. D. New York. October 22, 1918.)

TRADE-MARKS AND TRADE-NAMES ⇐58—INFRINGEMENT—IMITATION OF MARK.
A trade-mark for use on bags of onions, consisting of a red R, *held* infringed by a mark in all respects the same, except that the R and a blue S were put together in a monogram; the R being the prominent feature, and both parties inclosing the R in a red diamond.

In Equity. Suit by Abraham Rosenblum against Samuel Rosenblum. Decree for complainant.

Hamilton Anderson and Conrad A. Dieterich, both of New York City, for plaintiff.

Munn, Anderson & Munn, of New York City, for defendant.

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CHATFIELD, District Judge. Plaintiff owns registered trade-mark R in red for use on bags of onions. Defendant uses and has applied for registration of a trade-mark, with R in red and S in blue, put together in a monogram, for similar bags of onions.

Both use, as do many others, a red diamond inclosing the trade-mark. This narrows the scope of the trade-mark, for if the plaintiff was entitled to sole use of the diamond and the letter R, there would be little doubt that the defendant's mark infringed. But the defendant uses a similar red diamond and thereby gives the plaintiff the right to claim that the design as a whole is apt to deceive and obscures what little difference there is from the trade-mark proper. The defendant also uses lettering and words almost exactly like that of the plaintiff on other parts of the bag. Intent to imitate can therefore be inferred, and as the red R is the outstanding part of the monogram on his bags, it must be held that he is using the plaintiff's design.

The dominant feature of each design is the same R in red. Johnson & Johnson v. Bauer & Black, 82 Fed. 662, 27 C. C. A. 374; Omo Mfg. Co. v. Mystic Rubber Co. (D. C.) 225 Fed. 92; Cartier v. Carlisle, 3 Beav. 292.

There are other features of the plaintiff's case which substantiate his claim of unfair imitation and competition, and on the whole application a temporary injunction should issue.

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HALLOWELL et al. v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3141.

1. CONSPIRACY ⊂⇒43(12), 45—PROSECUTION FOR USING MAILS TO DEFRAUD—EVIDENCE.
In a prosecution for conspiracy to use the mails to defraud, letters written by defendants to persons charged to have been defrauded, asking further remittances, *held* admissible in evidence under the charge in the indictment, and as showing intent.

2. CRIMINAL LAW ⊂⇒824(8)—TRIAL—INSTRUCTIONS.
The failure to give an instruction limiting the purpose for which particular evidence may be considered is not error, where such instruction is not specially requested.

3. CRIMINAL LAW ⊂⇒423(1)—ACTS OF CONSPIRATORS—EVIDENCE.
In a prosecution for conspiracy to use the mails in furtherance of a scheme to defraud, where a conspiracy between defendants to carry out such scheme is shown, evidence of acts of one defendant in its execution is admissible against the others.

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Criminal prosecution by the United States against W. F. Hallowell and W. F. Lick. Judgment of conviction, and defendants bring error. Affirmed.

The plaintiffs in error were convicted under a charge of conspiracy to use the mails in furtherance of a scheme to defraud. The scheme involved a pretended location of claimants upon lands in Oregon represented to be included in what was known as the Oregon & California Railroad land grant, and which were then in litigation in a suit brought by the United States against the railroad company to forfeit the grant. The indictment charged that the defendants conspired to devise a scheme to defraud various named persons, and the public generally, through the use of the United States mails, by inducing them to pay over to the defendants certain sums of money, with the intention of defrauding them "out of all sums of money that such persons would pay over to the defendants, or either of them," and that the scheme contemplated making in substance the following representations:

That in the above-mentioned suit then pending the United States was seeking to compel the railroad company to sell and convey the lands of the grant to persons making application therefor through the defendants, in quantities not to exceed 160 acres to each applicant, and for a price not to exceed $2.50 per acre; that the defendants were the agents of the railroad company, and authorized by it to solicit persons to make applications to purchase lands; that the railroad company, conceding that it could not prevail in the suit, desired to procure a large number of persons to make application to purchase the land, and that it would require all persons making application to purchase to enter into a written option obliging themselves, upon procuring title, to convey the timber on the land to the railroad company; that every applicant would receive title within six months from the date of his application, and would make a large sum of money thereby; that all of the tracts of land for which applications were to be made through the defendants were portions of the land involved in the suit then pending.

The indictment then charged that all the representations were false, and known to the defendants to be false, and were made by them for the purpose of executing the fraudulent scheme; that it was the purpose of the United States in said suit to acquire for itself all of said lands, and it was the purpose of the railroad company to retain title to itself for all of said

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*Rehearing denied February 10, 1919.

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lands; that none of the defendants was ever authorized by the railroad company to make any of said representations; that many of the applications so induced were located upon the same tract of land; that many of the applications were made upon lands that never belonged to the railroad company and were not affected by the suit; that many of said tracts had no timber, and many of them were absolutely worthless. The indictment then set forth the commission of certain overt acts, which consisted in the mailing of certain letters through the United States mails.

The plaintiffs in error were convicted as charged, and they bring separate writs of error. They both assign error to the ruling of the court below in admitting certain letters in evidence, written by Hallowell, and signed "Hallowell & Co.," and sent to various persons who had made applications to purchase the lands at the instance of the defendants. The letters were all similar in general purport. The letters showed that demand was made in the name of Hallowell & Co., for payment by certain of the applicants of the sum of $2.50 per acre, the purchase price of the lands. Their admission in evidence was objected to as incompetent, irrelevant, and immaterial, and because entirely outside of the scope of the charge made in the indictment.

Thomas J. Cleeton and James H. McMenamin, of Portland, Or., for plaintiff in error Lick.

Edwin E. Heckbert and Samuel White, of Portland, Or., for plaintiff in error Hallowell.

Bert E. Haney, U. S. Atty., and Robert R. Rankin and Barnett H. Goldstein, Asst. U. S. Attys., all of Portland, Or.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The plaintiffs in error contend that, inasmuch as the indictment charges that it was the purpose of the scheme to induce each of the victims thereof to pay to the defendants named in the indictment the sum of $150 for their services in receiving and presenting to the railroad company the applications to purchase lands, it was error to admit the letters written to certain of the applicants demanding the further sum of $2.50 per acre; the purpose to demand said further sum not having been specified in the indictment, and proof of demand therefor being without the scope of the indictment. From the letters so admitted it appears that Hallowell & Co. informed the applicants that a decision was expected "any day now," that the money was demanded to meet the emergency of being required to pay it to obtain the deeds, and that it would be to the interest of the applicants to arrange to have the money on hand at once, "as in case they call for the money, and we are not ready to put it up, they wouldn't wait a minute."

To the contention of the plaintiffs in error it is to be said, first, that the indictment goes further than to charge that the scheme was only to obtain from each of the applicants the sum of $150 for the services of the defendants. It alleges further, as a portion of the scheme, that the defendants, upon receiving the applications, would thereupon pretend to tender to the said defendant railroad company, on behalf of each of said victims, the sum of $2.50 per acre for said respective tracts of 160 acres each, so by the said victims and various other persons to be applied for. It does not follow, from this language of the indictment, that the tender so contemplated was to be made with the funds of the defendants, and the demand upon the applicants to advance the money

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wherewith to make the tender, or to make the payments, was clearly not foreign to the scheme so charged. The letters contain intimations that, if the money therein applied for should not be needed for the purpose indicated, it would be returned to the applicants.

It is clear, also, that the letters were admissible for the statements they contain, aside from inducements to the applicants to advance the $2.50 per acre. Thus one of the letters states that the writers "have been told to file more applications as soon as possible, which we take to mean that they would wish to use up, or in other words get applications for, all of their land," and states further, "There is not a claim we have filed on worth less than $5,000." Another letter says: "We have been reliably informed that, before the 90 days is up, we will be notified to call for our deeds." Another falsely states: "The government suit was only brought with the intention of compelling the R. R. Co. to sell the land according to the terms of the grant." Two other letters state: "We have been advised that it would be advisable for us to be prepared to get our deeds." These statements all tend to prove the criminal conspiracy charged in the indictment, and they were admissible in evidence, notwithstanding the fact that before they were made the defendants had obtained from each of the applicants to whom they were addressed the sum of $150, in accordance with the general scheme.

[2] Again, the letters were admissible to show intent. Allis v. United States, 155 U. S. 117, 119, 15 Sup. Ct. 36, 39 L. Ed. 91; Dillard v. United States, 141 Fed. 303, 72 C. C. A. 451; Gould v. United States, 209 Fed. 730, 739, 126 C. C. A. 454; Moffatt v. United States, 232 Fed. 522, 526, 146 C. C. A. 480; Farmer v. United States, 223 Fed. 903, 911, 139 C. C. A. 341; Linn v. United States, 234 Fed. 543; Shea v. United States, 251 Fed. 440, 442, — C. C. A. —. The plaintiffs in error admit that such evidence is admissible to establish intent or motive, but contend that it was error to admit it in the present case, for the reason that the court, in admitting it and in instructing the jury, failed to limit the evidence to the question of motive and intent. There was no motion or request, however, that the evidence be thus limited, nor was the court requested so to instruct the jury. The failure to give an instruction limiting the purpose for which particular evidence may be considered is not error, where such instruction is not specially requested. 16 C. J. § 2500; Ball v. United States, 147 Fed. 32, 41, 78 C. C. A. 126; Schultz v. United States, 200 Fed. 234, 118 C. C. A. 420; Moffatt v. United States, 232 Fed. 522, 533, 146 C. C. A. 480.

[3] The plaintiff in error Lick contends that the trial court erred in failing to instruct the jury that they could not consider as against him the letters above referred to, nor the evidence in regard to the money obtained by Hallowell for the alleged purpose of paying the railroad company for the lands. In answer to this it is sufficient to say that no such request for an instruction was made, and that, if such a request had been made, it would not have been error to deny it. None of the evidence is brought here in the bill of exceptions, except that which relates to the letters, and the said payments of money to Hallowell. It is certified in the bill of exceptions that competent evidence was in-

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troduced to establish the fact that Hallowell, Lick, and others had entered into the conspiracy charged in the indictment, and that the overt acts charged in the indictment were performed; and although it is certified further that there was absence of evidence that Lick had knowledge of Hallowell's acts in writing the letters or receiving the money therein referred to, there is nothing in the record to show that at the time when these acts were done by Hallowell the conspiracy had been abandoned, or that it was not then being actively prosecuted. The general rule of evidence in such cases was therefore applicable, and it was proper for the jury to consider, as against Lick, the acts and declarations of his co-conspirator, made during the pendency of the conspiracy, and in furtherance of the common design, although he may have had no knowledge of those acts or declarations. Lick might have been entitled to an instruction that such evidence should not be considered against him, unless the jury were satisfied that a conspiracy existed, and that he was a party to it; but that is a question not here involved.

We find no error. The judgment is affirmed.

METROPOLITAN TRUST CO. OF CITY OF NEW YORK v. CHICAGO & E. I. R. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1918.)

No. 2530.

1. RAILROADS ⟸167—MORTGAGES—AFTER-ACQUIRED PROPERTY.
Ordinarily the lien of a railroad mortgage having the usual after-acquired provisions does not, on the consolidation of the mortgagor corporation with another, spread to the property contributed by the other constituent, or to after-acquired property of the consolidated company.

2. RAILROADS ⟸171(2)—MORTGAGE—REGISTRATION—AFTER-ACQUIRED PROPERTY—CONSOLIDATION OF RAILROAD CORPORATIONS.
A provision in a consolidation agreement that a mortgage on the property of one constituent railroad company, which contained after-acquired provisions, should have the force and effect of first mortgages executed by the consolidated company, *held*, in view of the failure of the mortgagee to record such mortgage in accordance with statute in counties where the consolidated company extended its lines, not to extend the security of the mortgage to the after-acquired property of the consolidated company, or the property contributed by the other constituent company to the consolidation.

3. RAILROADS ⟸167—MORTGAGES—CONSOLIDATION—PROPERTY INCLUDED.
A mortgage on the property of one railroad company, which was thereafter consolidated with another, *held* not to extend the lien to equipment acquired after the consolidation, etc.

4. RAILROADS ⟸167 — MORTGAGE — AFTER-ACQUIRED PROPERTY — CONSTRUCTION OF MORTGAGE.
A mortgage on the property of one constituent railroad company, which was thereafter consolidated with another, *held* not to apply by virtue of the replacement covenants to equipment purchased by the consolidated company to replace equipment originally owned by such constituent company.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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5. RAILROADS ⊂⇒167 — MORTGAGE — AFTER-ACQUIRED PROPERTY — REPLACEMENT COVENANTS.
A mortgagor's breach of a covenant for the maintenance and replacement of railroad equipment covered by the mortgage *held* to create no lien as to after-acquired equipment.

6. RAILROADS ⊂⇒167—MORTGAGE—PROPERTY COVERED.
Where a consolidated company, which succeeded the original mortgagor, disposed of equipment subject to the mortgage, and such sums went into the general coffers of the company and became mingled with its general funds, *held*, that the mortgagee could not establish a lien thereon after receivership.

7. RAILROADS ⊂⇒192—MORTGAGE—FORECLOSURE—SALE.
Where receivers were appointed for a consolidated railroad company, and mortgages foreclosed, *held*, that property, being susceptible of division into several systems, might be divided for sale, if for the benefit of creditors, and a mortgagee holding a mortgage on the property of that constituent company which had been run at a loss cannot complain of the severance.

8. RAILROADS ⊂⇒192—MORTGAGE—FORECLOSURE—SEVERANCE FOR SALE.
In the separation of a railroad into parcels for sale under the foreclosure of divisional mortgages, a court of equity is not bound by any hard and fast rule to fix the division to correspond absolutely with the several mortgage grants, but the division should be made so as to leave each parcel as nearly as may be in a situation to be operated as a railroad.

9. RAILROADS ⊂⇒192—MORTGAGE—FORECLOSURE—SEVERANCE FOR FORECLOSURE.
On foreclosure of constituent mortgages on the property of a consolidated railroad company, *held*, that the division should be made so that each portion might be operated as a railroad system, and for that purpose the division located in Indiana should be given a line to Chicago, etc.

10. RAILROADS ⊂⇒192—MORTGAGES—FORECLOSURE—SALE.
Where there were separate mortgages on the property of the constituent railroad companies, which were consolidated, *held* that, on division for sale it was proper, other creditors and lienholders being protected, to sell, with one of the constituent parcels, equipment used for the operation of that parcel, though it was not subject to the mortgage on the lien.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Bill by the Metropolitan Trust Company of the City of New York, as trustee, etc., against the Chicago & Eastern Illinois Railroad Company and others, which was consolidated with a creditors' bill, upon which receivers were appointed. From the decree, complainant appeals. Remanded, with instructions to modify.

Under a creditors' bill brought against the Chicago & Eastern Illinois Railroad Company, receivers were appointed who took and retain possession of its property. Bills were then brought in the same court for the foreclosure of mortgages as follows: Chicago & Indiana Coal Railway Company to the Metropolitan Trust Company et al., dated December 1, 1885; Chicago & Eastern Illinois Railroad Company to Central Trust Company, November 1, 1887; Chicago & Eastern Illinois Railroad Company to Bankers' Trust Company, July 1, 1905; Evansville & Terre Haute Railroad Company to Farmers' Loan & Trust Company, April 1, 1892. These suits were all consolidated with the first-named action.

The Chicago & Eastern Illinois Railroad Company is the result of successive consolidations, one of the constituents being a former corporation of

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the same name, itself a consolidated corporation, which was the mortgagor of the Central Trust mortgage. Another constituent was the Chicago & Indiana Coal Railway Company, likewise a consolidated corporation, one of whose constituents by the same name was the mortgagor of the Metropolitan Trust mortgage. The Bankers' Trust mortgage was given by the company as consolidated in 1894. The Farmers' Loan & Trust mortgage was given by the Evansville & Terre Haute Railroad Company, which on July 20, 1911, consolidated with the Chicago & Eastern Illinois under the latter name. June 6, 1894, occurred the consolidation between the former Chicago & Eastern Illinois Railroad Company, an Illinois corporation, having substantially all its property in Illinois, and the said consolidated Chicago & Indiana Coal Railway Company, an Indiana corporation, having all its property in Indiana.

The record sets forth at great length the various steps in the organization, consolidation, etc., eventuating in the present company, and of the giving of the several mortgages by the company or by its constituent corporations. These are sufficiently stated in the statement of facts which precedes the opinion of Judge Carpenter of the District Court, as reported in Railway Steel Springs Co. v. Chicago & E. I. R. Co., 246 Fed. 338, to which statement we refer in order to avoid repetition.

The appeals are by the Metropolitan Trust Company alone, and are from three decrees, or rather there are three appeals from decrees concerning the same subject-matter; all the appeals having been heard as one.

The first decree of May 22, 1917, found, inter alia, that under the Metropolitan mortgage there were issued and outstanding bonds of the Indiana Coal Railway Company to the amount of $4,626,000, which with accrued interest, constituted a lien on the property of the Coal Railway Company in the mortgage described and by it owned at the time of the consolidation of 1894; that under the Central Trust mortgage there were issued and outstanding bonds to the amount of $21,343,000, which, with accrued interest, were a lien on practically all the property of the company excepting the said Coal Railway property and the Evansville & Terre Haute property; that the Bankers' Trust mortgage, to the amount of the bonds issued thereunder, viz. $18,019,000. with accrued interest, was a lien on the property of the Chicago & Eastern Illinois Company, except the Coal Railway property and the Evansville & Terre Haute property; and that the Farmers' Loan & Trust mortgage, to the extent of the bonds issued thereunder, viz. $3,175,000, was, with accrued interest, a lien on the property formerly owned by the Evansville & Terre Haute Railroad Company. As to the findings respecting the Farmers' Loan & Trust mortgage, no question is raised. It ordered that the property of the company be sold, being first offered in certain parcels as fixed in the decree, and that there be reserved for further adjudication (1) questions of the extent of the liens of the several mortgages as between themselves, and the allocation between the mortgage estates of the expenses of the receivership and the payment of outstanding receiver's certificates; (2) for the benefit of the Metropolitan mortgage bondholders, all questions as to legality and effect of the consolidation agreement of 1894 as affecting the distribution of the proceeds of sale under the decree, and all questions as to the right of the Metropolitan bondholders to share in the proceeds of sale of various parcels decreed to be sold.

The second decree, bearing same date, merely fixed a time for the sale to take place.

The third decree, entered July 2, 1917, so far as it concerns the Metropolitan bondholders, disposed of the questions reserved by the first decree for further adjudication, and found that the Metropolitan mortgage was not a lien on any other property of the Consolidated Company than that owned by the Coal Railway at the time of the consolidation of 1894, and denied the petition of the Metropolitan Trust Company, which asked the court to set apart certain of the equipment for the benefit of its bondholders, and to decree that the lien of the Metropolitan mortgage be extended to such equipment, and found that no party to the actions was in position to dispute the validity of the consolidation of 1894, and that the Metropolitan bonds were a valid debt of the company.

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Charles Evans Hughes, of New York City, and Frank H. Scott, of Chicago, Ill., for appellant.

Arthur H. Van Brunt, of New York City, for Central Trust Co.

Roberts Walker, of Scarsdale, N. Y., and Samuel Adams and Mitchell D. Follansbee, both of Chicago, Ill., for Bankers' Trust Co.

John S. Miller, of Chicago, Ill., for appellees.

Before ALSCHULER and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). The questions presented and considered in the exhaustive briefs and arguments are mainly and in substance: (1) Was the lien of the Metropolitan mortgage extended by virtue of the consolidation agreement of 1894 to any property of the Consolidated Company thereafter acquired? (2) Does the lien of the Metropolitan mortgage attach to any equipment acquired after the consolidation of 1894, apart from the effect to be given specific provisions of the consolidation agreement? (3) In the enumeration of the property to be included in the various parcels to be separately offered for sale, should certain parts have been included with the Coal Railway property which by the decree of sale are not therewith included?

[1] Preceding the consideration of the first and main question we may state as a legal principle, applicable to railroad mortgages having the usual after-acquired provisions, the following from the first brief filed for appellant, that—

"Ordinarily on the consolidation of two corporations the lien of the mortgage of the constituent does not spread to the property contributed by the other constituent, or to the after-acquired property of the consolidated company"—citing in support New York Security Co. v. Louisville, etc., R. Co. (C. C.) 102 Fed. 382; Hinchman v. Point Defiance R. R. Co., 14 Wash. 349, 44 Pac. 867; Gibert v. Washington City R. R., 33 Grat. (Va.) 586; Compton v. Jesup, 68 Fed. 263, 15 C. C. A. 397.

[2] To maintain that the Metropolitan mortgage lien was extended to all the property thus passing to and afterwards acquired by the Consolidated Company, there must therefore appear conditions effective to that end, aside from the mere fact of the consolidation itself. Appellant's counsel assume to find ample authority for the contention in 14 words of article VII of the consolidation agreement of 1894, which words are, referring to the Metropolitan and the Central Trust mortgages: "Shall have the force and effect of first mortgages executed by this consolidated company." It is contended that these words constituted the Metropolitan mortgage for all intents and purposes the mortgage of the Consolidated Company, and under the after-acquired property provisions of that mortgage subjected to its lien all the property of the Consolidated Company then or at any time thereafter owned or acquired.

The dominating influence of these words as bearing upon this question is thus stated in the brief for appellant:

"The determinative question (aside from questions relating to certain equipment and to the method of sale decreed) is nothing more or less than the proper construction and legal effect of 14 words in a written instrument, namely, the articles of consolidation whereby in 1894 the Chicago & Eastern

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Illinois Railroad Company (itself a consolidated company of Illinois and Indiana) and the Chicago & Indiana Coal Railway Company (an Indiana corporation and also a consolidated company) consolidated to form the Chicago & Eastern Illinois Railroad Company, a corporation of Illinois and Indiana."

The context of these words is shown in the entire article VII, reproduced as a footnote [1] with the fourteen words italicized.

If these words must ultimately determine whether or not the lien of the Metropolitan mortgage was extended to property acquired by the company at and after the consolidation of 1894, we must in construing them, consider not only the words themselves, but their relation to other parts of the same instrument, and the situation of the parties and the property as well, and in case of any doubt, such construction, if any, as all concerned gave to them before any controversy arose.

It appears that long before the formal consolidation of 1894 the constituent Chicago & Eastern Illinois Railroad Company was an Illinois corporation, with its lines of railroad practically all in Illinois. It had theretofore acquired *all* the capital stock of the Coal Railway Company in exchange for its own stock, and it had in addition a 999-year lease of all of the Coal Railway property, and was operating that road as a part of its general system, although the separate corporate existence of the two was being formally maintained. After some years of such management it was deemed advisable that there be a consolidation of the corporation, already under the same ownership and direction, and this was undertaken. Thus managed, there was no occasion for careful weighing of the terms or expressions to be employed in effecting the consolidation. One legal repre-

[1] "Article VII.

"The mortgage or deed of trust made and entered into on the 1st day of November, in the year A. D. 1887, by and between the Chicago & Eastern Illinois Railroad Company and the Central Trust Company of New York, a corporation created by and existing under the laws of the state of New York, trustee, also the mortgage or deed of trust made and entered into on the 1st day of December, in the year A. D. 1885, by and between the Chicago & Indiana Coal Railway Company and the Metropolitan Trust Company of the City of New York, a corporation created and existing under the laws of the state of New York, and R. B. F. Pierce, of Crawfordsville, in the state of Indiana, trustees, *shall have the force and effect of first mortgages executed by this consolidated company*, and shall equally secure the payment of all bonds which have been issued under either of said mortgages or deeds of trust by the Chicago & Eastern Illinois Railroad Company, as well as all bonds which may be hereafter issued by this consolidated company, pursuant to and in accordance with the provisions of said mortgage or deed of trust made and entered into on the 1st day of November, in the year A. D. 1887, by and between the Chicago & Eastern Illinois Railroad Company and said Central Trust Company of New York, trustee.

"No bonds shall be hereafter issued under or pursuant to said mortgage or deed of trust made and entered into on the 1st day of December, in the year A. D. 1885, by and between the Chicago & Indiana Coal Railway Company and said Metropolitan Trust Company of the City of New York and said R. B. F. Pierce, trustees; but nothing in this article contained shall be construed in such manner as to limit or restrict the powers of this consolidated company to execute other mortgages or deeds of trust conveying its property, or any part thereof, to secure the principal or interest of any other debt or debts which it may create."

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sentative acted for both parties to the agreement, and there was not to be expected that degree of circumspection in the selection of words and phrases as would probably have been the case had there been contracting parties with interests in conflict. The mortgagees of the divisional mortgages were in no manner represented, and the several liens under their mortgages on property existent were not and could not have been affected by that transaction. The claim is that the fourteen words of the agreement made the Metropolitan and the Central Trust divisional mortgages both first mortgages of the Consolidated Company, with the practical effect, so far as concerns the present action, of extending each of the mortgages to all of the property of the company covered by the other, and under the after-acquired provisions of the mortgages, giving each a lien on all property thereafter acquired by the newly consolidated company.

If this is the purpose of the 14 words, they could not in fact have effected this end. Concededly neither these nor any other words which the two mortgagors might in the agreement for consolidation have employed could have given the Metropolitan bondholders a first mortgage on the already mortgaged property of the constituent Chicago & Eastern Illinois Company, nor could the Central Trust bondholders have thus secured a first mortgage on the already mortgaged property of the constituent Coal Railway Company. The stockholders might consolidate the corporations, but they could not consolidate the separate mortgages given on the distinct properties of the separate corporations. By their very terms the 14 words, if purporting to make of each of these mortgages a new first mortgage of the Consolidated Company, would give to each of the mortgagees a first mortgage on all its then existing property, and on all it might thereafter acquire—a result clearly impossible, and which it is not at all likely it was any more intended than it could have been effected.

Nor can it with reason be contended that by these words it was intended that each mortgagee, retaining its lien upon the property mortgaged, was granted a second mortgage on the other's property, subject to the prior lien of the other mortgage. The 14 words do not purport to have such effect, nor is such construction warranted by any other part of the article or the instrument.

It is insisted that the immediately following words of the article further appellant's contention. They are:

"And shall equally secure the payment of all bonds which have been issued under either of said mortgages or deeds of trust by the Chicago & Eastern Illinois Railroad Company or the Chicago & Indiana Coal Railway Company, as well as all bonds which may be hereafter issued by this consolidated company, pursuant to and in accordance with the provisions of said mortgage or deed of trust made and entered into on the 1st day of November, in the year A. D. 1887, by and between the Chicago & Eastern Illinois Railroad Company and said Central Trust Company of New York, trustee."

These words also, taken at their face, show a further want of exactness of expression on the part of the draftsman of the instrument. They purport to secure equally the holders of the bonds of both mortgages. If intending to equally secure the payment of all bonds which have already been issued under both of said mortgages, as well as those

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which may thereafter be issued under one of them, it again undertook what could not be performed. The literal carrying out of this condition would require wiping out all distinction between the two mortgages, and letting in the bondholders of both on the same footing as to the properties which severally secured the two mortgages, and letting in on the same basis and with like parity of security the holders of bonds to be subsequently issued under one of the mortgages. Although the words themselves might bear this construction, this could not have been done and was evidently not intended. No act of these mortgagors, whether dealing at arm's length or in perfect unison, could have had the effect of combining the securities under the two mortgages, or of subjecting the security of one to equality of lien with bonds which might subsequently be issued under the other mortgage.

Article VII was evidently not first conceived to meet this particular situation. It follows article VII of an earlier consolidation agreement of the former Chicago & Eastern Illinois Railroad with other corporations, and therein are found these significantly similar words:

"The mortgage or deed of trust made and entered into on the 1st day of November, in the year 1887, by and between the Chicago & Eastern Illinois Railroad Company, party of the first part hereto, and the Central Trust Company of New York, a corporation created by and existing under the laws of the state of New York, trustee, shall have the force and effect of a first mortgage executed by the consolidated company, and shall equally secure the payment of all bonds which have been issued under it by the Chicago & Eastern Illinois Railroad Company, as well as pursuant to, and in accordance with its provisions by the Consolidated Company."

The object of the employment of this language in the earlier instrument of consolidation is to be gathered from a peculiar clause in the Central Trust mortgage which is as follows:

"If the railroad company shall hereafter consolidate its property and franchises, by sale or otherwise, with the property and franchises of any other railroad company or companies, the several parties to such consolidation may, by apt words expressed in the agreement, give to this indenture the force and effect of a mortgage conveying to the trustee, above named, or its successor, all of the railroads and appurtenant property of the several parties, at the date of such agreement, and all railroads and appurtenant property which may be thereafter acquired, by construction or otherwise, by such consolidated company, to secure upon terms of equality the bonds which may have then been issued hereunder by the railroad company, as well as all bonds which may be thereafter issued by such consolidated company, in substantial compliance with the provisions hereof. In case such agreement shall be made, bonds issued by such consolidated company, shall be substantially in the forms above set forth, but in the name of the consolidated company, and shall be executed under its corporate seal and attested by the signatures of its president and secretary. It is the intent of this provision to invest such consolidated company with power to issue bonds for the purposes expressed, and subject to the conditions named in this mortgage or deed of trust, to the same extent as they could be issued by the railroad company if no such consolidation had been made, thereby giving to the holders of all bonds issued hereunder, whether by the railroad company or its successors, equality and security."

Under this clause of that mortgage the bondholders agreed that, if future consolidating companies shall provide in their articles of

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consolidation that the mortgage shall be the mortgage of the consolidating company, bonds may continue to be issued thereunder, and that all holders of bonds thereunder, whether issued before or after the consolidation, shall have equal security with each other on all the property upon which at any time the mortgage becomes the lien.

The agreement between the then consolidating companies thus became a necessary step to render effective this provision of the mortgage by which the bondholders thereunder were bound respecting equal security of then existing bonds and such as were issued under the same mortgage after the consolidation. That mortgage was the same Central Trust mortgage now under consideration, and when in 1894 the consolidation in question occurred, in order to render effective in this consolidation the same provision in the same mortgage, so it would remain an open mortgage under which the Consolidated Company might raise funds for further extensions, etc., it was properly deemed essential that the agreement of consolidation of 1894 should, as in the prior consolidation, make provision that the Central Trust mortgage be kept open to admit of future bond issues thereunder, with equality of security between all bonds theretofore, and all those subsequently issued thereunder. The agreement to that effect between the consolidators was just as essential in 1894 as it was in 1887, the year of the former consolidation. And so it is not strange that in 1894 practically the same language was employed to this end as was by the same persons employed a few years before, in respect to the same mortgage, to effect the same general purpose.

It being deemed necessary, or at least proper, in 1894 to deal specifically with the Metropolitan Trust mortgage in order that no further bonds should be issued thereunder, the language of the earlier provision was somewhat changed. But we do not regard the general intent and purport to have been different in the one transaction than in the other respecting the mortgage which was to remain the active open mortgage of the Consolidated Company.

The two mortgages were unlimited in the bonds issuable thereunder. But the Metropolitan mortgage contained no such broad authorization as the Central Trust mortgage, whereunder the mortgage might continue effective for the issuance of further bonds by a consolidated corporation if the consolidators should by "apt words" so declare in their articles of consolidation. It was evidently conceived that with the broad authorization and power of that clause, the Central Trust mortgage was better adapted for future bond issues to provide for growth and extension after the consolidation, than was the Metropolitan mortgage. It is evident to us that the consolidators of 1894 appreciated the situation, and that article VII of the consolidation agreement was designed to meet it. It provided not only "apt words" for giving effect to the quoted clause of the Central Trust mortgage, but it definitely specified that the Metropolitan mortgage should thenceforth be closed, and that no further bonds be issued thereunder, and that the Central Trust mortgage should remain open so that further bonds thereunder might be issued to pay for further exten-

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sions and improvements in accordance with the terms of the mortgage, with equal security to both new and old bondholders thereunder.

Conceding that in the absence of provisions to the contrary the consolidation would of itself have closed the Metropolitan mortgage and prevented the extension of its lien to further acquired property of the Consolidated Company, appellant's counsel insist that the provision in article VII with reference to the Metropolitan Company manifested an intention to make provision respecting the Metropolitan mortgage different from what would have been the case if it had not been mentioned at all. We do not think that such intention to make some different provision necessarily appears. Draftsmen of instruments frequently express definitely that which, if omitted, would, through operation of the law have produced the same result, so that the expression is in a sense a redundancy. This is often out of an abundance of caution, and to avoid, so far as possible, leaving the desired conclusion to construction or inference. It is quite probable that the draftsman was not content to leave the matter of the closing of the Metropolitan mortgage to the inferences to be drawn from such cases as New York Security Co. v. Louisville, etc., R. Co., and the others cited supra, but chose rather to express definitely the purpose and intent to close the Metropolitan mortgage and issue no further bonds thereunder in contradistinction to the intended course as to the Central Trust mortgage, viz. to continue it as the mortgage of the Consolidated Company, for the purpose of raising thereunder further funds for the large extensions which evidently were in contemplation.

Another instance in the same consolidation agreement of the distinct expression of that which in any event the law would impose is found in article X, whereby the Consolidated Company assumes all the debts and obligations of the constituent companies. The definite expression of this obligation does not suggest that one should seek in it a significance or meaning beyond or different from the general obligation of a consolidated corporation to discharge the debts of its constituents.

The inclusion of the Metropolitan in article VII had no essential significance beyond the definite recognition by the Consolidated Company of the mortgage as a lien upon part of the property so about to pass to the Consolidated Company, and of the purpose to close the mortgage to the further issue of bonds thereunder. Under the law as it is stated in the above quotation from brief for appellant, the situation of the Metropolitan mortgage is not materially different from what it would have been had all reference to it been omitted from article VII. In such case it would plainly not have been contended that any lien thereunder was extended to any future acquisitions or extensions of the Consolidated Company.

That no further or different obligations or rights as now contended for were created or imposed by article VII was evidently long the view of all of those who had any duty or function concerning these matters. For 20 years following this consolidation important extensions were being made to the lines of the company, and large sums of

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money raised to pay for them and for equipment through further bond issues under the Central Trust mortgage and the subsequent Bankers' Trust mortgage—$13,950,000 Central Trust, and $18,019,000 Bankers' Trust, bonds. No further money was raised under the Metropolitan mortgage. The extensions were made largely in the state of Illinois, running into many counties thereof not theretofore entered by this system. While the fact of making these extensions was of necessity open and notorious, nowhere in Illinois was the Metropolitan mortgage ever recorded, notwithstanding the statutory provision in Illinois that railroad mortgages shall be recorded in every county in the state through which they run. Section 4, Act May 7, 1873 (Acts 1873, p. 142). We are not considering this as bearing on any question of the validity of the Metropolitan mortgage as a lien in Illinois, but as significant of the intent and purpose and understanding of the parties; for it is not likely that this mortgage, if considered by the mortgagor a lien on the railway extensions in Illinois, would long have remained unrecorded in that state.

The fact that during all these years the Consolidated Company paid the interest on the Metropolitan bonds does not materially minimize or change the inference of fact to be drawn from the omission to record the mortgage in the many counties in Illinois into which the lines were extended with the funds raised under the Central Trust and Bankers' Trust mortgages.

On the part of the consolidators no reason or motive is apparent wherefore they would undertake by the consolidation agreement to extend the lien of the Metropolitan mortgage to property other than that which it covered at the time of the consolidation. The mortgage was to be closed so that no further bonds would be marketed thereunder. The bonds already issued were disposed of, and there appears no reason why the consolidators should have wished to make the Metropolitan bonds more attractive as an investment. But having determined to employ the Central Trust mortgage to raise money for the contemplated extensions, there was every reason why bonds thereunder, to be placed upon the market for raising large sums, should be made as attractive as possible in order to invite investment in them. But the inevitable result of making the Metropolitan bonds a lien upon extensions would have been an impairment of the company's further borrowing power under the Central Trust mortgage, as well as under the subsequently issued Bankers' Trust mortgage. It is to be noted that under these mortgages bonds for extensions could be issued for the amount of $18,000 per mile of main track including any prior liens thereon, and that in the many certificates issued for the certification of bonds for extensions, the Metropolitan mortgage was never mentioned as an existing lien.

It would in our judgment require more than the construction undertaken to be given these 14 words to warrant the conclusion that the consolidators thereby intended to or did undertake to bind the Consolidated Company, as well as the Central Trust mortgage, to an extension of the lien of the Metropolitan mortgage to the Central Trust security then on hand, and to the lines of the Consolidated Com-

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pany thereafter acquired, and we conclude on this question that the district court did not err in holding the lien of the Metropolitan mortgage on the railway to the lines of the Coal Railway Company at time of the consolidation of 1894.

[3] As to claim of lien on equipment, in so far as the claim is for a lien on all existing equipment acquired after the consolidation of 1894, arising through the said 14 words of article VII of the consolidation agreement, and the after-acquired property provisions of the Metropolitan mortgage, what has already been said respecting the operation of these provisions as bearing on the railroad lines constructed or acquired after the consolidation, applies likewise to equipment, and with like effect; necessitating the finding against appellant upon such contention.

[4, 5] Of the original 3,065 units of Coal Railway equipment subject to the lien of the Metropolitan mortgage, which passed to the Consolidated Company in 1894, all have disappeared save 114 thereof, which the receiver disposed of and the proceeds were decreed to be applied on appellant's mortgage debt. It is contended for appellant that "even though appellant's position on the principal controversy should be incorrect, appellant is entitled to a lien upon equipment of an equal value or amount with the equipment which was subject to its mortgage at the time of the consolidation"; that the Consolidated Company had the use of this equipment and derived revenue from it and wore it out, and replaced such thereof as became useless with other equipment; that the Consolidated Company always possessed and that the receiver took and held equipment, in replacement of that which the Coal Railway contributed to the consolidation of 1894, and that to the value of such Coal Railway equipment as went into the consolidation the Metropolitan is entitled to a lien upon equipment. We find no evidence of the value of the Coal Railway equipment at the time of the consolidation, beyond the fact that its cost price was $1,230,357.71, and that as against this $1,215,000 of the Metropolitan bonds were issued.

It does not appear that through bookkeeping, accounting, marking or in any manner whatever the Consolidated Company ever set apart any of the much larger equipment it acquired after the consolidation, as in replacement of disposed-of Coal Railway equipment, or that any steps whatever were taken to subject to the lien of the closed Metropolitan mortgage any of the subsequently acquired equipment, as in replacement of that disposed of. The most frequent practice of the Consolidated Company was to procure equipment from the makers, who took trust certificates or other obligations, under which they retained the title, or a lien on the equipment, for the price of it, and from time to time the Central Trust Company or the Bankers' Trust Company would certify bonds in accordance with the provisions of their mortgages not exceeding the value of the equipment, to supply funds with which the company might discharge its obligations therefor to the makers, and thus acquire title from or release of the liens of the makers. To a certain extent also the Consolidated Company bought equipment, and from time to time the Central and Bankers'

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Trust Companies issued bonds as against the equipment for the amount of its value. Since the consolidation of 1894 bonds under these mortgages have been certified and issued as against practically all of the equipment acquired after the consolidation, aggregating $15,343,000—an amount which is evidently far in excess of the present value of the 23,000 units of equipment in the hands of the receiver to be sold under the decreed liens of the Central Trust and the Bankers' Trust mortgages.

This contention for a lien of the Metropolitan rests, not on any covenant for lien on after-acquired property, but on a contractual obligation of the mortgagor to maintain and replace the mortgaged equipment. But the Metropolitan mortgage imposes no such obligation. The usual covenant for maintenance and replacement of equipment is not to be found in this mortgage. The nearest approach is a provision in article VIII empowering the trustees to allow the railway company to dispose in its discretion of such equipment, machinery and the like, as may have become unfit for use, the company replacing such by new, and all property acquired to replace "any of the property conveyed under the provisions of this article" to be subject to the lien of the mortgage without other act or conveyance. The evidence does not show any equipment to have been disposed of under the terms of this article. Evidently it was considered that the after-acquired property provisions of the mortgage would sufficiently protect the mortgagee in this regard. But these provisions having under the circumstances become ineffectual to that end, we are not at liberty, in the absence of evidence of fraudulent, mistaken or accidental omission, to import into the mortgage a replacement covenant which the parties have not included. But if it were there, or if the provisions present were properly to be construed as such a covenant, no lien would attach merely because of the mortgagor's breach of the covenant through its failure to maintain and replace the Coal Company equipment of 1894. United States Trust Co. v. Wabash W. Ry. Co. (C. C.) 38 Fed. 891; Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339.

[6] There is considerable discussion in the briefs respecting the proceeds of equipment subject to appellant's mortgage which from time to time the Consolidated Company disposed of, the amount of which was found to be $196,846.61. Part of this amount is based on the stipulation that the scrap value realized by the company for cars dismantled, destroyed or becoming otherwise useless was $95 per car. The master found the number of such cars to be 1,159, but from our examination of the evidence it appears to be 2,055, thus increasing the total so received to $281,966.61. Counsel for appellant maintain that the money so realized could not honestly have been retained by the company, except upon the theory that appellant's lien would attach to equipment which supplied the place of that disposed of, and that since the presumption is in favor of the honesty of the railway company's officers, it should be concluded that the Consolidated Company intended and understood that the Metropolitan lien would attach to units of subsequently acquired equipment equal to the dis-

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posed-of Coal Railway units. Assuming even this to be so, the understanding of the Metropolitan officers could not bind the mortgagees who through their subsequent advancements as against this equipment acquired the superior equity. The amount so received by the Railway Company on account of its disposal of the mortgaged equipment was not in any manner segregated or paid into a trust fund, but went into the general coffers of the company and became indistinguishably mingled with its funds. It is not and could not well be seriously contended that these funds were traceable into the hands of the receiver, so that appellant might maintain a lien thereon, or priority of claim therefor.

[7] Lastly, it is complained that the decree improperly severs the Coal Railway from the balance of the Chicago & Eastern Illinois system, special criticism being made of the noninclusion with the Coal Railway in the foreclosure sale as decreed, of the line from Otter Creek to Brazil, Ind., and the line from Momence, Ill., to the Indiana-Illinois state line, and also of any of the equipment.

Respecting generally the severance and sale of the Coal Railway from the rest of the so-called Chicago & Eastern Illinois system, we are satisfied the decree of the district court was proper. The Metropolitan mortgage covers the Coal Railway only. The Coal Railway does not appear to be essential to the rest of the system, nor the rest of the system to the Coal Railway. It does not appear to us that either materially supplements the other. The master's report finds the Coal Railway to be a parallel and competing line with the Chicago & Eastern Illinois, and indeed the Coal Railway appears to be in a small way a system in itself. The association and ultimate consolidation of the two was manifestly for the purpose of eliminating competition between them. There appears no such interrelation between these parts as to suggest substantial disadvantage to either from the severance decreed, except as is hereinafter indicated and provided against.

Under the evidence the master found that the Coal Railway division was being and for some time had operated at considerable loss. Ordinarily this of itself would not be a sufficient cause for "sloughing off" branches, or disrupting a railroad system. While deliberate purpose to run down and make unprofitable the Coal Railway division of this system is suggested, no evidence appears to connect the trustees or bondholders of the Central Trust mortgage with any such purpose. That mortgage was given before the consolidation, and if it be true that the Coal Railway can be operated only at a loss, it would diminish the security of the Central Trust mortgage if the more remunerative property upon which it is secured, could be sold on foreclosure only in connection with the losing Coal Railway. In any view of this record, we see no impropriety in the decree in permitting severance and separate sale of the Coal Railway under the foreclosure of these mortgages.

[8] But in the separation of a railroad into parcels for the sale under the foreclosure of divisional mortgages a court of equity is not bound by any hard and fast rule to fix the parcels or divisions to

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correspond absolutely with the several mortgage grants. The rights of all parties should of course be protected, without overlooking the interest of the public in the continued beneficial operation of public highways constructed and operating under its authority. The severance from one division of a part necessary to its successful operation, and not essential to the operation of any other part, cannot be justified on the ground alone of mortgage descriptions. If division must be made it should be, so far as is reasonably possible, at points which will leave the various divisions as nearly as may be in situations to be operated as railroads.

[9] The complaint which appellant makes because of the noninclusion with the Coal Railway division—or parcel D as fixed in the decree—of the road from Otter Creek to Brazil, Ind., does not impress us as well founded. This is an east and west line connecting the southern terminus of the Coal Railway with the Chicago & Eastern Illinois. By it the latter reaches the Brazil coal fields, enabling it to compete for that traffic with the Coal Railway which otherwise reaches that field, to eliminate which competition these lines became associated under one ownership and were ultimately consolidated. For traffic south of its line the Coal Railway has other connections. The Brazil-Otter Creek line would for the Coal Railway be merely a connecting link between itself and the Chicago & Eastern Illinois, while to the latter it means an entry into these coal fields. The advantage to the Coal Railway in having it, or its disadvantage in not having it is far outweighed by its greater advantage to the Chicago & Eastern Illinois and ensuing embarrassment of the latter if severed from it. Equitable considerations dictate its inclusion with the Chicago & Eastern Illinois rather than with the Coal Railway parcel.

With the Momence-State Line road the situation is quite different. This was built before the consolidation, by the Chicago & Eastern Illinois, but after a community of interest had been established between the two lines, to join a line built about the same time by the Coal Railway from Percy Junction, Ind., to the state line. The two form a line about 40 miles long (about 29 miles in Indiana and about 11 miles in Illinois) running in a northwesterly direction towards Chicago and constituting the most advantageous and logical connection of the Coal Railway for its traffic with Chicago, which is the principal market for the coal and other commodities carried by the Coal Railway. It serves to form a continuous line from Momence through Percy Junction and thence in the same general southerly direction about 100 miles further to the south terminus of the Coal Railway. That this Momence-State Line bit of road was by the Consolidated Company regarded as really a part of the general Coal Railway property is indicated in a description of it in the Bankers' Trust mortgage, where in connection with the Coal Railway from the state line to its southern terminus it was described as "a main line of railroad extending from Momence, Ill., by way of Goodland, Ind., to Brazil, Ind." There are no stations of any importance between Momence and Percy Junction, and it seems plain that severance arbitrarily at the state line would leave the Illinois stub end of practically

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little value to the Chicago & Eastern Illinois and considerable of an embarrassment and loss to the Coal Railway through interference with a continuous line to its normal connection at Momence. We think that upon due protection to the lienors of the Momence end of this line, it should be included in and disposed of with the Coal Railway property.

[10] As to inclusion with the Coal Railway in the foreclosure sale of part of the equipment, what has been said respecting the Momence-State Line piece of railroad is even more applicable upon this proposition. A railroad without equipment can serve no function. While it may be said that new equipment can be acquired for the Coal Railway, this would evidently involve outlay much greater than would the retention for this road of a reasonable amount of the equipment such as has been and is in constant use thereon, and is adapted to its needs. The equipment found to be subject to the lien of the Central Trust mortgage as described in section II of article XXXVII of the decree of sale, and ordered sold with the Chicago & Eastern Illinois parcel, comprises some 23,300 units, and has been and is in use over and for the entire system, including the Coal Railway. Doubtless some of it has long been used exclusively in the operation of the Coal Railway. If all is to be withdrawn from the Coal Railway division, the Coal Railway will have none at all, while the Chicago & Eastern Illinois will have for its use all that theretofore served both itself and the Coal Railway. The Central Trust and Bankers' Trust bondholders cannot as such have any interest in depriving the Coal Railway of all equipment, so long as it realizes to them its fair value, and does not through the manner of its disposition impair the value of the other property upon which their obligations are secured. As the Coal Railway has been and is now equipped with a portion of this equipment it cannot be said that the remaining part of the system will be in any manner injured if a due portion of the equipment is sold with the Coal Railway.

As to the railroad from Momence to the state line, and equipment for the Coal Railway, the decree of sale should be modified so as to provide that the railway, from its junction with the Chicago & Eastern Illinois main tracks at Momence to the Indiana state line, and all right of way, stations, depots, structures, telegraph and other appurtenance thereto, be, under the direction of the district court, fairly appraised, and that under same direction there be set apart from the equipment found in the decree to be subject to the Central Trust mortgage lien, an amount thereof reasonably necessary and suitable for the operation of the Coal Railway as a going operating road, having reference also to the operating needs of all the divisions now being served by all of such equipment; and that under the direction of the court the equipment so set apart for the Coal Railway be appraised at its fair market value; that thereupon within a time to be fixed in the decree, appellant indicate as the district court may direct, whether or not the Momence-State Line road, or the equipment set apart, or both are acceptable at such appraised values, and if acceptable, they or such as is acceptable, be accordingly included and offered for sale with said Coal Railway; and upon the sale thereof, before any part of

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the proceeds of same is applied upon the Metropolitan Trust debt, the amount or amounts of such appraised valuations shall be retained by the master out of such proceeds, to stand in lieu of and in the substitution for said Momence-State Line road and the said equipment so set apart, the amount so retained to be subject to the liens as now fixed in the decree upon the railroad and equipment; and if the acceptance of appellant as above provided for is not forthcoming, the railroad or equipment as to which the acceptance is not made shall not be so included with the Coal Railway, but shall be disposed of in the manner provided in the decree; the expense of such setting apart and appraisements to be borne by appellant, unless before this is done appellant shall file its disclaimer of any claim for such inclusion of the Momence-State Line road, or equipment, or both. In the case of such inclusion with the Coal Railway of the Momence-State Line road, or equipment or both, the decree should be further correspondingly modified as to the upset prices therein fixed, and in other respects where necessary to conform.

The cause is remanded with instructions to so modify the decree of foreclosure as to make it conform hereto. In the other respects the decrees are affirmed. Two-thirds of the costs of the appeals shall be paid by appellant, and one-third by appellees.

On the argument Judge KOHLSAAT sat with the court, but he died before the opinion was prepared.

NAVASSA GUANO CO. v. COCKFIELD et al.

(Circuit Court of Appeals, Fourth Circuit. April 8, 1918.)

No. 1578.

1. EVIDENCE ⟸68—PRESUMPTION—NATURAL CONSEQUENCES OF ACT.
A person is presumed to intend the natural consequences of his acts.

2. FRAUDULENT CONVEYANCES ⟸139—FORM OF TRANSFER—INSURANCE PREMIUMS—RIGHTS OF CREDITORS.
Where insured, knowing that he was insolvent and realizing he was about to die within a few days, attempted to change beneficiary of his policy, making it payable to his brother, instead of his legal representative, the transaction was fraudulent as to his creditors, although he did not intend to defraud creditors, and although policy by its terms had no surrender value; only two annual premiums having been paid thereon.

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Suit by the Navassa Guano Company against Elle Nixon Cockfield and George W. Dickson, as executors of the will of S. R. Cockfield, deceased, and others. Decree (244 Fed. 222) for defendants, and plaintiff appeals. Decree reversed in part, and cause remanded, with direction.

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Philip H. Arrowsmith, of Lake City, S. C., and Henry E. Davis, of Florence, S. C. (Willcox & Willcox, of Florence, S. C., on the brief), for appellant.

A. C. Hinds, of Kingstree, S. C. (Kelley & Hinds, of Kingstree, S. C., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The material facts appear to be these: On February 5, 1916, S. R. Cockfield, of Johnsonville, S. C., insured his life for $6,000, payable at his death to his legal representatives, and paid the first annual premium of $185.70. The policy contained this provision:

"The insured may, at any time while this policy is in force, by written notice to the company at its home office, change the beneficiary or beneficiaries under this policy, such change to take effect only upon the indorsement of the same on the policy by the company."

On February 5, 1917, the insured paid the second annual premium, partly by note secured by the policy, and thereby continued the insurance in force for another year. Three days later, February 8th, he was stricken with a serious and, as it proved, fatal illness. The next day, the 9th, or later, he wrote the insurance company:

"Inclosed please find policy 29888, which you will change the beneficiary and make it payable to Reamer L. Cockfield, related to me as brother. Please attend to this and return to me promptly."

Under date of the 13th, the company acknowledged receipt of the policy and request, and added:

"We attach a formal request to be complied with for this purpose. Have your signature witnessed by a disinterested party, return to us, and the matter will have our immediate attention. In the meantime your policy will be held in abeyance."

The insured died on the 16th of February, without having executed the "formal request." It is admitted that he was insolvent when his letter to the company was written and at the time of his death. Reamer L. Cockfield, the brother named in the letter, was a physician, and as such attended the insured in his last illness, and the trial court found in effect, and upon ample and convincing testimony, that S. R. Cockfield, when he wrote the insurance company, had been advised by his brother that his illness would probably terminate fatally. In a word, we take it to be established that the insured changed the beneficiary named in his policy, or attempted to do so, with full knowledge of his insolvency and in anticipation of death within a comparatively short time.

The suit is brought, as the decree appealed from succinctly states, "to subject the proceeds of this insurance policy, which the insurance company admits to be due and payable to the party who may be lawfully entitled, to the payment of the creditors of S. R. Cockfield, upon the ground, first, that the transfer was invalid, null, and void as to creditors, and, next, that in any event the transfer was insufficiently executed, so as to pass the title of the policy, and it still remains the

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property of the estate of S. R. Cockfield, and should be administered as such, and applied to the payment of his creditors." The court below sustained the transfer of the policy and awarded the proceeds to the transferee, Dr. Cockfield, less so much as represents the premiums paid by the insured in his lifetime, which was directed to be turned over to his executors. The decree distributes the insurance money accordingly, and the creditor appeals.

We put aside, without expressing any opinion, the contention of appellant that the attempted change of beneficiary was ineffectual for any purpose, in order to decide the case upon the assumption that the letter written to the company by the insured a few days before his death effected a valid transfer of the policy and its proceeds, except as against the rights of creditors. The argument in behalf of appellee rests upon the proposition that, inasmuch as the policy by its terms had no cash surrender value, only two annual premiums having been paid, its transfer to the brother diverted nothing of value from the insured's estate, and this we apprehend is the crux of the case. Some support is sought by analogy in that section of the Bankruptcy Law which provides for the disposition of insurance on the life of a bankrupt, and under which it is held that a policy having no surrender value does not pass as an asset to the trustee. Burlingham v. Crouse, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148. But this is not a bankruptcy proceeding, and it seems manifest that the statutory right of a trustee in such case cannot measure or affect the right of creditors in a suit like this to reach the proceeds of a policy on the ground that as to them it has been fraudulently transferred. The only law here applicable is the statute of Elizabeth, which upon this issue is the common law of South Carolina.

[1, 2] Granting, however, the principle invoked by the appellee, that a policy without surrender value may be validly transferred even as against creditors, we are not prepared to hold that the policy in question had no surrender value at the time of its transfer. If the insured had then been in his usual health, with the normal expectation of life, his estate would not have been depleted by a change of beneficiary, and creditors could not justly complain. In that case the transferee might have taken a burden, instead of a bounty, because of the probability that an indefinite number of premiums would have to be paid. But the situation here is altogether different. The insured knew that he was about to die; he had been told so by his brother. He therefore knew, or at least supposed, that presently, and long before another premium would be payable, the full amount of his policy, less the small note secured thereby, would come into the hands of his executors and be subject to the claims of creditors. The only reasonable inference is that in these circumstances he undertook to turn over to his brother, to whom it was a pure donation, the insurance money which otherwise would go to the payment of his debts. This being so, we think it cannot be said that the transferred policy was valueless. On the contrary, as it seems to us, the fact of impending death, the practical certainty that the life of the insured would end within a few days, operated to remove the element of con-

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tingency, and gave to the policy at the time of its transfer an actual pecuniary value closely approximating its face amount. The terms of the policy relating to surrender value may be controlling, when the insured entertains the ordinary expectation of life; but they should not be permitted to shield a gratuitous transfer to the prejudice of creditors, when he knows that death is an early certainty. Nor can the transfer in question be defended on the ground of difference between conscious and constructive fraud, for it is familiar doctrine that every man must be presumed to intend the natural consequences of his acts. The insurance procured by Cockfield was by his direction made payable to his legal representatives, and it thereby became, whatever its value, an asset of his estate. When he sought to change the beneficiary, he knew that death was near, and that the proceeds of the policy, if not transferred, would soon be paid to his executors; and he was therefore chargeable with the results of his action, even if he lacked the intention of defrauding his creditors. In short, we are convinced that the transaction under review was fraudulent as to creditors and must be so adjudged.

And this conclusion is sustained, as we think, by the clear weight of authority. A case directly in point is Stokoe v. Cowan, 29 Bevan, 637. The facts are strikingly similar. Cowan had two policies upon his life, one taken out in April, 1857, the other in June, 1858, both payable to his estate. On November 9, 1859, he assigned them absolutely to his mother, to whom they had been previously pledged for a small amount. He died insolvent on the 3d of December following. Stokoe, a creditor at the time of the assignment, brought suit to set it aside. At the time of the transfer Cowan was ill with consumption, and it was known by those about him that he could live but a short time longer. The same defense was set up as here, that the policies were of little or no value; the assignee being liable to pay the premiums, and their value therefore depending entirely upon the amount of future payments. But the Master of the Rolls, in a brief but very explicit opinion, held that the assignment could not stand as against creditors, and gave the plaintiff a decree for the full amount of the policies, less the sum for which they were pledged, saying, among other things, that:

"The value of a policy does not depend so much on the number of payments made, as on the age of the insured and the state of his health at the time the assignment takes place."

To the same effect is another English case decided a few years later, Freeman v. Pope, L. R. 9 Eq. 206, which is cited with approval in Central Bank of Washington v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370. In the latter case the Supreme Court said (128 U. S. pages 204 and 207, 9 Sup. Ct. 44, 45 [32 L. Ed. 370]):

"In the view of the law, credit is extended in reliance upon the evidence of the ability of the debtor to pay, and in confidence that his possessions will not be diminished to the prejudice of those who trust him. This reliance is disappointed, and this confidence abused, if he divests himself of his property by giving it away after he has obtained credit. And where a person has taken out policies of insurance upon his life for the benefit of his estate, it has been frequently held that, as against creditors, his assignment, when insolvent, of

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such policies, to or for the benefit of wife and children, or either, constitutes a fraudulent transfer of assets within the statute and this, even though the debtor may have had no deliberate intention of depriving his creditors of a fund to which they were entitled, because his act has in point of fact withdrawn such a fund from them, and dealt with it by way of bounty. Freeman v. Pope, L. R. 9 Eq. 206. * * * The rule stands upon precisely the same ground as any other disposition of his property by the debtor. The defect of the disposition is that it removes the property of the debtor out of the reach of his creditors. * * * The obvious distinction between the transfer of a policy taken out by a person upon his insurable interest in his own life, and payable to himself or his legal representatives, and the obtaining of a policy by a person upon the insurable interest of his wife and children, and payable to them, has been repeatedly recognized by the courts."

We regard these authorities as decisive of the instant case and further discussion appears unnecessary. It follows that the decree appealed from, so far as it awards any portion of the insurance money, to the appellee, must be reversed, and the cause remanded, with instructions to enter a decree in accordance with the views herein expressed.

Reversed.

LE MORE et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. July 29, 1918. Rehearing Denied November 9, 1918.)

No. 3188.

1. CRIMINAL LAW ⟸619—CONSOLIDATION OF INDICTMENTS—DISCRETION.
   The trial court may, in its discretion, consolidate several indictments before trial, and try the same together.
2. POST OFFICE ⟸49—SCHEME TO DEFRAUD—EVIDENCE.
   In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for use of the mails in connection with a scheme to defraud, whereby defendants induced ocean carriers to issue bills of lading though no shipments were delivered, and drafts with bills of lading attached were negotiated, though persons on whom drafts were drawn accepted them knowing all circumstances, *held*, that evidence was sufficient to go to jury.
3. POST OFFICE ⟸35—OFFENSES—SCHEME TO DEFRAUD.
   To sustain a conviction under Pen. Code, § 215 (Comp. St. 1916, § 10385), denouncing use of mails in connection with a scheme to defraud, proof only of the devising of the scheme or artifice to defraud, without proof that any one was defrauded, is sufficient.
4. CRIMINAL LAW ⟸822(1)—INSTRUCTIONS AS A WHOLE.
   An extract is not to be considered apart from the charge, and error cannot be predicated thereon where the charge as a whole is correct.
5. CRIMINAL LAW ⟸829(1)—REFUSAL OF REQUESTS.
   The refusal of requests to charge, covered substantially by the charge given, is not error.
6. CRIMINAL LAW ⟸829(8)—INSTRUCTIONS—GOOD CHARACTER.
   Where the court correctly and fully charged on good character, the refusal of a requested charge that good character itself might generate a reasonable doubt of guilt *held* proper.
7. CRIMINAL LAW ⟸393(2)—EVIDENCE COMPULSORILY PRODUCED.
   In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for using the mails in connection with scheme to defraud, books of ac-

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count of partnerships in which defendants were partners, which were produced by the trustee in bankruptcy of the firms, who had taken possession of them, held admissible over objections that they were compulsorily produced.

8. POST OFFICE ⊂⊃49—OFFENSES—EVIDENCE.
In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for using the mails in connection with a scheme to defraud, where defendants contended that money obtained, etc., went into firms of which they were members, *held* that the government could show the amounts defendants drew from such firms, etc.

9. CRIMINAL LAW ⊂⊃351(10)—ATTEMPT TO DESTROY EVIDENCE.
In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for using the mails in connection with a scheme to defraud, whereby ocean carriers were induced to issue bills of lading though no shipments were delivered, etc., a cablegram sent by one of the defendants directing destruction of bills of lading, etc., *held* admissible against him, being an attempt to destroy evidence.

10. CRIMINAL LAW ⊂⊃371(1)—EVIDENCE—OTHER OFFENSES—INTENT.
In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for using the mails in connection with a scheme to defraud, whereby ocean carriers were induced to issue bills of lading though no shipments were delivered, etc., proof of the use of other bills of lading, to cover which no goods were shipped, was admissible on the issue of fraudulent intent, the evidence not being confined to transactions set out in the indictment.

11. CRIMINAL LAW ⊂⊃448(12)—OPINION—EVIDENCE.
In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for using mails in connection with a scheme to defraud, whereby defendants induced ocean carriers to issue bills of lading though no shipments were delivered, and drafts with the bills of lading attached were negotiated, etc., testimony by bankers that they would not have made advances had bills not been attached, or had they known no goods were shipped, was admissible, being evidence of effect of recitals according to course of business of bankers, rather than mere opinion as to effect in a specific instance.

12. CRIMINAL LAW ⊂⊃448(3)—EVIDENCE—INTENT.
In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for using the mails in connection with a scheme to defraud, whereby defendants induced ocean carriers to issue bills of lading though no shipments were delivered, and drafts with bills attached were negotiated. etc., testimony that witness did not personally expect to make shipments when he drew bills was not incompetent, as a statement of opinion, where answer was limited to his own expectation, and amounted to no more than that witness gave no instructions for shipment when he drew the bills.

13. POST OFFICE ⊂⊃49—OFFENSES—EVIDENCE.
In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for using the mails in connection with a scheme to defraud, whereby defendants induced ocean carriers to issue bills of lading though no shipments were delivered, and drafts with the bills of lading attached were negotiated, etc., *held*, that testimony that witness drawing bills of lading declined to accept power on ground bills of lading were not regular was admissible on question of defendant's intent.

14. WITNESSES ⊂⊃277(4)—CROSS-EXAMINATION OF ACCUSED—SCOPE.
Where a defendant charged with violating Pen. Code, § 215 (Comp. St. 1916, § 10385), by using mails in connection with scheme to defraud, whereby ocean carriers were induced to issue fraudulent bills of lading, which were attached to drafts that were negotiated, testified that acceptors who understood transaction were able to pay, etc., cross-examination as to amount of acceptances was not objectionable as relating to matter not brought out on direct examination.

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15. WITNESSES ⊂=277(1)—CROSS-EXAMINATION OF ACCUSED—DISCRETION.
Where a defendant voluntarily takes the stand he waives his constitutional privilege, and the extent of his cross-examination is a matter for the discretion of the trial judge.

16. CRIMINAL LAW ⊂=721(2)—ARGUMENT—DEFENDANT'S FAILURE TO TESTIFY.
Where defendant took the stand, but was prevented from answering questions on cross-examination by objections that they did not come within the scope of the direct examination, the prosecutor could comment in his argument on defendant's failure to answer.

17. CRIMINAL LAW ⊂=722½—ARGUMENT—OTHER OFFENSES.
In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for using the mails in connection with a scheme to defraud, etc., where defendants, who had become bankrupt, contended that moneys realized from the scheme went into their business, argument of the prosecutor as to disposition of the proceeds, *held* warranted, not being in effect an attempt to charge defendants with the offense of concealment in bankruptcy.

18. CRIMINAL LAW ⊂=1134(4)—MOTION FOR NEW TRIAL—REVIEW.
The overruling of defendant's motion for new trial cannot be reviewed on writ of error.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Albert Le More and Edward E. Carriere were convicted of having devised a scheme or artifice to defraud, etc., in violation of Penal Code, § 215, and they bring error. Affirmed.

Charlton R. Beattie, of New Orleans, La., George Wesley Smith, of Rayville, La., and Michel Provosty, of New Orleans, La., for plaintiffs in error.

Jos. W. Montgomery, U. S. Atty., of New Orleans, La.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. [1] 1. The plaintiffs in error were convicted of having devised a scheme or artifice to defraud in violation of section 215 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1916, § 10385]). They were convicted under two indictments, which were consolidated before trial, and tried together. Plaintiffs in error objected to the consolidation, and assign the order of the court directing the consolidation as error; but this was a discretionary matter, and no abuse of discretion is shown in the record.

[2, 3] 2. The plaintiffs in error also assign as error the refusal of the District Court to direct a verdict of acquittal. Section 215 requires of the government, in order to prove its case, to establish but two things: The forming or devising a scheme to defraud, and the deposit in the post office of a letter to effectuate the scheme. Among other classes of frauds mentioned in the section is devising of a scheme to defraud by means of false representations, and this is the class of fraud relied upon by the government in this case for conviction. No questions presented by the appeal relate to the second proposition, i. e., the use of the mails by the plaintiffs in error. It is denied by them that they devised any scheme to defraud the parties they are alleged in

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the indictments to have intended to defraud. The scheme relied upon by the government was, briefly stated, this: The plaintiffs in error were engaged in the business of exporting staves from the ports of Mobile and New Orleans to European countries, and had been so engaged for many years before their bankruptcy. The staves were exported by them to three or four regular consignees, among whom was the firm of B. Gairard Fils, in Paris. They had also formed a branch in England, which did business under the name of the Liverpool Stave Company, and to which they consigned staves. When they shipped staves the course of business was to draw on the consignee, with bill of lading for the staves attached to the draft, and to procure bankers in this country or abroad to purchase or discount the drafts. The drafts were time drafts, which required acceptance by the consignee on presentation. Payment followed in 60 or 90 days after acceptance. The bills of exchange had attached to them a slip, directing delivery of the attached bill of lading to the acceptor, upon his acceptance, and the course of business was to make delivery of the bill of lading to the consignee, upon his acceptance of the draft and bill of exchange, and he thereby acquired title to the staves, if any were shipped. For many years before the bankruptcy of the firms of which the plaintiffs in error were the members a practice had sprung up between these firms and two steamship lines, the Austro-American Steamship Company and the Vogeman Line, to issue bills of lading to the firms of plaintiffs in error for staves when no staves had been in fact received by the steamship company for transportation, upon a letter of the plaintiffs in error guaranteeing future delivery of staves of the quantity and description set out in the bill of lading. Certain of the consignees were privy to this course of business. The evidence tended to show, with reference to the Austro-American Line, at least, that it made an endeavor to locate on the yard of plaintiffs in error in New Orleans, which was opposite the steamship company's dock, staves corresponding to the requirement of each bill of lading, and to identify them. However, the staves were never delivered on shipboard in a large majority of cases during the last years of the firms' history. Instead of shipping the staves to the consignee, in pursuance of the bill of lading, when the draft drawn on the consignee was presented to him for acceptance he accepted the draft, detached the bill of lading, and surrendered it either to the officers of the steamship company at European port of destination or returned it to the plaintiffs in error's firm in this country, and they in turn surrendered it to the steamship company's agents at point of shipment. Upon receipt of the bill of lading the steamship company surrendered the letter of guaranty which they had taken to secure delivery of the staves to the plaintiffs in error or their firm. Upon receiving each bill of lading plaintiffs in error drew against the consignee mentioned in it for the purchase price of the supposed shipment, attached the bill of lading evidencing the shipment to the draft, presented the draft, with bill of lading attached, to some banker for discount, and received the proceeds of the draft from the banker. The banker thereupon forwarded the draft and bill of lading to the consignee, through its correspondents, and procured the acceptance of the

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draft by the consignee, and the consignee, upon presentment of the draft for payment, would pay it, though he had never received any staves at all. All the drafts which were the basis of all the counts in both indictments had been presented and accepted in this way, though no shipments of staves had been made to answer the requisition of the bills of lading. In the years during which this practice was pursued drafts amounting to $16,000,000 had pursued this course. Many of these drafts were paid by subsequently drawn drafts, which were, in effect, renewals of the previously drawn drafts. This course of business was in this way prolonged. The drafts against which no shipments of staves were made, and which were not mere renewals, represented unsecured loans to the drawers. At the time of the bankruptcy there were outstanding, accepted but unpaid, drafts in an amount largely in excess of a million dollars, B. Gairard Fils having accepted over a million of this amount. The death of the senior Gairard precipitated the crisis, resulting in the failure of his firm, and as well that of the other consignees, the Liverpool Stave Company, the Association Industrielle Française of Paris, Coulon, Berthoud & Co., and Fry, Miers & Co. of London, and thereafter the partnerships of which plaintiffs in error were members. The holders of the drafts, which were outstanding, accepted, but not paid, were unable to obtain payment either from the bankrupt drawers or drawees, and had no recourse against the bills of lading or their contents.

The positions of the plaintiffs in error are twofold. They say no fraud was committed by them because the evidence shows that they intended that the drafts should be paid by the acceptors, and were reasonably justified in believing that they would be paid from the fact that over a course of previous years similar drafts had been paid in every case, though they had aggregated millions, and because the consignees were wealthy business men, who were supposed to be amply able to respond to liabilities such as were represented by their acceptances. They further say that, conceding a fraud was committed by the false representation contained in the bill of lading attached to the drafts, and to cover which no goods had been delivered to the issuing steamship company for transportation, the persons defrauded were not the bankers who discounted the drafts, as the indictments charged, because the law and the direction contained on the slips attached to the drafts advised them that the bills of lading were security for the acceptance only of the drafts, and not for their payment, and because all the drafts set out in the indictment were in fact accepted, and the bills of lading delivered to acceptors for their disposition, and it was immaterial to the bankers, after acceptance, whether the bills of lading were true or false. They also say that, according to the course of business, the bankers invariably exacted of the consignees either an acceptance on the draft itself, or a cabled agreement to accept, which was its equivalent, before any money was advanced on the faith of them.

As to the first contention, the fraud asserted by the government against the plaintiffs in error was not the drawing of the drafts and obtaining the proceeds of the discount thereof, intending not to pay the drafts, either primarily through the acceptors or secondarily them-

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selves. If it had been, an expectation, actually and reasonably entertained by the drawers that the acceptors were able and willing to pay the drafts, might have deprived the transaction of a fraudulent intent to obtain the proceeds of the discount of the drafts, expecting the drafts not to be paid. The fraud relied upon, however, consisted in an alleged false representation contained in the bills of lading, materially affecting the ability of the acceptors to pay the drafts, and inducing the bankers to part with their money, when they might have been unwilling to do so if no such representations had been made. The bill of lading recited the delivery by plaintiffs in error to the issuing steamship company for transportation to the consignee and drawee of staves in value equal to the amount of the draft.

As to the second contention, such representation might constitute a material inducement to the bankers to advance on the drafts in two ways: First, it was an assurance that the drawee would be put in funds from the proceeds of the sale of the staves when received sufficient to take up the drafts, and, second, it gave to the numerous transactions evidenced by the drafts and bills of lading the appearance of regular purchases of merchandise by the drawers, and the means of paying the sellers in a commercially recognized and customary way, when in truth and in fact the transactions were not purchases of staves by the drawees, but mere unsecured loans to the drawers from the drawees, under the disguise of regular dealings between seller and buyer of merchandise.

The function of the bills of lading was not altogether limited to that of security for the acceptance of the draft. Conceding that the bankers were not entitled to look to the bills of lading as security for either the acceptance or payment of the drafts, we still think that the recital might well constitute a material representation (1) that the acceptor would have funds with which to pay the draft when it matured, and (2) that the transaction was one in the regular course of mercantile business, and not an irregular way of borrowing money without security. If the representation was false, in that no staves were intended to be shipped when the bills of lading were issued and presented to the bankers with the drafts, then it was probable that the bankers would be defrauded in either of the ways stated by such false representations. Again, the offense created by section 215 requires proof only of the devising of a scheme or artifice to defraud. It does not require the government to establish that any person was actually defrauded by the scheme. In this it differs from the offense of obtaining money or property by false pretenses. Even though the drafts, the basis of the various counts in the indictment, were in fact accepted before the banks made advances on them, and even though such had been the usual course of business, it would not follow necessarily that the plaintiffs in error knew that acceptances would always precede advances, when they formed or designed the scheme, so as to exclude all idea that the plaintiffs in error anticipated that the bankers might rely upon the security of the bills of lading pending the time they made the advances and the time of acceptance. We think the jury were authorized to infer that the alleged false representations in the bills of lading were of a

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character calculated to deceive and defraud the bankers who advanced on the faith of them, and this though the bills of lading were security for the acceptance only, and not for the payment of the drafts.

If the plaintiffs in error devised a scheme to deceive by false representations the takers of the drafts as to a material fact, affecting the ability of the acceptors to pay the drafts, or affecting the value of the security accompanying them, or the regularity of the transaction evidenced by them, and which was calculated to deceive them and induce them to discount the drafts, when otherwise they would not have done so, we think a case would be made out under section 215 of the Criminal Code, though the plaintiffs in error believed, and had reasonable grounds for believing, that the drafts would be accepted and paid by the drawees. The bankers would have been defrauded by a false representation that induced them to believe they were getting something more secure than they actually got, and the forming of a plan to do this by means of false representations would be the devising of a scheme to defraud within the express terms of section 215.

The presentation to a bank for discount of a draft with a bill of lading attached well could be regarded as a request to cash, or make an advance on, the price of goods shipped, and as a representation that the drawee's acceptance would amount to a promise to pay for goods actually shipped and by the delivery of the bill of lading made subject to his order. The absence, without the knowledge of the discounting bank, of a real shipment would make the discounting of the draft the financing of what appeared to be a real movement of goods, but which in reality was a mere deceptive appearance of such a transaction. On the face of it the supposed actual shipment of goods is a basis for a credit or advance so obtained, it appearing that the drawers were parting with the goods called for by the bill of lading, and that the drawee by his acceptance would be promising to pay for goods in transit consigned to him or his order. The result of such operations was that what the drawers and drawees realized from them came from the discounting banks, and not, as it appeared, from staves owned, shipped, and received.

For these reasons we do not think the District Court erred in refusing to direct an acquittal.

[4] 3. The next assignment is based on a portion of the charge of the District Judge. The part complained of is as follows:

"But if the only reason or cause of their discounting of the draft was the reason that they believed that the goods had been shipped, as set out in the bill of lading, that would be a false pretense and a fraudulent scheme, and the mailing of the letters in furtherance of that would complete a federal offense."

Taken by itself, the part complained of may omit reference to some of the elements of the offense, and, by reason of the omission, appear to lay undue emphasis on the influence the representations had on the bankers; but the extract is not to be separated from its context, nor considered apart from the rest of the charge. When considered with the rest of the charge, we see no error in it.

[5] 4. The plaintiffs in error complain of the refusal of the District

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Judge to grant certain of their special requests to charge. We think the first, if abstractly correct, has no application to a case of alleged fraud based on false representations as to the shipment of goods contained in a bill of lading. The most visionary could not hope that merchandise not delivered to the carrier would reach the consignee. This was the gist of the scheme to defraud charged in the indictment.

We think requests numbered from 2 to 7, inclusive, were otherwise substantially charged by the court. They relate to the principle that the bills of lading attached to the drafts secured the acceptance and not the payment of the drafts, as was held in the case of National Bank v. Merchants' Bank, 91 U. S. 92, 23 L. Ed. 208.

Requests numbered 8, 9, and 10 predicated the guilt of the plaintiffs in error upon the belief of the jury that they entertained no reasonable expectation that the drafts would be paid when they procured their discount. We do not think they assert the law of this case.

[6] The eleventh request is to the effect that good character, when proven, might of itself generate a reasonable doubt of the guilt of plaintiffs in error. The District Judge charged fully upon the effect of evidence of good character in other respects. The plaintiffs in error rely upon the statement of the court in the opinion in the case of Edgington v. United States, 164 U. S. 361–366, 17 Sup. Ct. 72, 74 (41 L. Ed. 467), that "the circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing." What the court decided in that case was that the value of evidence of good character was not confined to doubtful or conflicting cases, or not to be considered by the jury "unless the other evidence left the mind in doubt," but that the weight of authority was to the effect that good character in any case, when considered in connection with the other evidence in the case, might generate a reasonable doubt. What the court said with reference to reputation for good character under some circumstances alone being sufficient to create a reasonable doubt, though without it the other evidence would be convincing, was said by way of argument, and not to announce a rule of law to be given in charge to the jury. We do not think that the trial judge was required to charge the jury in the language quoted from the opinion.

[7, 8] 5. (a) Exceptions to rulings on the evidence are relied upon for reversal. The District Judge permitted the government to introduce in evidence the books of account of the partnerships in which plaintiffs in error were partners. They were produced by the trustee in bankruptcy of the partnership, who had taken possession of them, as the books of the bankrupt firm. The plaintiffs in error objected to their use by the government upon the ground that they were compulsorily produced. The case of Johnson v. United States, 228 U. S. 457, 33 Sup. Ct. 572, 57 L. Ed. 919, 47 L. R. A. (N. S.) 263, holds to the contrary. Objection was also made to that part of the books which contained the personal accounts of the plaintiffs in error, upon the additional ground that such accounts were immaterial to any issue in the case. The plaintiffs in error contended that the money obtained on the irregular drafts all went into the business of the partnerships with

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which they were connected. We think the government had the right to show, by way of explanation, the amounts that were drawn out of the partnerships by the plaintiffs in error, the individual partners.

[9, 10] (b) The plaintiffs in error also complain of the admission in evidence of a cablegram addressed to one Medinger at Paris, and delivered by the plaintiff in error Carriere to the witness Lambert to be coded and transmitted to the addressee. The loss of the original message was proven, and a foundation laid for the introduction of the copy. The cablegram was sent three or four days after the failure of the firms in which the plaintiffs in error were partners, and directed the addressee, their Paris representative, to get some bills of lading issued by the Austro-American Steamship Company which were supposed to be in the possession of Marquand Gairard, son of the senior partner of B. Gairard Fils, and to destroy them as soon as received. It is true these bills of lading were testified to have been others than those set out in the indictments, and it was shown that the cablegram was sent at the instance of, and in an endeavor to protect, the Austro-American Steamship Company, yet it constituted an attempt on the part of the plaintiff in error Carriere to destroy evidence, and was admissible, certainly, as against him, for that reason. Upon the issue of fraudulent intent the evidence was not confined to the transactions set out in the indictments. Proof of the use of other bills of lading by plaintiffs in error, to cover which no goods were shipped, was competent upon this issue.

[11] (c) The bankers who testified for the government, and who had made advances, were asked whether they would have made advances on the drafts if no bills of lading had been attached to them, or if they had been informed that no goods were shipped to comply with the requirements of the bills of lading, and were permitted to answer in different ways that they would not have done so. The questions were objected to as being irrelevant and calling for expressions of opinion from the witness. In a prosecution under section 215 the government is not required to show that the fraudulent scheme devised was successful, or that the party intended to be defrauded was actually defrauded. It is enough for it to show that the scheme devised was one that was calculated to defraud. The evidence should be considered as directed to the issue as to whether the representations in the bills of lading were of a nature likely to deceive, and not to the issue as to whether the witness was in fact deceived by them in the instant case, as would have been the case if the prosecution had been for obtaining money by false pretenses. The witnesses were bankers, accustomed to dealing in drafts of like kind. Their evidence was, in effect, that bankers purchasing drafts drawn for the purchase price of merchandise, with bills of lading attached, would rely upon the genuineness of the bill of lading, and the representation that the goods had been shipped, as recited by it, in buying the drafts. This did no more than state the course of business among bankers in this respect, and was testified to by witnesses who were experts familiar with the customs of bankers in such matters. We think the evidence was material upon the issue as to whether or not the recitals of the receipt of the staves in the bills of lading were calculated

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to deceive purchasers of the drafts to which the bills of lading were attached, and that it was evidence of the effect of such recitals according to the course of business among bankers, rather than the mere opinion of the witness as to the effect of the representation upon him in a specific instance. But if the evidence called for by the questions objected to was subject to the objections made, the admission of it was not such error as would justify a reversal of the judgment. There was other unquestionably competent evidence to support a finding that banks applied to were likely to be influenced to discount drafts accompanied by bills of lading by a reliance on the bills of lading evidencing real shipments of goods. The other evidence disclosed by the record is such as to satisfy us that the exclusion of the testimony in question would not have resulted in a finding different from the one made. It is not reasonably supposable that, in the absence of that testimony, the jury would have failed to conclude from the other evidence adduced that the defendants would not have met with the same success in realizing on their drafts if it had been made known to the banks dealt with that the bills of lading accompanying drafts presented for discount did not represent any actual shipments of goods, and that the means of paying accepted drafts would be obtained from the same or other banks by discounting other subsequently drawn drafts, also accompanied by bills of lading which represented no actual movement of goods. It seems that it would not be going too far to say that it may be treated as a matter of common knowledge that credits or advances by banks based upon what appears to be actual movements of commodities in legitimate commerce would not be as readily obtainable if the falsity of the appearance of reality is made known when the credits or advances are applied for.

[12] (d) The witness Harris was permitted to testify that he personally did not expect to ship the staves when he drew the bills of lading, against objection that this was the statement of opinion of the witness. The answer of this witness was limited to his own expectation, and the context shows that it amounted to no more than a statement that he gave no instructions at the time he drew the bills of lading for the delivery of the staves for shipment. This appears from his testimony that "there had been shipments of staves made against the bill of lading drawn with a letter of guarantee." His testimony as to his own expectation, based on the fact that he had given no instructions to ship, was competent.

[13] (e) The same witness was permitted, against objection, to testify to a conversation between himself and the plaintiffs in error, in which he declined to accept a power of attorney from plaintiffs in error, assigning to them as his reason that he did not think the bills of lading were regular. This evidence tended to bring home prior notice to plaintiffs in error of the irregularities in the bills of lading, and was material upon the question of whether or not they intended to defraud.

[14, 15] (f) The plaintiff in error Carriere voluntarily testified in his own behalf. On cross-examination he was asked by the United States attorney as to the amount of accepted and unpaid drafts outstanding against B. Gairard Fils at the time of the failure of that firm, and also

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as to the financial condition of the Liverpool Stave Company, and was permitted to answer, against the objection that it was matter not brought out upon direct examination, and on which he could not be properly cross-examined. The witness had testified on his direct examination to facts tending to sustain the ability of the two firms mentioned to pay their acceptances. It was proper cross-examination to show the amount of such acceptances and any fact tending to throw light on the financial condition of either acceptors. The plaintiff in error having voluntarily offered himself as a witness, the waiver of his constitutional privilege was complete, and the extent and latitude of the cross-examination was a matter for the discretion of the District Judge. Diggs v. United States, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502.

[16] 6. The plaintiffs in error excepted to the closing argument of the District Attorney in two respects:

(a) Upon the comment of the District Attorney on the failure of the plaintiff in error Carriere to answer certain questions asked him on cross-examination to which objection had been sustained. The objections were based altogether upon the ground that the matter inquired about was not within the scope of direct examination of the witness. It is contended that comment on his failure to answer was in violation of his constitutional privilege.

In the case of Caminetti & Diggs v. United States, 242 U. S. 470–493, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, the Supreme Court, sustaining an instruction given by the District Court, that the failure of the defendant Diggs, who had taken the stand in his own behalf, to explain incriminating circumstances, might not only be commented upon by counsel, but might be considered by the jury, with all the other circumstances, as to his guilt or innocence, said:

"This instruction, it is contended, was error in that it permitted the jury to draw inferences against the accused from failure to explain incriminating circumstances when it was within his power to do so, and thus operated to his prejudice, and virtually made him a witness against himself, in derogation of rights secured by the Fifth Amendment to the federal Constitution.

"There is a difference of opinion expressed in the cases upon this subject, the Circuit Court of Appeals in the Eighth Circuit holding a contrary view, as also did the Circuit Court of Appeals in the First Circuit. See Balliet v. United States, 129 Fed. 689 [64 C. C. A. 201]; Myrick v. United States, 219 Fed. 1 [134 C. C. A. 619]. We think the better reasoning supports the view sustained in the Court of Appeals in this case, which is that where the accused takes the stand in his own behalf, and voluntarily testifies for himself (Act of March 16, 1878, c. 37, 20 Stat. 30 [Comp. St. 1916, § 1465]), he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.

"The accused of all persons had it within his power to meet, by his own account of the facts, the incriminating testimony of the girls. When he took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him."

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The District Court, therefore, did not err in permitting comment upon the failure of the plaintiff in error Carriere to answer material questions asked him on cross-examination, which he was prevented from answering by an objection interposed by his counsel upon the sole ground that they did not come within the scope of the direct examination.

[17] (b) The District Attorney's argument was also excepted to because he asked the jury what had become of the large amount of money, represented by the unpaid acceptances, and, answering his own question, said to the jury that he suspected some one of the defendants had gotten a large amount of money from the proceeds of the drafts. The contention of the plaintiffs in error is that this was in effect charging the plaintiffs in error with a separate offense—the concealment of assets from their trustee in bankruptcy. It is equally capable of being interpreted as an argument that the plaintiffs in error had gotten and disposed of the money before bankruptcy. The issue of what was done with the proceeds of the drafts, whether material or not, was treated as being material by both parties. The plaintiffs in error, through their counsel, attempted to show that all the proceeds of the drafts went into the stave business of the plaintiffs in error. The government, through the district attorney, argued that the plaintiffs in error individually benefited by the money, other than their benefit as members of the partnerships. There was evidence in the record from which the jury might have drawn either inference, and it was proper for the district attorney to support by argument the inference of individual appropriation. Whether plaintiffs in error derived benefit from the transactions individually or as partners seems unimportant upon the question of their guilt or innocence.

[18] 7. Complaint is made also of the overruling of the motion for a new trial, but the action of the District Judge on the motion is not subject to review by this court.

No error appearing in the record, the judgment of the District Court is affirmed.

TATUM v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Fifth Circuit. October 29, 1918.)

No. 3263.

1. RAILROADS ⟸305(2)—CROSSING ACCIDENTS—FRIGHTENING HORSE.
A petition setting up injuries when plaintiff's horse and buggy collided with defendant's train, which alleged defendant's flagman gave no warning until the horse was only a few feet from the tracks, when the flagman swung his flag directly before the animal, scaring it, etc., *held* to state a cause of action for negligence.

2. PLEADING ⟸214(1)—DEMURRER—ADMISSIONS.
A demurrer, for the purpose of the demurrer, admits as true the allegations of the pleading attacked.

3. PLEADING ⟸8(17)—CONCLUSIONS—NEGLIGENCE.
Negligence being the ultimate fact to be pleaded, and not mere conclusions of law, a declaration or petition charging defendant with an act

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injurious to plaintiff, with a general allegation of negligence, etc., is sufficient, at least against general demurrer, without setting forth the details of acts causing injury, unless they could not be negligent under any circumstances.

4. NEGLIGENCE ⊜56(1)—PROXIMATE CAUSE.
It is only when causes are independent of each other that the nearest becomes the causa proxima.

5. NEGLIGENCE ⊜136(9)—ACTIONS—JURY QUESTION.
In cases of doubt as to the existence of negligence, where it seems possible for reasonable men to reach more than one conclusion, the better rule is to leave the question of negligence to the jury.

In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Action by W. P. Tatum against the Louisville & Nashville Railroad Company. There was a judgment sustaining a demurrer and dismissing the petition, and plaintiff brings error. Reversed and remanded, with directions.

Reuben R. Arnold, of Atlanta, Ga., for plaintiff in error.

John L. Tye and Henry C. Peeples, both of Atlanta, Ga., and D. W. Blair, of Marietta, Ga., for defendant in error.

Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

SHEPPARD, District Judge. This is an action for damages for personal injuries to the plaintiff in error, due to a collision of plaintiff's horse and vehicle with defendant's train at the Main street crossing of the defendant's railroad in the town of Cartersville, Ga. There was a demurrer to the first petition, which was sustained, with leave to amend, which was done; the amendment not differing very materially from the averments of the original petition, except that the allegation in the fifth paragraph of the first pleading that "the horse took fright at an automobile and began to run towards the railroad crossing, near which the watchman flaunted his red flag, which caused the horse to shy to the right, striking a large rock, in connection with the smoke of a passenger train," is auspiciously "stricken."

In the amended pleading no allusion is made to an automobile scaring the horse, nor, indeed, that the horse was frightened, nor that the horse "in its fright had gotten completely beyond control of plaintiff," nor that "connection with the smoke of a passenger train" had anything to do with the collision.

In the last paragraph of the amendment, the plaintiff attempts to lay aside the "weights that doth so easily beset," by striking all allegations in the original petition which are "inconsistent with this amendment." To this method of pleading, we note in passing, the defendant properly complains under one assignment of its demurrer.

The second pleading, which is styled "Amendment to Declaration," omitting for the sake of brevity and perspicuity the argument and evidence with which it bristles, states in substance that plaintiff was driving a horse attached to a buggy on Main street in the town of Cartersville, towards the railroad crossing on said street; that Main street

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is straight for 250 yards in the direction from which plaintiff was approaching; that defendant maintained a watchman at said crossing, who had a clear view of the plaintiff the distance of 250 yards. One hundred and sixty feet from the crossing in the direction from which plaintiff was approaching was the intersection of Main and Public Square streets, the latter 90 to 100 feet wide. When plaintiff reached this street, the horse was going at a brisk trot, but under "perfect control," and could have been checked up or easily turned into Public Square. While plaintiff was traversing the street the said distance of 250 yards, plaintiff was in full view of the crossing, which was clear. The watchman, who was standing near the crossing, had a clear view of plaintiff's horse and buggy coming in his direction for a distance of 250 yards. The customary warning to persons of the approach of trains or danger was to step to the center of the crossing and to wave a red flag. While plaintiff was driving down toward the crossing the distance before mentioned, the watchman, facing in his direction, stood with his stop signal "down by his side," which was notice, if not an invitation, to the plaintiff that the crossing was clear. At that time the train approaching the Main street grade crossing could have been seen by the watchman a quarter of a mile away. Plaintiff's view of the track in the direction from which the train was coming was obstructed by buildings and box cars, and by the exercise of ordinary care he could not have known of the approaching train. The train gave no signal of its approach, and, notwithstanding the watchman's opportunity to signal plaintiff when he was as far as the intersection of Public Square street 150 feet away, or to have given him timely warning, he permitted plaintiff to approach within 25 or 30 feet of the crossing, when suddenly he sprang in front of the horse, violently gesticulating and waving a "huge red flag," which frightened the horse and caused it to swerve to the right 20 to 30 feet, where the buggy struck a large boulder, when the horse swerved again to the left and sprang onto the track, where the buggy was demolished by the passing train, from which plaintiff sustained his injuries.

Plaintiff alleges as concurrent acts of negligence, in addition to the foregoing, defendant's failure to observe the blow-post law of Georgia, a violation of the speed ordinance of the town of Cartersville, and failure to keep a lookout on the engine of the train. In view of the conclusion reached upon the negligent acts here summarized, only brief notice later need be taken of the concurrent acts of negligence.

[1, 2] Defendant demurred to the petition as amended, specifying many grounds, which altogether amount to a general demurrer, to the effect that the amended pleading stated no cause of action. The court sustained the demurrer and dismissed the petition, and this order is assigned here as error. The question, then, presented upon this assignment, is: Does the amended declaration state a cause of action? Do the acts of negligence alleged in the amended pleading, which for the purpose of the demurrer are admitted to be true, raise a question of fact which entitles plaintiff to the intervention of a jury?

[3] There is no hard and fast rule for pleading negligence. The general rule is well stated in 29 Cyc. 570:

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"A complaint or petition in an action for negligence must show negligence on the part of the defendant. * * * The rule sustained by the weight of authority is that, negligence being the ultimate fact to be pleaded, and not mere conclusions of law, a declaration or complaint charging defendant with an act injurious to plaintiff, with a general allegation of negligence in the performance of the act, is sufficient, at least against a general demurrer for want of facts, without stating details or particulars of the act causing the injury, unless the particular acts alleged are such that they could not be negligent under any possible state of facts or circumstances probable under the allegations of the complaint."

The instant declaration sets forth facts with unnecessary detail, but if the facts alleged are sufficient to make a prima facie showing of negligence against the railroad company, and unless the acts pleaded actually refute the charge of negligence, it is sufficient to warrant a submission of the facts to a jury to determine whether there was negligence. Then, if plaintiff has disclosed by his statement of the facts any acts or conduct on the part of the defendant's servants, showing negligence prima facie, it would seem, under the authorities, sufficient to withstand a general demurrer.

From a fair analysis of the amended declaration we find that the defendant company kept a watchman at the crossing in question to warn travelers of the approach of trains, and according to the declaration his sins and defaults were more serious because of the fact that they were more of commission than of omission. When we examine for the primary cause of the collision between the train and the horse and buggy, we are informed from the pleading that it was the frightened horse. What caused the horse to take fright? We ascertain likewise that it was the conduct of the watchman. In what respect? The frantic waving of the "red flag" before the horse's face.

It is a reasonable inference from the facts alleged that a horse under "perfect control," moving even at a brisk trot, could have been checked with the reins in the distance of 25 feet upon a timely signal to the driver. At least the averments of the amended petition would support a reasonable inference that the watchman failed to flag plaintiff, when he knew or ought to have known of the probable danger, when he saw plaintiff coming 150 feet away. According to the declaration, the watchman was, or should have been, cognizant of the approach of the train, and knew, or should have known, of the obstructions alleged to have obscured plaintiff's view of the track. The plaintiff, seeing the watchman at the crossing, could well have relied on him for warning, and the described attitude of the watchman while in clear view of the plaintiff's approaching vehicle may have been sufficient to have relieved plaintiff of the obligation to "stop, look, and listen."

A jury might conclude, from the facts disclosed by the declaration, that the demeanor of the watchman at his post of duty was an invitation to plaintiff to proceed with impunity to the point, at least, where the course of the horse was suddenly diverted, within 25 to 30 feet of the track. Even this distance away might have sufficed for stopping the horse, but what the watchman actually did, according to the story of the pleader, was extraordinary. After seeing the horse and buggy

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come down the street for 250 yards, the watchman waited until the animal was within 25 to 30 feet of the crossing to make a demonstration of warning, which, if the allegations are true, was well calculated to excite the horse beyond control, and render defendant responsible for the natural consequences of such fright. The act of the horse swerving back in the direction of the track after contact with an obstruction could not be said to be beyond the reasonable and legitimate consequences of such a stop signal. Can it be said, from the acts alleged, that the conduct of the watchman, under the circumstances, was that of a reasonably prudent person? If not, then the question whether there was negligence was one of fact, properly to be submitted to a jury.

[4] The swerving back of the horse onto the track by impact of the buggy with the boulder, after its direction was diverted, was a condition subsequent to the cause. It may be that the watchman's act produced the fright which necessarily set the cause of the collision in operation. It is only when the causes are independent of each other that the nearest becomes the causa proxima. Milwaukee, etc., R. Co. v. Kellog, 94 U. S. 469, 24 L. Ed. 256; Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395.

[5] Whether the conduct of the watchman, under the circumstances of the case, was that of a reasonably prudent man, in the exercise of ordinary care, we think was not a question of law, but of fact. We cannot say that a jury of reasonable men could reach but one conclusion upon the facts of this case. Even in cases of doubt as to the existence of negligence, the better rule, it seems, is to leave the question of negligence to a jury to determine. Richmond v. Powers, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; McDermott v. Severe, 202 U. S. 600, 26 Sup. Ct. 709, 50 L. Ed. 1162.

Without adverting to the concurrent causes of negligence alleged, since the case must be sent back, further than to say that negligence predicated on the violation of statutes and ordinances is generally facts for the jury (Grand Trunk v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485), we conclude that there are sufficient acts of negligence charged against the watchman to have warranted the submission of the facts to a jury.

If the defendant should apprehend embarrassment in the preparation of its defense, as indicated by the demurrer, by inconsistent allegations of the complaint or other matters not of substance, it is enough to say that special demurrers are available under the Georgia practice, by which the vice, if any, may be corrected in the trial forum.

The judgment below is reversed and remanded for further proceedings not inconsistent with this opinion. It will be so ordered.

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DOE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

Nos. 5196, 5197.

1. INDICTMENT AND INFORMATION ⟸99—DESCRIPTION OF OFFENSE—REFERENCE TO OTHER COUNTS.
That a count in an indictment is bad does not affect the propriety of references in other counts to facts stated therein to avoid repetition.

2. CRIMINAL LAW ⟸984—SENTENCE—LEGALITY.
Where a verdict of guilty is rendered upon all the counts of an indictment, and the sentence imposed does not exceed that which might properly have been imposed under any one count, the sentence is good, if any count is sufficient.

3. INDICTMENT AND INFORMATION ⟸110(3)—ESPIONAGE ACT—LANGUAGE OF STATUTE.
An indictment, under Espionage Act, tit. 1, § 3, for willfully obstructing the recruiting or enlistment service, is sufficiently specific, if it charges the offense in the language of the statute.

4. CRIMINAL LAW ⟸1036(8) — FEDERAL COURTS — REVIEW BY APPELLATE COURT.
It is within the sound discretion of the Circuit Court of Appeals to notice the claim of counsel for a convicted defendant that there was no evidence to sustain the verdict, although the question was not raised in the trial court.

5. ARMY AND NAVY ⟸40—ESPIONAGE ACT—WILLFULLY OBSTRUCTING RECRUITING SERVICE.
Evidence *held* sufficient to sustain a conviction for willfully obstructing the recruiting and enlistment service of the United States.

6. CRIMINAL LAW ⟸24—INTENT—PRESUMPTION FROM UNLAWFUL ACT.
A defendant must be presumed to have intended the legitimate and necessary consequences of his willful and deliberate acts.

7. ARMY AND NAVY ⟸40 — ESPIONAGE ACT—RECRUITING SERVICE — "OBSTRUCT."
The word "obstruct," as used in Espionage Act, tit. 1, § 3, making it an offense to obstruct the recruiting or enlistment service, should be given a broad meaning, and includes to hinder, impede, embarrass, and retard, in whole or in part.
[Ed. Note:—For other definitions, see Words and Phrases, First and Second Series, Obstruct.]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Criminal prosecution by the United States against Perley B. Doe. From a judgment of conviction, defendant brings error. Affirmed.

F. T. Johnson, of Denver, Colo. (S. H. Johnson, of Denver, Colo., on the brief), for plaintiff in error.

Harry B. Tedrow, U. S. Atty., of Denver, Colo.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

CARLAND, Circuit Judge. Doe was charged in two indictments, No. 3105 and No. 3106, with violating section 3, title 1, and section 3, title 12, Act of Congress June 15, 1917 (40 Stat. 217, c. 30). Each indictment contained three counts. The indictments were consolidated for the purpose of trial, and the defendant was found guilty upon each count, and a general judgment was entered on each indictment; the

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sentences of imprisonment to run concurrently. The indictment was attacked by demurrer and motion in arrest, on the ground that neither of the counts of the indictments stated facts sufficient to constitute an offense against the United States. The third count of indictment 3105 was in the following language:

"That said Perley B. Doe, on, to wit, November 26, A. D. 1917, at the city and county of Denver, in the state and district of Colorado, and within the jurisdiction of this court, the United States then and there being at war with the Imperial German Government, pursuant to a joint resolution of the Congress of the United States, approved by the President of the United States April 6, 1917, did feloniously and willfully obstruct the recruiting and enlistment service of the United States, to the injury of the said service, and to the injury of the United States, in that he, said Perley B. Doe, did then and there deposit and cause to be deposited in the post office of the United States at said city and county of Denver, and thereby cause the post office establishment of the United States to deliver to the Lutheran Church, South Logan and Dakota streets, Denver, Colorado, and divers persons to the grand jurors unknown, a certain circular, and circulars, which said circular and circulars were in words and figures identical with the words and figures of the statement set forth in the first count of this indictment, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The circular referred to in said count is as follows:

"In his war message, April 2, Wilson spoke of Germany's 'promise' to end the U-boat warfare. At Madison Barracks Lansing said: 'The immediate cause of war was the announced purpose of Germany to break its promise as to submarine warfare.'

"Germany never made any such promise. In the note of May 4, 1916, containing the so-called promise, Germany carefully stated that as to the future she must 'reserve itself complete liberty of decision.'

"For brief but adequate statement of diplomatic notes that led to war send to your Congressman for La Follette's speech of April 4, 1917, which was suppressed.

"Endless chain. Please write at least one copy and send this and that to friends of immediate peace."

[1] The fact that the first count may have been bad in no way affects the propriety of referring to it to save repetition. Blitz v. United States, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725; Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097.

[2] Where a verdict of guilty is rendered upon all the counts of an indictment, and the sentence imposed does not exceed that which might properly have been imposed upon conviction under any single count, such sentence is good, if any such count is sufficient. Claassen v. United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; Ballew v. United States, 160 U. S. 187, 197, 16 Sup. Ct. 263, 40 L. Ed. 388; Selvester v. United States, 170 U. S. 262, 267, 18 Sup. Ct. 580, 42 L. Ed. 1029; Hardesty v. United States, 168 Fed. 25, 26, 93 C. C. A. 417.

[3] Counsel for defendant urges that the count above quoted is bad, because it does not allege facts showing how or in what way the act of the defendant would obstruct the recruiting and enlistment service of the United States, and does not give the names of the particular persons who were affected by the conduct of the defendant. The offense charged is purely statutory, and the words of the statute contain all

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the ingredients of the offense. The count under consideration charges the offense in the language of the statute, and this is sufficient. Potter v. United States, 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214; United States v. Gooding, 12 Wheat. 460, 6 L. Ed. 693; United States v. Britton, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520; Burton v. United States, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392.

"The means of effecting the criminal intent, or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to go to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment." Wharton's Criminal Law, § 292; Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; May v. United States, 199 Fed. 42, 117 C. C. A. 420.

We think the count in question clearly apprised the defendant of what he must be prepared to meet, and showed with accuracy to what extent he might plead a former acquittal or conviction. Cochran v. United States, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704.

[4] The question of the sufficiency of the evidence to sustain a verdict of guilty on the count under consideration was not raised in the trial court during the trial, but we are asked to consider it, although not so raised. It is within the sound discretion of this court to notice the claim of counsel that there was no evidence to sustain the verdict of guilty, although this question was not raised in the trial court. Wiborg v. United States, 163 U. S. 632, 16 Sup. Ct. 1127, 41 L. Ed. 289; Clyatt v. United States, 197 U. S. 207, 28 Sup. Ct. 429, 49 L. Ed. 726; Crawford v. United States, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465; Weems v. United States, 217 U. S. 349, 30 Sup. Ct. 544, 54 L. Ed. 793; Sykes v. United States, 204 Fed. 909, 123 C. C. A. 205; Moore v. United States, 224 Fed. 95, 139 C. C. A. 651.

[5] We have decided to exercise our discretion in this case. The undisputed evidence showed that the defendant circulated the statement set forth in the indictment and several hundred others of similar import to German Lutheran and other churches of various denominations, professors in German colleges and other Universities, and individuals. Some of the cities to which the statements were sent were Boston, New York, Milwaukee, Denver, and San Francisco. A statement sent to Beth-Eden Church, Denver, Colo., closed with the words:

"We are forced to the endless chain to get the truth before the people. Will you help Truth, Free Speech, and Peace by writing and circulating one or many copies of this? Secret League of Patriots for Free Speech or Blood."

A statement sent to Benjamin Largent, Denver, Colo., opened with the words:

"By the greatest campaign of lies the world has ever known the young men of Germany and America are being made to hate and kill each other."

A statement sent to J. G. Marner, Denver, Colo., opened with the statement:

"By clever lies spread by war parties in all countries, the young men of the world are being duped into hating and killing each other."

The circulars, other than the one set forth in the indictment, were circulated about the same time as the former, and were offered for the

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purpose of showing intent. The defendant testified that his intent was only to establish the truth. On cross-examination the defendant admitted that in a letter to his sister, which was seized by the post office authorities, he had used the following language:

"You have seen the beautiful pictures in the post office labeled 'Great Opportunity to See the World. Enlist in the Navy.' The government deliberately entices its citizens, thoughtless boys for the most part, into the army and navy and then holds them in peonage."

Also:

"Our laws, recognizing that peonage is an abuse, makes it illegal everywhere else. In time of peace there is no excuse for it certainly in the military forces. To allow a young man of 18 to sell himself into slavery to slick-tongued recruiting officers is of course an outrage."

Also:

"I saw the prisoners in the naval prison at Charleston before it was moved to Portsmouth. Mere boys sentenced to two years in prison because they had left a job they did not like. It went to the heart of all of us, I think; the looks on the faces of some of those boys! I am sure that unjust punishment will make criminals of some. Others it will mark humiliated and broken for life. A crowd of us Postmen visited the prison together and there was a hush upon us as we went away. I for one swore (as Lincoln did) that if ever I were given power slavery would be abolished in our army and navy."

We think that a fair construction of the circular contained in the indictment shows that its author intended to convey the idea that, in so far as the United States based their declaration of war upon the announced purpose of Germany to break her promise as to submarine warfare, the United States was wrong, as Germany had never made any such promise. Such an argument would have a direct tendency to obstruct the recruiting and enlistment service of the United States. Whether a man shall enlist in the service of the United States is determined by the conclusion reached in his mind as to his duty to do so. Nothing would be more liable to prevent or obstruct an affirmative decision than the thought that his country was in the wrong.

[6, 7] The necessary and legitimate consequence therefore of the circular would be to obstruct the recruiting and enlistment service of the United States, and, the circular having been knowingly issued, the defendant must be presumed to have intended the necessary and legitimate consequences of his act. Moreover, looking outside of the circular to other evidence in the record, it appears beyond question that the defendant was engaged in the advocacy of principles which would necessarily obstruct the recruiting and enlistment service of the United States, and if such service was so obstructed it would be to the injury of the United States. The word "obstruct" should be given a broad meaning in order to carry out the undoubted intention of Congress. It has been uniformly held that the word as used in the statute means to hinder, impede, embarrass, and retard, in whole or in part, the recruiting and enlistment service of the United States.

The constitutional power of Congress to enact the legislation under which the indictment is drawn is so well established at this day as to need no discussion. The power to declare war is not to be turned into

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an empty phrase by limiting the power of the United States to make the war power effective.

The third count of indictment No. 3106 charged the defendant with using the mails and postal service of the United States for the transmission of the circular described by reference in the third count of indictment No. 3105. For reasons heretofore stated, this count was good, and, as the mailing of the circular was admitted, it followed as a matter of course, if the defendant was guilty under the third count of indictment No. 3105, he was guilty under the third count of indictment No. 3106, as the jury found. This state of the record sustains the judgment of the court on indictment No. 3106, and we need not discuss the other counts of that indictment.

There is one objection to the judgments on each indictment which was not assigned as error, but called to the attention of the court at the argument. It is this: The formal judgments entered each recited that the court found the defendant "guilty of the crime of obstructing enlistment service of the United States." Giving to this language the effect claimed for it, it would not affect the judgment as to the third count of indictment No. 3105, heretofore considered. We think, however, the language must be considered as surplusage. The jury found the defendant guilty, not the court; and, the judgment on each indictment being general, no inference ought to be indulged in that the court intended to limit its sentence to count 3 of indictment No. 3105 in the sentence on that indictment, or that it did not intend to impose any sentence under indictment No. 3106. It would be of no practical value to the defendant if his claim should be sustained, except as to the fine of $100, as the terms of imprisonment run concurrently.

There being no error with reference to the third counts of each indictment, the judgments below are affirmed; it being unnecessary to consider the objection with reference to the other counts of the two indictments.

It is so ordered.

ELGIN, J. & E. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. August 23, 1918. Rehearing Denied November 9, 1918.)

No. 2486.

1. INDICTMENT AND INFORMATION ⇐65—MATTERS OF EVIDENCE.
An indictment charging that a railroad company violated Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), by false billing, etc., assisting a shipper to obtain transportation at less than the usual rates, is not defective because it did not set out the waybills, for the waybills are mere evidence of the classification, etc.

2. CARRIERS ⇐38—REGULATIONS—VIOLATION—INDICTMENT.
An indictment charging that a railroad company violated Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), by assisting a shipper to obtain transportation at less than the regular rates, *held* not required to set forth the steps provided by law to fix a lawful rate of transportation, such as publishing and posting.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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3. CARRIERS ⊂⊃38—VIOLATION OF REGULATIONS—INDICTMENT.
As the regular rates to be charged must be made by the railroad company itself, an indictment charging a violation of Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), by assisting a shipper to obtain transportation at less than the regular rate, need not be amplified by setting forth the means or steps taken to adopt the rate.

4. CARRIERS ⊂⊃38—OFFENSES—INDICTMENT.
An indictment charging that a railroad company, in violation of Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), assisted a shipper to obtain transportation at less than the regular rate, is not defective, though alleging the rates departed from to be on paper, wood pulp, and strawboard boxes knocked down flat in carload, whereas the shipments charged did not specify that the boxes were knocked down.

5. CARRIERS ⊂⊃38—OFFENSES—INDICTMENT.
An indictment charging a violation of Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), by a railroad company, in that it assisted a shipper to obtain transportation at less than the regular rate, *held* not defective, as failing to set forth the manner or means whereby the shipper was assisted, etc.

6. CARRIERS ⊂⊃38—OFFENSES—INDICTMENT.
As a shipper is primarily responsible for freight charges, and the contracts for transportation were made by it, an indictment charging that a railroad company, in violation of Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), assisted the shipper to obtain transportation at less than the regular rates, was not defective for failure to allege that the shipper actually paid the freight.

7. INDICTMENT AND INFORMATION ⊂⊃202(2)—FORMAL DEFECTS—CURE BY VERDICT.
Defects in an indictment charging that a railroad company, in violation of Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), assisted a shipper to obtain transportation at less than the regular rates, etc., *held* mere imperfections of form, which, after verdict, were cured by Rev. St. § 1025 (Comp. St. 1916, § 1691).

8. CORPORATIONS ⊂⊃428(1)—KNOWLEDGE OF AGENT—IMPUTATION TO CORPORATION.
A corporation is not chargeable with knowledge of facts which become known to its agent, unless the agent in the line of his duty ought and could reasonably be expected to communicate the knowledge to his principal.

9. CRIMINAL LAW ⊂⊃1172(6)—APPEAL—HARMLESS ERROR.
A charge, in a prosecution against a railroad company for violation of Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), by assisting a shipper to obtain transportation at less than the regular rates, etc., that the railroad company was chargeable with all knowledge about the shipments that any of its agents might have, *held* harmless, if erroneous, where there was no evidence from which the jury might have imputed to the company knowledge of any agent whose knowledge was not properly attributed to it, etc.

10. CARRIERS ⊂⊃38—OFFENSES—EVIDENCE.
In a prosecution against a railroad company for violation of Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), by assisting a shipper, etc., to obtain transportation at less than the regular rates, evidence *held* sufficient to sustain the conviction, warranting an inference that the company knew the nature of the shipment.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

The Elgin, Joliet & Eastern Railway Company was convicted of violating Interstate Commerce Act, § 10, and it brings error. Affirmed.

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Kempes K. Knapp, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne, of Chicago, Ill., and Stanley Payne, for the United States.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. Plaintiff in error railroad company, herein called Company, was indicted for violation of section 10 of the Interstate Commerce Act.[1] Act Feb. 4, 1887, c. 104, 24 Stat. 382 (Comp. St. 1916, § 8574).

The indictment charges four shipments by the Carrier-Low Company, on each shipment four counts being predicated, which severally allege that the Company (a) by false billing assisted, (b) by false classification assisted, (c) by false billing suffered and permitted, and (d) by false classification suffered and permitted, the shipper to obtain transportation at less than the regular rates.

The several counts charge that the Company knowingly received at its Joliet, Ill., station for interstate shipment, initially over its railroad, cars of paper, wood pulp and strawboard boxes, which were falsely classified or billed as "strawboard," on which latter the regular rate of transportation was less than on the boxes.

The sufficiency of the indictment was attacked by a motion in arrest of the judgment which was rendered upon the verdict of the jury, the grounds alleged being that the indictment (1) fails to set out the instrument or entry alleged to constitute the false billing or false classification; (2) fails to allege facts necessary to the existence of any lawful rate charged to have been departed from; (3) fails to charge that the rate alleged to have been departed from was applicable to the shipments in question; and (4) fails to allege facts sufficient to charge that the shipper was assisted by the Company to obtain the transportation at the lower rate.

[1] The complaint under the first contention is mainly that the waybills for the shipments were not set out in the indictment. We do not regard the waybills themselves as the billing or the classification, but rather as evidence of it. The statutory offense charged consists in knowingly suffering and permitting, or assisting the shipper to procure, transportation at less than the regular rate. While it is essential that the means (the false billing or classification) be charged, it is not necessary that the indictment set forth evidence of the means.

[1] "Any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense."

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Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681. The allegations are that the defendant by "false billing" and by "false classification" assisted, or suffered and permitted, the shipper to obtain transportation at unlawful rates of the particular shipments set out in the indictment. While this sufficiently apprised the defendant of the nature of the charge it had to meet, yet if in the preparation of its defense it was necessary and proper that it be further advised respecting the waybills, a request for further particulars would in all probability have produced such further information thereon as the government possessed, and the defendant was entitled to have. Kirby v. United States, 174 U. S. 47, 19 Sup. Ct. 574, 43 L. Ed. 890; Durland v. United States, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 40 L. Ed. 606; Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390.

[2, 3] The second contention rests on failure to set forth the steps required by law to be followed to fix a lawful rate of transportation—such as publication and posting. We consider the allegations sufficient in that regard in charging that the regular rate established and then in force was as stated in the indictment, without setting forth the steps which were essential for the fixing of such rate. United States v. Miller, 223 U. S. 599, 32 Sup. Ct. 323, 56 L. Ed. 568. Besides, the regular rate as charged then to have been in force must by necessary inference be the rate made by the railroad company itself, and presumably it would know not only its own rates, but the steps it had taken to fix them; and the Company is manifestly at no disadvantage and under no hardship if the allegation in the indictment of the existence of the regular rate is not amplified by setting forth the means or steps taken to adopt it. Standard Oil Co. v. United States, 164 Fed. 376, 90 C. C. A. 364 (7th C. C. A.).

[4] The third objection proceeds upon the assumption that the indictment charges the rate departed from to be on "paper, wood pulp and strawboard boxes, knocked down flat, in carload lots," whereas the shipments charged did not specify that the boxes were "knocked down" or that they were carload lots. We regard this discrepancy immaterial, in view of the allegation that the defendant falsely billed and transported the shipment over the described route "at a total rate and charge of 7½ cents for each 100 pounds thereof, instead of 9 cents per 100 pounds (the amounts and destinations differing as to the several shipments), the regular rate and charge then established and then in force on the said railway route and line of transportation, for the transportation of the said paper, wood pulp and strawboard boxes, between Joliet aforesaid and Indianapolis aforesaid."

[5] Nor are we impressed with the fourth ground urged, viz. that the indictment fails to set forth the manner or means whereby the shipper was assisted or suffered to obtain the transportation at less than the lawful rate. In the language of the statute the Company was charged with assisting or suffering and permitting the shipper to obtain the transportation at less than the lawful rate, by means of false billing or classification. The shipments were described, car

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numbers given, and the lawful rate and the rate charged were both stated. One cannot well read the counts without concluding that they charge the shipments to have been made by and through procurement of the shipper; and while further particulars might with propriety have been stated, we believe the language of the Supreme Court in New York Central R. R. Co. v. United States, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. 613, is quite applicable here:

"An examination of the indictment shows that it specifically states the elements of the offense with sufficient particularity to fully advise the defendant of the crime charged and to enable a conviction, if had, to be pleaded in bar of any subsequent prosecution for the same offense."

[6] Hereunder it is further urged that the indictment fails to state that the freight was paid or to be paid by the shipper, and that hence the shipper did not obtain the transportation at the lower rate. If it were shown, as alleged, that through false billing or classification the Company knowingly and willfully suffered or assisted the shipper to obtain the shipments to be accepted and transported at the lower rate, it would not in our judgment affect the proposition if the shipper did not actually pay, or was not to pay, the freight charges. The goods being delivered for shipment by the shipper, and the contract for the shipment being made with and by it, the shipper obtains the transportation and is primarily liable for the freight charges, regardless of his contractual relations with his consignee governing the ultimate payment thereof. The interest of the shipper to secure for its patrons transportation at rates at least as low as those enjoyed by the patrons of any competitive shipper affords a strong inducement to the shipper to procure transportation at lowest obtainable rates.

[7] We are satisfied, not only that the indictment is sufficient, but also that the imperfections alleged against it are as to matters of form which in no manner prejudiced the defendant, and, after verdict, are cured by the operation of section 1025 of the Revised Statutes (Comp. St. 1913, § 1691).

The various errors assigned and discussed, predicated on rulings upon admission and rejection of evidence, are in the main based upon the want of proper allegations in the indictment involving substantially the same propositions we have considered. The disposition of these contentions respecting the sufficiency of the indictment disposes likewise of the claims respecting the admissibility of these various items of evidence—the bills of lading and the like. We regard them as evidence proper to be admitted under the allegations of the indictment, and not requiring specific allegations thereof in the indictment to render them admissible.

[8, 9] The charge to the jury respecting the Company's knowledge of the false classification and underrating of these shipments is seriously complained of. It is as follows:

"Now, it is the rule that where as in this case there is an inquiry as to the knowledge of a party respecting a situation or a subject-matter, the rule is that the defendant is chargeable with all knowledge about it that any and all of its agents, officials and employés have about the thing they are dealing with in the line and course of their dealing for the defendant upon

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the subject-matter. So in this case, in determining the question of what knowledge the defendant had as to the real character of the several shipments, you will consider all the information which the evidence shows all of the defendant's officers, agents and employés had upon that subject, and if you find that collectively they all had information which if all in the hands or in the brain of one man would amount to knowledge of the fact of the real character of the shipments that were going forward, and that despite that fact the wrong rate was given to it, your verdict will be guilty."

A substantially similar charge was approved by the Sixth Circuit Court of Appeals in a case where the railroad company charged with violation of the same act had at hand the actual records from which it appeared that a shipment of lumber, which, in order to obtain thereon the lower through tariff rate, was falsely represented to be, and was accepted as, through freight, whereas in fact it was not such. Grand Rapids R. R. Co. v. United States, 212 Fed. 577, 129 C. C. A. 113; also in Michigan Central R. R. Co. v. United States, 246 Fed. 353, 158 C. C. A. 417, where the controlling facts are very similar.

It would seem that, as stating a rule of general application, the charge is too broad, and that under some circumstances it would be error to give it. For instance, if in the case before us there were evidence that a car repairer or track hand or other like employé of the company actually saw the contents of the cars in question before they were billed out, and knew they contained strawboard and not paper boxes, the jury under such a charge would be required to find that this knowledge of such an employé was knowledge of the Company. But in the nature of things the knowledge of such an employé, who has no function whatever with respect to receiving or classifying freight, and no concern whatever with shipments or rates or tariffs, and no occasion, purpose or duty to communicate to his employer such incidental knowledge thus coming to him, would not ordinarily be the knowledge of the Company. A corporation is not chargeable with knowledge of facts which become known to its agent, unless the agent in the line of his duty ought and would reasonably be expected to communicate the knowledge to his principal. Neal v. M. E. Smith Co., 116 Fed. 20, 54 C. C. A. 226; Korn v. Chesapeake & Ohio Ry. Co., 125 Fed. 897, 62 C. C. A. 417; Reed v. Munn, 148 Fed. 737, 80 C. C. A. 215; Mechem on Agency (1st Ed.) §§ 718–721; Tiffany on Agency, p. 262.

We have searched the record here narrowly, but vainly, for an instance where the jury, under this charge, might have imputed to the Company knowledge of any agent whose knowledge was not lawfully and properly attributable to his principal. It nowhere appears that any one connected in any capacity with the Company saw the contents of these particular cars before they were shipped, or was specifically told what they contained. The conclusion of the Company's knowledge of the nature of the shipments is not based upon what appears specifically with reference to the particular shipments, but rather upon the general course of dealing between the Company and this shipper, as to which course of dealing it seems plain to us from the record, there can be no question of the Company's knowledge; and in passing thereon the charge could not possibly have misdirected or misled the jury. There being no evidence in the record to which the

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charge could have been applied with resultant prejudice to plaintiff in error, its giving worked no harm.

[10] This brings us to the contention that in no event does the evidence warrant the inference of the Company's knowledge that these cars contained the alleged paper boxes and not strawboard. Under the record herein, the jury might have found that the Company did a large freight business at Joliet, where there were many manufacturers, among them this shipper which sent over this railroad an average of a carload of freight weekly; that the shipper had for some years been engaged in manufacturing paper boxes at Joliet, and that the Company, in its advertising matter for soliciting freight business, enumerated the industries at Joliet, describing this one as a manufacturer of paper boxes, and that the Company well knew that this shipper was engaged only in the business of making paper boxes, and that its outgoing freight business was the shipment of such boxes, made up or "knocked down," mostly in carload lots; that the shipper began to bill out its product as "strawboard," and that soon representatives of the Western Weighing and Inspection Bureau (established by the railroads generally for properly classifying freight shipments) contended that these shipments should be classified as "paper boxes knocked down," which classification carried a higher freight tariff rate; that while at first it was decided that the shipments were entitled to the lower rate, it was afterwards determined that the shipments were not "strawboard," but were paper boxes, and that the higher rate applied; that for a year or more after such determination, the shipper nevertheless continued to prepare its bills of lading, giving the shipments the classification of "strawboard," and to so tender its shipments to the Company, whose regular agents signed the bills accordingly, and the freight was forwarded; that during all such time the representatives of the Western Weighing and Inspection Bureau frequently protested to the Company at its Joliet freight office against the classification of the shipments as "strawboard" and its corresponding rate, and in case of such protests the particular shipments protested against, to the knowledge of the Company, would be "set up" to the "paper box knocked down" classification and the rate advanced accordingly, to which "setting up" the shipper in each case acceded without protest; that some of the time the complaint and the "setting up" occurred at the destination; that in obtaining rates for shipping, the shipper usually asked the Company's Joliet freight representative for rates to a given destination on "strawboard" and on "paper boxes knocked down," but that during the time in question it never tendered for shipment any such freight as "paper boxes," but always as "strawboard," and the Company continued to receive and classify and bill out and forward these shipments as such; that at the Company's Joliet freight office, out of the hundreds of carloads shipped daily, the "setting up" was extremely rare, so that a very considerable proportion of the shipments of which complaints were made, resulting in the "setting up" of the shipments, were the shipments of this one shipper; that the complaints as to these shipments became so numerous, requiring in each instance the holding up of the shipment and the "set-

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ting up" of the classification and rate, that it became a nuisance to the Company, and after a year or more of such practice the Company for the first time requested the shipper to discontinue the shipments as "strawboard," whereupon the practice ceased; but that during the continuation of the practice the shipments of the "paper boxes knocked down" in question were tendered, and by the Company billed, classified, and forwarded, and were paid for, at the lower "strawboard" rate; that there were a number of railroads at Joliet engaged in sharp competition with the Company for freight business, soliciting this shipper, which likewise gave them business, tendering to them also its shipments as "strawboard," which were so accepted and billed and submitted to the "setting up" wherever discovered and insisted upon.

From these facts we cannot say the jury was not warranted in concluding, as it probably did conclude, that the Company, to obtain, hold, or extend its business with this shipper, was entirely willing that this product, though known to the Company to be paper boxes, should be presented for shipment as "strawboard," and be classified and billed accordingly, and if the shipment went through under such classification and corresponding rate, well and good; otherwise it would be "set up," and the regular and higher tariff rate applied. If the jury did so conclude, and presumably it did, it needs no further demonstration to justify the ultimate finding that the Company knowingly and willfully, through false billing, or false classification or both, assisted or suffered and permitted the shipper to obtain transportation at less than the regular rate.

The judgment is affirmed.

L. P. LARSON, JR., CO. v. WM. WRIGLEY, JR., CO.

WM. WRIGLEY, JR., CO. v. L. P. LARSON, JR., CO.

(Circuit Court of Appeals, Seventh Circuit. July 30, 1918.)

Nos. 2498, 2500.

1. TRADE-MARKS AND TRADE-NAMES ⟸3(4)—SUBJECT-MATTER.
The word "Spearmint" is a common noun, denoting flavor, and is not susceptible of appropriation as a trade-mark.

2. TRADE-MARKS AND TRADE-NAMES ⟸59(5)—INFRINGEMENT.
The word "Peptomint" is so different in appearance and sound that it would not infringe "Spearmint," were it a proper trade-mark.

3. TRADE-MARKS AND TRADE-NAMES ⟸93(3) — UNFAIR COMPETITION — EVIDENCE.
Evidence *held* insufficient to show that defendant, a rival gum manufacturer, which sold its product under the name "Peptomint," was guilty of unfair competition towards complainant, which sold its gum under the name "Spearmint."

4. TRADE-MARKS AND TRADE-NAMES ⟸84—RELIEF—FRAUD.
Where complainant, who sued for unfair competition and infringement of trade-mark, attempted to deceive the court and oppress his opponent, that was sufficient ground for denying him equitable relief.

5. EVIDENCE ⟸265(7)—JUDICIAL ADMISSIONS—ACCEPTANCE.
While a litigant has no cause to complain if the court accepts his solemn and sworn admissions in pleadings and testimony as true, his

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adversary cannot compel the court to do so, for, if that were possible, a court could be forced to decide moot, feigned, and collusive cases, etc.

6. EVIDENCE ⟨⟩265(7)—JUDICIAL ADMISSIONS—ACCEPTANCE.

In a real and legitimate controversy, a party should be left bound by his averments in pleadings and his admissions in testimony, unless the court can find an absolute demonstration from other evidence, or from facts within judicial notice, that the averments and admissions could not be true.

Appeals from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Bill by the William Wrigley, Jr., Company against the L. P. Larson, Jr., Company, together with another bill by the same complainant against the same defendant, which counterclaimed. The first bill was dismissed, and complainant appeals; while the second bill and counterclaim were dismissed, and defendant appeals—the appeals being consolidated. First decree affirmed, and that part of the second decree dismissing the counterclaim reversed, with directions.

Certiorari denied 248 U. S. —, 39 Sup. Ct. 22, 63 L. Ed. —.

James R. Offield, of Chicago, Ill. (Charles K. Offield, of Chicago, Ill., of counsel), for Wm. Wrigley, Jr., Co.

Charles H. Aldrich, Frank F. Reed, and Edward S. Rogers, all of Chicago, Ill., for L. P. Larson, Jr., Co.

Before BAKER and ALSCHULER, Circuit Judges, and LANDIS, District Judge.

BAKER, Circuit Judge. In No. 2500 Wrigley Company appeals from the final dismissal of its bill against Larson Company for alleged unfair competition and infringement of trade-mark.

[1, 2] "Spearmint" was counted on as a trade-mark and was charged to be infringed by "Peptomint." First. "Spearmint" is a common noun, denoting flavor, and is therefore not susceptible of appropriation as a trade-mark. Second. "Peptomint" is so different in appearance and sound that there would be no infringement, even if "Spearmint" were a proper trade-mark.

[3, 4] Respecting unfair competition, an inspection of the packages discloses some marked dissimilarities. On the display side of the one "Wrigley's Spearmint Pepsin Gum" are the prominent words; on the other, "L. P. L. Peptomint Gum." "Spearmint," specially emphasized, is printed on the shaft of a spear, lying horizontally along the middle of the label. "Peptomint," specially emphasized, is printed on a straight-line banner, running obliquely from lower left to upper right, and laid upon a circle in the middle of the label. These differences, when the labels are placed side by side, are very striking. But there are also striking similarities. Both packages severally contain 5 sticks of gum, done up in pink wrappers, which protrude at each end some distance beyond the label wrappers. Both labels are done on white paper with red and green printers' inks. Spear shaft and head are green, and thereon "Spearmint" shows in large white letters. Larson Company's banner is green, and thereon "Peptomint" shows in large

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white letters. "Wrigley's" above the spear and "Pepsin Gum" below are printed in red. Larson's circle is red. In segments above and below the banner "L. P. L." and "Gum" appear in white on the red background. Both labels bear sprigs of mint in green.

If the case were to be disposed of by the foregoing comparison, the finding might well be that the similarities so overbear the differences that the casual purchaser might be misled by the common color and printing scheme; and such was the view of the learned District Judge in granting a pendente lite injunction on the sworn bill and exhibits.

But at the final hearing other facts appeared, which may be briefly summarized as follows: In gum making before Wrigley's time it was common practice to form sticks of the size and shape now used by Wrigley and Larson; to wrap the sticks in pink paper; to put 5 sticks in a package; to put 20 packages in a box; to tie each package of 5 pink sticks with a counterband of white paper; to use red and green printers' inks on the white counterband; to display the maker's name and "Gum" or "Pepsin Gum" in red letters; and, if the flavor was of the mint order, to print the name denoting flavor in white on a green design or in green on a white design. And on the package of this general style Wrigley was not the first to apply "Spearmint" as a display word of special emphasis. That had been done by Pulver years before Wrigley came on the scene. So there was nothing that Wrigley did not take from others, except his own name and the spear as the design on which to spread the word "Spearmint."

Wrigley, of course, knew these facts, and also the inside story of his suit against Pulver. According to the final decree in that case, Wrigley, not Pulver, was the originator of the "Spearmint" package. But the decree was not entered until Wrigley owned both sides of the lawsuit. He gave Pulver $100,000 in cash and $150,000 in notes running one to five years. If Pulver should fail to keep still, there might be trouble in collecting the notes remaining unpaid. It was Larson's persistent digging that unearthed this hidden story.

Wrigley's oppression of his opponent and his attempt to deceive the court were ample grounds for refusing him relief in equity; and in the strict law, when Wrigley is limited, as he must be, to his own name and the spear design for displaying "Spearmint," Larson is not liable for using his own initials and the oblique banner across the circle for displaying "Peptomint."

[5] In No. 2498, the record came here first; but it presents a later controversy. Larson, while under the pendente lite injunction against his "Peptomint" package, brought out his "Wintermint" brand. Wrigley sued him as an infringer of "Wrigley's Doublemint" package. On final hearing Wrigley's bill was dismissed for want of equity, and Wrigley has acquiesced.

Wrigley's bill described the packages and averred that confusion had arisen and was bound to continue. This was fortified by the opinion testimony of Wrigley and another officer of his company. Larson, in his answer and counterclaim, fully accepted Wrigley's position as to similarity and confusion, denied that "Wrigley's Doublemint" was the elder, and averred that Wrigley had deliberately brought out "Double-

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mint" to undermine Larson's established and growing trade in "Wintermint." The evidence proves with certainty that "Wintermint" was seven months older than "Doublemint." A reasonably clear inference from facts in the record is that Wrigley was acquainted with the "Wintermint" package before adopting his "Doublemint" package.

But, in support of the counterclaim, no proof was made of actual confusion. Counsel, however, contend that an inference to that effect may be drawn from Larson's testimony that after "Doublemint" appeared his sales of "Wintermint" materially decreased. True, but a falling off in business may result from fair as well as from unfair competition.

Insistence comes to be centered on the proposition that the trial court was not at liberty to determine the question of actual or probable confusion from a comparison of the packages and from the lack of direct testimony, but was bound to take that issue as settled by Wrigley's averments and admissions in court; and counsel cite many cases as supportive of their contention.[1]

Undoubtedly a litigant has no cause for complaint if the court accepts his solemn and sworn admissions in pleadings and testimony as true. But we must reject the contention that his adversary has the right to compel the court to do so. Otherwise a court could be forced by parties to decide moot, feigned, and collusive cases, or a chancellor might be made to proceed with an equitable accounting between partners who had stolen the property they brought into court.[2] But the present case on the counterclaim is not moot, nor feigned, nor collusive, and it presents a question of Larson's legitimate property rights.

In the "Wintermint" package the sticks of gum are wrapped in green paper; also in the "Doublemint" package. Both have counterbands of white paper bearing words and devices in red and green printers' inks. To a casual glance the packages seem alike in some degree. But the differences are noticeably prominent. "Wintermint" is displayed

[1] Sullivan v. Colby (C. C. A. 7th) 71 Fed. 460, 464, 465, 18 C. C. A. 193; 10 R. C. L. 701, 702, sub. "Estoppel," where the authorities are cited as follows: Sutherland v. Sutherland, 102 Iowa, 535, 71 N. W. 424, 63 Am. St. Rep. 477; Tarbell v. Royal Exchange Shipping Co., 110 N. Y. 170, 17 N. E. 721, 6 Am. St. Rep. 350; Morrison v. Atkinson, 16 Okl. 571, 85 Pac. 472, 8 Ann. Cas. 486, and note. Vide Appeal and Error, 2 R. C. L. 183 et seq.; Balloch v. Hooper, 146 U. S. 363, 13 Sup. Ct. 128, 36 L. Ed. 1008; Northern Pac. Ry. v. Paine, 119 U. S. 561, 7 Sup. Ct. 323, 30 L. Ed. 513; Kansas R. Co. v. Morton, 61 Fed. 814, 10 C. C. A. 12; Central R. Co v. Stoermer, 51 Fed. 518, 2 C. C. A. 360; Clark-Montana R. Co. v. Butte & S. Copper Co. (D. C.) 233 Fed. 547; Historical Pub. Co. v. Jones Bros. Pub. Co., 231 Fed. 638, 145 C. C. A. 524; Morton v. Clark, 181 Mass. 134, 63 N. E. 409; Loughridge v. N. W. Ins. Co. 180 Ill. 267, 54 N. E. 153; Standard Brewing Co. v. Bemis Malting Co., 171 Ill. 602, 49 N. E. 507; Leeds v. Townsend, 228 Ill. 451, 81 N. E. 1069, 13 L. R. A. (N. S.) 197.

[2] Everet v. Williams, section 94, note, Lindley on Partnership (5th Eng. Ed.); Evans v. Richardson, 3 Merivale, 469; Richardson v. Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; Bartle v. Nutt, 4 Pet. 184, 7 L. Ed. 825; Coppell v. Hall, 7 Wall. 542, 19 L. Ed. 244; Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539; Fowle v. Spear, Fed. Cas. No. 4996; Heath v. Wright, Fed. Cas. No. 6,310; Kohler v. Beeshore, 59 Fed. 572, 8 C. C. A. 215; Uri v. Hirsch (C. C.) 123 Fed. 568; Fetridge v. Wells, 13 How. Pr. 388; Simmons v. Mansfield Drug Co., 96 Tenn. 84, 23 S. W. 165.

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on Larson's oblique banner; "Doublemint," on the shaft of a spear having a head at each end. And the name of the maker in each case is given emphasis: "Larson's Wintermint," "Wrigley's Doublemint." From a comparison the learned District Judge found that the distinctive words and marks were so dominating that the careless purchaser, desiring "Larson's Wintermint," would not be misled into taking "Wrigley's Doublemint."

[8] With nothing before us but the packages, we would be inclined to concur in the finding. But the record contains also Wrigley's averment in his bill that confusion had arisen. There was no proof to support that averment and Larson's parallel averment. But Larson's counsel may have relied on the stipulation of fact in bill and counterclaim to save hunting up and bringing in witnesses of wrongful sales. Furthermore, Wrigley and another interested with him gave testimony as experts in the gum business that confusion was likely to result from the similarities; and so there is a basis for at least the possibility that Wrigley's averment of fact and his expert opinion may be true, and that Larson's diminished sales came from Wrigley's simulation of the "Wintermint" package.

In such a situation, the rule, in our judgment, is this: In a real and legitimate controversy, a party should be left within the knot of his averments in pleadings and admissions in testimony, unless the court can find an absolute demonstration from other evidence in the case or from facts within judicial notice, like the laws of physics, etc., that under no circumstances could the averments and admissions be true. This is in analogy to the rule respecting the sustaining of a demurrer to a bill for infringement of a patent on account of the invalidity of the patent on its face. Westrumite Co. v. Commissioners, 174 Fed. 144, 98 C. C. A. 178; Lange v. McGuin, 177 Fed. 219, 101 C. C. A. 389.

In No. 2500 the decree is affirmed.

In No. 2498 the part of the decree that dismisses the counterclaim of Larson Company is reversed, with the direction to enter an injunction and order an accounting.

TEVANDER et al. v. RUYSDAEL.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1918.)

No. 2554.

1. PARTNERSHIP ⊂=104—ACTION BETWEEN PARTNERS—NATURE OF SUIT.
A suit, in view of pleadings, evidence, and findings, *held* not one to dissolve a corporation, but one within the power of a court of equity, to reestablish the status prior to fraud.

2. PARTNERSHIP ⊂=311(5)—CONTRACT TO DISSOLVE—FRAUD—EVIDENCE.
Evidence *held* to warrant finding of fraudulent representations, relied on, justifying rescission of the executed agreement between plaintiff, a young woman without business experience, and defendant, sole business manager, who had been partner of plaintiff's husband up to his death, for dissolution of partnership between them, organization of a corporation, and transfer to it of partnership assets.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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3. PARTNERSHIP ⟸311(5)—CONTRACT TO DISSOLVE—FRAUD—NATURE OF REPRESENTATIONS.

Representations whereby defendant induced plaintiff to agree to dissolution of equal partnership between them, organize a corporation with the controlling share in defendant, and transfer to it the partnership assets, while some of them were promissory in character, being in substance a statement of defendant's state of mind towards plaintiff, which, if true, would have made the change immaterial, being false, to her prejudice, were representations of facts.

4. PARTNERSHIP ⟸311(5)—CONTRACT TO DISSOLVE—FRAUDULENT REPRESENTATIONS—CARELESS RELIANCE.

A young inexperienced woman *held* not careless in relying on the representations of her partner, the sole business manager, former partner of her deceased husband, for falsity of which she seeks rescission of her agreement with him for dissolution of the partnership, organization of a corporation in which he should have the controlling share, and transfer to it of the partnership assets.

5. PARTNERSHIP ⟸311(4)—PRIVATE DISSOLUTION AND SETTLEMENT—FRAUD—LACHES.

Plaintiff *held* not guilty of laches in bringing suit for rescission of her agreement for dissolution of partnership with defendant, organization of a corporation in which he should have the controlling share, and transfer to it of partnership assets, much of the most convincing proof of the fraud not coming to light till a few months before suit.

6. PARTNERSHIP ⟸311(5)—CONTRACT TO DISSOLVE—AVOIDANCE FOR FRAUD—PARTNERSHIP AGREEMENT.

On avoidance for fraud of contract for dissolution of partnership, the partnership agreement, providing that all patents and inventions of either partner shall belong to the partnership, governs rights of the parties, and patent taken out by one of them is properly adjudged to belong to the partnership.

7. PARTNERSHIP ⟸83—AGREEMENT FOR COMPENSATION—EFFECT OF FRAUD.

Absolute right of a partner to 20 per cent. of profits as compensation as business manager, under agreement of copartner that he should have this for faithful services, is avoided by his attempt to defraud copartner.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by Eleanor M. Ruysdael against Olof N. Tevander and others to establish a relation of partnership, recover assets, dissolve such partnership, appoint a receiver, etc. Decree for plaintiff, and defendants appeal. Affirmed.

Appellee sought and secured a decree holding the incorporation of the Standard Cap & Seal Company as for naught, decreeing the relations between Tevander and herself to be those of a partnership, decreeing that the partnership be dissolved, ordering an accounting with Tevander, adjudging that certain patents standing in the name of Tevander be assigned to the partnership, and ordering a distribution of the assets between the parties.

Appellant Tevander and the deceased husband of appellee entered into a partnership to conduct the manufacture of a machine for making seals for capping bottles, the business name being Tevander & Co. Mr. Manierre acquired his half interest in this partnership on June 21, 1910, for which he paid $5,500. The business was very successful. Appellee became a partner shortly after her husband's death, October 7, 1912, her position being the same as that of her deceased husband. Tevander, who was made the active manager immediately thereafter, received a salary of $5,000 per year, which in 1914 was increased to one-fifth of the net earnings, with a guaranteed minimum of $6,000.

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In January, 1915, the corporation, Standard Cap & Seal Company, was formed under the laws of Illinois, with a capital stock of $50,000, of which Tevander took 251 shares and appellee 249, issued in exchange for the assets and good will of the copartnership, Tevander continuing in the active management of the company. Upon the execution of the formal assignment of the business assets and good will of the copartnership to the corporation, the parties, by a written agreement, canceled the contract of partnership.

During the last year of the copartnership the profits, after deducting Tevander's 20 per cent., amounted to about $45,000. Immediately upon incorporation, with the consent of a nonstockholding director, Tevander reduced the cash dividends to 10 per cent., secured in his own name patents in which appellee claimed an interest, drew as his salary for 1915 the sum of $21,274.40 and for 1916 $33,359.22.

Although a director, and to a certain extent controlling the second director, who held no stock, Tevander endeavored to sell to the corporation the new patent standing in his name.

In the articles of copartnership it was agreed that "all patents and inventions of either partner shall belong to the partnership, and at the time of the application shall be assigned to the partnership. No partner has a right to grant a license, sell, assign, or reassign any patent or invention without the written consent of the other."

Appellee testified that at the time the agreement to organize the corporation was entered into she asked Mr. Tevander about the title to inventions, to which Mr. Tevander replied: "Of course, anything I invent along the lines of the business will belong to the company. The law takes care of this and there is no use writing it down."

The District Court made specific findings covering all of the issues, and all of them were favorable to appellee. Among other things the court found:

"(7) During the existence of the partnership between Tevander and plaintiff, Tevander formed a plan to eliminate plaintiff from the half ownership in these new inventions, and the patents therefor, when they should issue, to which she was entitled under the terms of the partnership agreement, by inducing her to terminate the copartnership then existing between them, by transferring all the assets thereof to a corporation; planning and intending to withhold from plaintiff all information concerning the new invention and device, and to withhold application for patents therefor until after the termination of the partnership and the transfer of the assets to the corporation.

"(8) During the month of January, 1915, and prior to the 22d day thereof, Tevander, designing to cheat and defraud plaintiff, conceived the scheme of inducing her to consent to the incorporation of the business, planning to induce her to give him one extra share of stock in the corporation which he planned to organize, intending to use the control thereby given him in the selection of a board of directors, a majority of whom would do his bidding, so that by refusal to declare dividends he might so reduce plaintiff's income as to make her dependent upon his will, and by these means and other cunning devices so discourage and harass her as to force her to part with her interest at a figure far below its real value.

"9. With the foregoing designs Tevander represented to plaintiff that the business was assuming such proportions that the copartnership could be carried on more conveniently and with greater profit as a corporation; that the business of the copartnership could go on as before, but, as to the extra share to be given him, this was merely to enable him to have his own way with the management, and to protect him in event of her death, remarriage, or sale of her interest against evilly disposed persons who might set out to wreck the business for the purpose of robbing him of his interest therein; that he would treat her as he always treated her; that, so long as she remained his partner in the business, he would consider he held this extra share as much for her benefit as for his own; that her income would not be reduced. On the other hand, Tevander threatened that unless she would assent to his wishes he would bring suit to dissolve the copartnership; that no one but himself understood the business or would desire to purchase it; that the result of such suit would be the sale of the business at a price far

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below its real value; that in the event of such sale she would realize very little for her interest; all of which representations were false and fraudulent and made by Tevander with the fraudulent designs aforesaid.

"(10) By the foregoing and divers other cunning persuasions, promises, and threats which, at the time of making them, he did not intend to fulfill or perform, and which were made for the purpose of cheating and defrauding and for the purpose of eliminating plaintiff from any ownership in his new inventions when they should have been perfected and patented, Tevander induced plaintiff to consent to the organization of a corporation, to be managed by three directors, who need not be stockholders, and to transfer to him, at the nominal consideration of $250, one extra share of stock which would otherwise belong to her, when the real value thereof was largely in excess of this price."

Additional specific findings necessary to sustain appellee's bill were made.

As conclusion of law the court found:

"(26) By reason of the fraud practiced by Tevander upon plaintiff, the assignment of the assets of the copartnership on February 22, 1915, to Standard Cap & Seal Company, and all subsequent assignments of the assets of the copartnership to the corporation, and the cancellation and termination of the agreement of copartnership indorsed upon the written agreement thereof (attached to bill of complaint herein as Exhibit 2), and the contract entered into between plaintiff and Tevander, January 27, 1915 (attached to the bill of complaint as Exhibit 3, providing for the payment to Tevander of 20% of the net profits per annum as and for salary), were at the time of their several executions void and of no force or effect, and the oral agreement of copartnership entered into between plaintiff and Tevander in October, 1912, and confirmed by the written agreement of copartnership entered into October 31, 1914, has continued in full force and effect until the date hereof, and the patents for the new closure and closure-applying machines covered by United States letters patent numbered 1,200,669 and 1,219,791 were procured by Tevander during the copartnership between plaintiff and himself, and the ownership of these patents are subject to the terms and conditions of their partnership agreement. * * *"

Appellants attack (a) the authority of the federal court by decree in chancery to dissolve the corporation Standard Cap & Seal Company; (b) the findings of the court on the issues of fraud and fraudulent representations; (c) appellants also attack that portion of the decree requiring Tevander to assign patents standing in his name to the partnership.

Edward W. Everett and Dwight B. Cheever, both of Chicago, Ill., for appellants.

Albert Fink, of Chicago, Ill., for appellee.

Before BAKER and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge (after stating the facts as above). [1] Was the federal court without authority to enter the decree here attacked?

Appellants urge that this is a suit to dissolve an Illinois corporation, the appellant herein, Standard Cap & Seal Company; that the federal court should adopt the rulings of the highest court of Illinois upon the authority of a court of equity to dissolve such corporation (Sim v. Edenborn, 242 U. S. 131, 37 Sup. Ct. 36, 61 L. Ed. 199; Ennis Water Works v. City of Ennis, 233 U. S. 652, 34 Sup. Ct. 767, 58 L. Ed. 1139; Yazoo & Miss. V. R. R. v. Adams, 181 U. S. 580, 21 Sup. Ct. 729, 45 L. Ed. 1011); that it is the established law of the state of Illinois that a corporation cannot be dissolved except by complying with the statutes in respect thereto (Wheeler v. Pullman Iron & Steel Co., 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818; People v. Weigley, 155 Ill. 491,

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40 N. E. 300; Shriver v. Day, 276 Ill. 403, 114 N. E. 918); that a federal court cannot, independent of statutory authority, dissolve a state corporation (Wells Co. v. Gastonia Co., 198 U. S. 177, 25 Sup. Ct. 640, 49 L. Ed. 1003; Conklin v. U. S. Ship-Building Co. [C. C.] 140 Fed. 219; Republican Mountain Silver Mines v. Brown, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776); that the record fails to disclose facts bringing the case within any of the reasons enumerated by the Illinois statute as sufficient ground for dissolution.

With these various contentions there can be no quarrel, but appellee contends this is not a suit to dissolve the Illinois corporation, Standard Cap & Seal Company, but is one to set aside an agreement made between appellee and Tevander, entered into through false and fraudulent representations made by Tevander and relied upon by appellee, and to restore the partnership theretofore existing, and terminated only by reason of the fraudulent agreement, and to retransfer to such copartnership assets fraudulently taken from it, and to secure such relief upon the re-creation of the copartnership as one partner is entitled to receive in a winding-up proceeding.

The prayer for relief, while not conclusive, is instructive. Among other things complainant prayed that—

"the incorporation of the business of the copartnership heretofore existing be held for naught, and it be decreed that the true relations existing between Tevander and herself are those of copartnership; that the partnership be dissolved, an accounting be had with Tevander and the assets distributed between them; that Tevander be required to set forth the nature of his new improvement and inventions, and decreed to hold the same in trust for the copartnership; pending final determination of this cause a receiver be appointed," etc.

The allegations in the bill set out with considerable particularity the history of the copartnership and the corporation; the fraudulent representations and inducements made by Tevander to secure a termination of the partnership and the organization of the corporation, wherein Tevander secured, through the ownership of a majority of the stock, permanent control of the policy of the company; the efforts of Tevander to avoid the provisions of the copartnership respecting title to patents, heretofore quoted; the securing of patents in Tevander's name; and efforts to force appellee to sell her interest in the company's business. The findings support appellee's theory that no dissolution of the corporation is involved. It appears to us that the pleadings, evidence, and findings justify this court in concluding that the suit is one to re-establish the status quo ante the fraud, dissolve the partnership, grant an accounting, appoint a receiver, and divide the assets.

While appellants strenuously contend that to strip the corporation of its assets is in substance to work a dissolution, they overlook the fact that the property passed to the corporation by reason of an agreement secured through fraud. Inasmuch as Tevander and appellee are the only stockholders of the corporation, and therefore the rights of third parties are not involved, no good reason is seen why a court of equity should not grant such relief as will afford appellee adequate redress for the wrongs by her suffered through the fraudulent representations of Tevander.

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While no authorities are cited in support of the jurisdiction of a court of equity upon facts such as here disclosed, we find none of appellants' citations in point. Surely a court of equity will delight in finding the necessary means of enforcing its decrees against delinquent defendants, and its powers are as extensive as the exigencies of the case demand. If appellee was induced to enter the agreement to dissolve the partnership and create the corporation through the fraudulent representations of Tevander, will a court of equity permit the latter to escape liability by hiding behind the fictitious third party, the corporation, the stock of which he and appellee are the sole owners? The assets of the copartnership were turned over to this corporation by reason of the action of the copartners, which action was induced by the fraudulent representations of appellant Tevander. This fact being shown, the right of the corporation to the assets of the copartnership is subject to be defeated upon proof that fraud was practiced upon the copartnership. In other words, the title of the corporation to the assets here involved rests upon an assignment from the copartnership. Contemporaneously executed and indorsed on the back of the assignment is an agreement to dissolve the copartnership. Both assignment and agreement to dissolve in turn rest upon the written agreement of Tevander and appellee (a) to dissolve the copartnership, (b) organize the corporation, and (c) assign to the latter the assets of the former. If fraud tainted the last-named agreement, its consequences reach all three transactions. Even though the corporation may not be dissolved, no good reason is advanced why it should hold property under an assignment secured through fraud.

We conclude the court was authorized to grant the relief decreed in this suit.

[2] Does the evidence warrant the finding that Tevander made false and fraudulent representations relied upon by appellee to her damage, and which fraudulent representations justified the court in rescinding the agreement made to dissolve the copartnership?

In the previous discussion the court assumed that the evidence justified the findings of the court in favor of the appellee. But appellants deny the sufficiency of the proof to warrant such findings.

A careful and thorough examination of the evidence justifies the conclusion that not only was there evidence to support the court's findings, but no other conclusion would have been warranted.

It will serve no useful purpose to restate in detail the evidence which leads us to this conclusion. It will be sufficient to say that the parties hardly stood at arms' length and dealt as strangers. Appellee was a young, inexperienced person, whose husband had engaged with appellant Tevander in a business that was unusually profitable. Upon the death of her husband, appellee, then scarcely of age and entirely inexperienced in business matters, immediately made Tevander sole manager of the business, intrusted him with the entire conduct of the business, and paid him a princely salary—in 1914, $10,644.24, in 1915, $21,274.40, in 1916, $33,359.22. In addition thereto Tevander's share of the profits exceeded the amounts received by him as compensation. Immediately upon securing control of the corporation through the

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ownership of a majority of stock, Tevander secured action preventing the payment of any cash dividends in excess of 10 per cent., although the annual profits of the company exceeded 300 per cent. of the capital. This conduct is hardly explainable upon any theory other than that he hoped thereby to force appellee, who was accustomed to live beyond an income of $2,500, to sell her interest in the business.

Tevander's conduct with reference to the patents is even more reprehensible. Under an agreement with his deceased partner to turn over to the partnership any patent that might be secured by him that pertained to the business of the partnership, it is impossible to reach any other conclusion than that he sought the dissolution of the copartnership to rid himself of this written obligation. No sooner had the copartnership been dissolved, and the agreement with reference to patents terminated, than he filed application in the patent office for a patent in his own name, which patent covered a machine that threatened to displace the one manufactured by the company. Controlling two of the three directors, he endeavored at a subsequent meeting of the directors to sell this patent to the company for the sum of $500,000.

[3] But appellants urge that there were no actionable misrepresentations made by Tevander, and if the findings of the court, Nos. 8 and 9, heretofore quoted, be accepted, no fraudulent statements appear upon which a suit to rescind a contract might be predicated. In other words, it is claimed that the statements made by Tevander that—

"the business was assuming such proportions that the copartnership could be carried on more conveniently and with greater profit as a corporation; that the business of the copartnership could go on as before, but, as to the extra share to be given him, this was merely to enable him to have his own way with the management and to protect him in event of her death, remarriage, or sale of her interest against evilly disposed persons who might set out to wreck the business for the purpose of robbing him of his interest therein; that he would treat her as he always treated her; that so long as she remained his partner in the business he would consider he held this extra share as much for her benefit as for his own; that her income would not be reduced. * * *"

—were mere promissory representations, and were not actionable.

With this conclusion we cannot agree. While some of these representations were promissory in character, they were in substance but an expression of Tevander's state of mind toward appellee. If the statements were true, then appellee was justified in assuming that the partner of her deceased husband, and her own partner for a year and a half, entertained no covetous designs upon her property, but only desired to treat her in the manner in which a confiding partner might well expect from an active partner, well compensated for his responsibility. If the statements were true, then Tevander's attitude toward appellee was such that it mattered not whether the business was conducted as a copartnership or as a corporation, whether the share which gave to Tevander the majority of the stock stood in the name of one party or the other, or in the name of both. Surely such representations were material and persuasive only as they impressed appellee with the asserted open, fair, and friendly state of mind which appellant Tevander professed to possess toward appellee.

No separate consideration of appellant's claim that appellee was not influenced or induced to act by the representations is necessary. It ap-

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pears that, notwithstanding the warning given her by friends, she chose to place reliance upon the professions of friendship made by her partner, the friend of her deceased husband. She relied thereon even as against the judgment of disinterested advisors.

[4] Nor can we say that she was careless in so relying upon Tevander's representations. The business had been wonderfully successful. She had received in the year 1914 over $18,000 for her share of the profits, after paying Tevander his salary, and after providing a reasonable surplus in the treasury. The entire responsibility rested upon Tevander, and appellee was not unmindful of Tevander's right to be protected in case of her sudden and unexpected death.

[5] Nor are we impressed with the claim that appellee failed to act promptly after discovering the fraud. Proof of the deception came only by piecemeal. Courts are slow to hold the defrauded party guilty of carelessness because of his or her reluctance to believe a former associate or partner false to his trust. Appellants are not in a good position to urge the enforcement of any harsh rule based upon appellee's tardy awakening. Much of the proof of the most convincing character did not come to light until a few months before suit was instituted. We conclude appellee was not guilty of laches.

[6] Did the court err in adjudging that Tevander held the patents in trust for the partnership?

Under the agreement made between the original parties to the partnership, all patents of the character under consideration belonged to the partnership. Tevander's claim to them arose from the agreement terminating the partnership. This contract, having been avoided by the fraud heretofore mentioned, the original agreement governed the rights of the parties, and the court properly adjudged the patents to belong to the partnership.

[7] Complaint is also made because the court refused to allow Tevander, as his salary, 20 per cent. of the profits for the year 1916.

By the decree an accounting was ordered and all matters referred to a master. Under such accounting Tevander may be allowed a reasonable compensation for his services during this year. Whether the master will allow 20 per cent. of the net profits or a lesser sum will depend upon all the facts and circumstances disclosed upon such hearing. Clearly, Tevander has forfeited his right to an absolute claim to the sum fixed in the contract. The agreement allowed him a given per cent. of the net profits for *faithful* services.

The decree is affirmed.

Judge KOHLSAAT participated in the hearing of this suit and concurred in the conclusion, but died before the announcement of this opinion.

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In re ARKIN DRESS CO., Inc.

Petition of SHAINE.

(Circuit Court of Appeals, Second Circuit. May 23, 1918.)

No. 110.

1. BANKRUPTCY ⟸140(2)—RECLAMATION OF MERCHANDISE—IDENTIFICATION.
Where bankrupt, shortly before bankruptcy, purchased merchandise, obtaining credit through false representations, sellers had a right to reclaim merchandise so long as it remained in the hands of the bankrupt, and could reclaim proceeds of the sale so long as they could identify the fund.

2. BANKRUPTCY ⟸212—RECLAMATION OF MERCHANDISE—IDENTIFICATION OF FUND—SUFFICIENCY OF EVIDENCE.
On petition for reclamation of merchandise fraudulently obtained by bankrupt and sold shortly before bankruptcy, evidence *held* insufficient to trace proceeds of sale into hands of trustee.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of the Arkin Dress Company, Incorporated, bankrupt. Reclamation proceeding by Heyman Cohen & Sons. Report of special master, recommending denial of petition for reclamation, reversed by District Court, and order entered directing trustee to pay over to Heyman Cohen & Sons, or their attorneys, the sum of $1,283.25. On petition to revise the order by Maurice L. Shaine, as trustee. Order reversed, and motion to confirm report of special master granted.

The alleged bankrupt is a corporation organized under the laws of the state of New York, of which Louis Arkin, Jr., was the president and general manager. On December 29, 1916, a petition in involuntary bankruptcy was filed against it and on January 11, 1917, an order was entered adjudicating it an involuntary bankrupt. On December 30, 1916, the revising petitioner was appointed receiver, and on February 21, 1917, trustee of the bankrupt.

Rosenberg & Ball, of New York City (David W. Kahn, of New York City, of counsel), for revising petitioner.

Morrison & Schiff, of New York City, for respondents Heyman Cohen & Sons.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

ROGERS, Circuit Judge. A reclamation proceeding was instituted by Heyman Cohen & Sons, jobbers in woolen and dress goods in the city of New York. Their petition asked for an order requiring the receiver to turn over the sum of $2,085; that amount representing the proceeds of certain merchandise sold by them to the bankrupt and resold by the latter to one Rosenzweig.

The reclamation petition alleged that the petitioners had sold to

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the bankrupt certain merchandise, consisting of 1,737⅝ yards of blue serge cloth, being induced to do so by the false and fraudulent representations made by Louis A. Arkin, Jr. The matter was referred to a special master, who recommended the denial of the petition of the reclaiming creditors, basing his recommendation upon the ground that the proceeds of the goods so sold had not been traced into the hands of the receiver. Motions were then brought on, in the District Court, to confirm and to reverse the report; and the District Judge decided that the special master had erred in his conclusions and that the reclamation should be granted. An order was accordingly entered, directing the trustee to forthwith pay over to Heyman Cohen & Sons, or their attorneys, out of the moneys in his hands as trustee, the sum of $1,283.25. It is this order that we are now asked to revise.

It appears that the Arkin Dress Company, on December 17, 1916, represented to Heyman Cohen & Sons, the reclaiming creditors, that it had an order from John Wanamaker for a quantity of dresses requiring 2,300 yards of blue serge cloth. The Dress Company also represented that it had on deposit at that time with the Union Exchange National Bank at least $3,000. A check in the sum of $2,210.96 was delivered by the bankrupt to Heyman Cohen & Sons to pay an indebtedness due from it to Heyman Cohen & Sons, not then due, but which it was necessary to pay to get more credit. It also, and for the purpose of inducing Cohen & Sons to sell and deliver to it the blue serge cloth above referred to, represented falsely that its financial condition was the same or better on December 27 than it was on September 9, 1916, there having been a financial statement on that date. In reliance on these representations Heyman Cohen & Sons delivered to the bankrupt 1,737⅝ yards of blue serge cloth, valued at $2,085.

Before selling the cloth to the bankrupt the claimants inquired of Woods' Commercial Agency as to the bankrupt's financial condition. They were informed that on December 11, 1916, the president of the bankrupt corporation submitted an affidavit which he now swears was false. It also appears that its bank credit on December 27, instead of being $3,000, as represented, was only $54.90. The petition in involuntary bankruptcy was filed two days after the delivery of the blue serge. The president of the bankrupt corporation swears that this merchandise was delivered in the original packages by the bankrupt the day after it received them to one Rosenzweig, who paid to the bankrupt the sum of $2,500. He also swears that of this amount $2,100 was turned over in currency by him to the receiver in bankruptcy. It clearly appears that this merchandise was obtained from the claimants by means of false representations made to them by the bankrupt directly, as well as through the Woods' Commercial Agency. The representations were false, and they were relied upon by the claimant.

[1] The claimants had a right to reclaim the merchandise so long as it remained in the hands of the bankrupt. They could also claim the proceeds of the sale to Rosenzweig so long as they could identify the fund. The testimony was that the bankrupt sold to Rosenzweig

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at 65 per cent. of the cost. Computed on that basis, the bankrupt received $1,553 for the Heyman Cohen & Sons serge. But as Rosenzweig paid him altogether $2,500 for the total merchandise turned over, and retained out of that $415 for himself, the proportionate loss to the claimants out of the transaction amounted to $269.75. This left $1,283.25 as the sum due the claimants, and the District Judge has entered an order directing the receiver to turn over that amount to the claimant.

[2] The trustee claims that this order of the District Judge was erroneous, in that it has not been shown that the proceeds of the identical goods sold by Heyman Cohen & Sons were ever paid over to the receiver. The sole question in the case is whether the claimants have identified the fund. The testimony they rely upon is that of Louis Arkin, Jr., and if it can be believed the proceeds of the goods have been traced into the hands of the trustee, and the order of the District Judge is right. If the question were simply one between the vendor and the vendee, the testimony of Arkin might be accepted; but the decision of the question affects the rights of all the creditors of the bankrupts' estate, and if the fund in its entirety is to be withdrawn, and turned over to Heyman Cohen & Sons, all other creditors being excluded therefrom, the evidence should not be doubtful, but should be reasonably conclusive. We are unable to regard the testimony as at all persuasive. Arkin testified, it is true, that he sold the identical goods his company received from the claimants to one Rosenzweig, and that he received from him $2,500. But he stated that that sum represented also somebody else's goods; that he did not know how much he received for the claimants' goods; that he did not know how much other merchandise he sold or what he received for it. He admitted, however, that he got 65 per cent. of the amount he paid the claimants for the goods. He admitted that the statement given to the Woods' Commercial Agency on December 11, 1916, and which he had signed was not true. He admitted that on December 27, 1916, he had no unfilled order from John Wanamaker which required about 2,300 yards of cloth, and denied that he had represented that he had such an order, although the testimony of the claimants showed that he had made such a representation. He admitted that he knew his company was insolvent when he bought the serges from Heyman Cohen & Sons, and that for perhaps three or four weeks prior to that purchase and prior to the failure his company had ceased to do any making of dresses, and was simply buying merchandise and selling it in the original packages at a loss, getting for it from 50 to 65 per cent. of what it cost; that in the month or two prior to the failure he had bought more than $40,000 worth of goods, which he had sold in the manner above indicated; that he did not know whose goods he sold to Rosenzweig at the time he sold him the claimants' goods. In answer to the question, "Who were you doing business with at that time?" he answered, "I don't remember exactly." This man is not entitled to belief. He is revealed by his own testimony as thoroughly unscrupulous, dishonest, and unworthy of credence. Whether the money he turned over to the trustee was money which

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came from the sale of the claimants' goods, or from the sale of some one else's goods, is not proven.

The order of the District Court is reversed, and the motion to confirm the report of the special master is granted.

HARDWOOD PACKAGE CO. v. COURTNEY CO.

(Circuit Court of Appeals, Fourth Circuit. April 3, 1918.)

No. 1569.

1. SALES ⟸53(1)—CONTRACT—QUESTION FOR JURY.
In an action by the seller of hardwood staves for the buyer's failure to accept, whether there was complete agreement between the parties as to the terms of the contract of sale *held* a question of fact for the jury.

2. CONTRACTS ⟸35—FORMAL CONTRACT.
Apart from statute of frauds, if minds of contracting parties meet at all points, and their agreement of sale is fully set forth in unsigned memorandum, which they both accept as correct, binding obligation results, though it was their intention to have formal contract prepared and signed.

3. CONTRACTS ⟸35—SIGNATURE OF FORMAL CONTRACT.
An unsigned contract cannot be enforced by either of the parties, however completely it may express their mutual agreement, if it was also agreed that the contract should not be binding until signed by both.

4. SALES ⟸53(1)—SIGNATURE OF FORMAL CONTRACT—QUESTION FOR JURY.
In action by seller of hardwood staves for buyer's refusal to accept, whether it was intention of both parties that contract be reduced to writing and signed by both before it became binding, *held* question of fact for jury.

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action by the Courtney Company against the Hardwood Package Company. To review judgment for plaintiff, defendant brings error. Reversed.

D. M. Easley and D. E. French, both of Bluefield, W. Va., for plaintiff in error.

W. E. R. Byrne, of Charleston, W. Va. (Linn & Byrne, of Charleston, W. Va., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and McDOWELL, District Judge.

KNAPP, Circuit Judge. The questions deemed controlling in this case will appear from a comparatively brief statement, without reciting at length the somewhat complicated facts out of which the litigation arose. In the court below the Courtney Company, defendant in error, was plaintiff, and the Hardwood Package Company, defendant, and they will be so designated in this opinion. These parties, through their respective agents, entered into negotiations in the latter part of 1912 for the sale by plaintiff and purchase by defendant of a large quantity of barrel staves. On the 21st of December, at defendant's place of business in Philadelphia, an agreement appears to have been reached

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with a representative of plaintiff. A contract was accordingly drawn up in duplicate, on the printed form used by defendant, and both copies sent by mail unsigned to plaintiff at Charleston, W. Va., for its signature. The plaintiff, however, declined to execute this contract, and instead prepared a contract of its own, dated January 1, 1913, which was signed in duplicate by its president and mailed to defendant on the 9th of that month. The defendant received this contract in due course, but did not sign it. On the 1st of May it was returned unsigned, with a letter stating that "we have canceled all negotiations, for staves and heading, that we may have had with you," and refusing in effect to take the staves in question. To this the plaintiff replied in substance that a binding contract had been made, that it had at all times been ready and willing to perform the same, that the market price of staves had gone down materially, and that if defendant persisted in its refusal it would sell the staves for the best price then obtainable and hold the defendant responsible for any resulting loss.

Some three years later, in March, 1916, this suit was brought to recover, as damages for alleged breach of contract, the difference between the amount for which plaintiff sold the staves to other parties, after defendant refused to take them, and the amount that plaintiff would have received at the price named in the contract claimed to have been made; that is, the contract prepared by plaintiff and sent to defendant in January, 1913, as above stated. The special count of the declaration is on that contract, set out in full in the pleading, which is asserted to be valid and enforceable, because it expresses the actual agreement of the parties and was accepted as such by the defendant. At the trial, and under its plea of nonassumpsit, the defendant gave evidence tending to support two defenses: (1) That there was no complete agreement between the parties, because their minds never met on any contract, verbal or written; and (2) that it was the understanding and intention of plaintiff and defendant alike that the contract for which they were negotiating should not be binding, unless reduced to writing and signed by both parties. The jury found for the plaintiff for the full amount of its claim, and defendant comes here on writ of error.

[1, 2] It is enough to say that in our opinion the first of these defenses was not established as matter of law. True, certain acts and declarations of plaintiff were shown which seem quite inconsistent with a belief on its part that a definite contract had been made, and apparently the jury would have been warranted in finding that the negotiations in question went no further than proposals by each side, first the defendant, and later the plaintiff, which the other side was not willing to accept. But in view of the explanations of plaintiff, and taking into account all the evidence upon this issue, we think it became a question of fact which was properly submitted to the jury. Apart from the statute of frauds, which is not set up in this case, it is well settled that if the minds of contracting parties meet at all points, and their agreement is fully set forth in an unsigned memorandum, which they both accept as correct, a binding obligation results, although it was their intention to have a formal contract prepared and signed. Jenkins &

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Reynolds Co. v. Cement Co., 147 Fed. 641, 77 C. C. A. 625; Whitted & Co. v. Fairfield Cotton Mills, 210 Fed. 725, 128 C. C. A. 219; Morton v. Witte, 147 App. Div. 94, 131 N. Y. Supp. 778; Drummond v. Crane, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707, 38 Am. St. Rep. 460.

[3] But it is equally well settled that an unsigned contract cannot be enforced by either of the parties, however completely it may express their mutual agreement, if it was also agreed that the contract should not be binding until signed by both of them. In the leading case of Mississippi & Dominion Steamship Co. v. Swift, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545, it is said:

"When parties enter into a general contract, and the understanding is that it is to be reduced to writing, or if it is already in a written form that it is to be signed before it is to be acted on, or to take effect, it is not binding until it is so written or signed. * * * When correspondence indicates that a formal draft of a contract was in the minds of the parties, or at least in the mind of the party sought to be charged, as the only authoritative evidence of a contract, and that he did not have, nor signify, any intention to be bound until the written draft had been made and signed, he is not bound until such draft is duly made and signed. * * * The burden of proof is upon the party claiming the completion of the contract before the written draft thereof is signed."

To the same effect are Ambler v. Whipple, 87 U. S. (20 Wall.) 546, 22 L. Ed. 403, Hennessy v. Bond, 77 Fed. 403, 23 C. C. A. 203, Spinney v. Downey, 108 Cal. 666, 41 Pac. 797, and Morrill v. Mining Co., 10 Nev. 125.

[4] In the instant case, as already said, it was one of the defenses that neither the contract sued upon nor any other contract for the purchase of staves was to take effect and be binding until signed by both parties, and accordingly the defendant asked the following instruction:

"The court instructs the jury that, if you believe from the evidence in this case that it was the intention of the plaintiff and defendant, in their negotiations respecting the contract for staves, that it was to be reduced to writing and signed by both parties before it became a binding contract, then you will find for the defendant."

This instruction was refused on the ground, as appears from the record, that it was "misleading in its terms under the evidence." How this could be said is not apparent. The proposition of law involved in the request is undoubtedly sound, and it seems clear to us that the evidence on this issue presented a question of fact to be passed upon by the jury. Two references will suffice. As late as February 14th plaintiff wrote defendant:

"We have never received the copy of the contract for staves sent you some time ago. Not having heard from you, we are shipping some of these staves to other parties."

And on the trial of the cause Samuel Courtney, then president of the plaintiff company, testified:

"Q. And the reason you didn't commence shipping staves is because they didn't sign the contract? A. That is right. Q. And you knew that the con-

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tract had to be signed by Mr. Pew? A. Yes, sir. I knew it was supposed; he said some place that Pew would have to sign it."

This of itself was enough, as we think, to raise a question for the jury. And the obvious effect of refusing the requested instruction was to shut out an independent defense, which, if sustained by a finding of fact, would have defeated the plaintiff's action. Whether or not it was understood throughout the negotiations that the parties would be bound only by a signed agreement was a distinct and vital issue, which, on the proofs made, was plainly for the jury to determine. We cannot sustain defendant's contention that the evidence on this issue was so conclusive as to require a directed verdict in its favor; but we are convinced, after careful study of the case, that the question here considered was a question of fact, which should have been submitted to the jury under proper instructions. The refusal to so submit it was therefore an error for which the judgment must be reversed.

As the remaining questions appear to be of little importance, and may not arise on another trial, we deem it unnecessary to make them the subject of discussion.

Reversed.

SOLER, Commissioner of Health, v. SCOVILLE et al.

(Circuit Court of Appeals, First Circuit. November 21, 1918.)

No. 1348.

1. TERRITORIES ⇐32—PORTO RICO—ACTION AGAINST—CONSENT.
Action against the commissioner of health of Porto Rico, in his official capacity, to restrain him from purchasing land and erecting a tuberculosis hospital, *held* in reality against the sovereign, and so not maintainable without its consent; it being presumed, in the absence of allegation to the contrary, that he acted in good faith and within the scope of his authority, and he acting under his general authority, and not under any special and limited authorization.

2. COURTS ⇐405(2)—CIRCUIT COURT OF APPEALS—SCOPE OF REVIEW.
The appeal being from an interlocutory decree under Judicial Code, § 129 (Comp. St. 1916, § 1121), the Circuit Court of Appeals is authorized to determine whether the District Court had jurisdiction.

Appeal from the District Court of the United States for the District of Porto Rico; Hamilton, Judge.

Suit by Hector H. Scoville and others against Alejandro Ruiz Soler, Commissioner of Health for Porto Rico. From an interlocutory decree, granting a temporary injunction, defendant appeals. Reversed and remanded.

Col. Edward S. Bailey, Asst. Judge Advocate General, of Washington, D. C. (Howard L. Kern, Atty. Gen., of Porto Rico, on the brief), for appellant.

Hector H. Scoville, of San Juan, P. R. (Charles Hartzell and Daniel F. Kelley, both of San Juan, P. R., on the brief), for appellees.

Before BINGHAM and JOHNSON, Circuit Judges, and ALDRICH, District Judge.

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BINGHAM, Circuit Judge. This is an appeal from an interlocutory decree of the United States District Court for Porto Rico granting a temporary injunction restraining the appellant, Soler, commissioner of health for Porto Rico, from purchasing a certain tract of land and erecting thereon a hospital for the treatment of tuberculosis patients. In the court below Soler appeared specially, and entered a motion to quash the summons and dismiss the petition for want of jurisdiction, assigning as reason therefor that the action, although brought against the commissioner of health in his official capacity, was in reality an action against the people of Porto Rico, who had not consented to be sued, and therefore the court was without jurisdiction.

It appears that on February 19, 1918, a temporary restraining order was issued; that on March 9, 1918, the defendant's motion to dismiss for want of jurisdiction was denied; and that, affidavits relating to the plaintiffs' motion having been filed, a temporary injunction, as prayed for in the complaint, was granted.

In the assignment of errors the appellant complains that the court erred in denying his motion and granting the motion for a preliminary injunction.

It is conceded by the appellees that the people of Porto Rico cannot be sued without its consent, and it may well be conceded, for in Porto Rico v. Rosaly y Castillo, 227 U. S. 270, 33 Sup. Ct. 352, 57 L. Ed. 507, it was held that—

"It is not open to controversy that, aside from the existence of some exception, the government which the organic act established in Porto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent."

It is also conceded that the defendant, Soler, as commissioner of health for Porto Rico, is charged with the duty of erecting a tuberculosis hospital.

In the act of March 2, 1917, providing a civil government for Porto Rico and known as the Jones Act (39 U. S. Stat. at Large, pp. 951, 955, 964, c. 145), certain executive departments of the government were created, among which was the department of health, the head of which was to be known as the "commissioner of health." It was also provided that—

"The heads of departments shall collectively form a council to the Governor, known as the executive council. They shall perform under the general supervision of the Governor the duties hereinafter prescribed, or which may hereafter be prescribed by law, and such other duties, not inconsistent with law, as the Governor, with the approval of the President, may assign to them." Section 13.

"That the commissioner of health shall have general charge of all matters relating to public health, sanitation, and charities except such as relate to the conduct of maritime quarantine, and shall perform such other duties as may be prescribed by law." Section 19.

And "that the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable. * * *" Section 37.

In pursuance of the authority above conferred the Legislature of Porto Rico in Act No. 71, approved December 6, 1917, and in Act No. 89, approved December 7, 1917, appropriated the sums of $20,000 and

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$40,000, respectively, which acts, except as to the sums appropriated, read as follows:

"Care of tuberculosis patients, including purchase and repair of equipment, construction and repair of buildings, and insurance on equipment and on buildings owned by the people of Porto Rico and used as a sanatorium, including also the purchase of the necessary land, payment of salaries of personnel and expenses of transportation of patients and other expenses, for six months, $20,000."

It appears that the land on which a tuberculosis hospital was located had been taken by the military authorities of the United States for a training camp; that, to meet the public necessity thus created, the defendant, by virtue of the general authority vested in him as commissioner of health and the appropriation acts of December 6 and December 7, 1917, entered into a contract for the purchase of a certain tract of land, containing about 35 acres, from a Mr. and Mrs. Hubbard, situated on the south side of the highway leading from Rio Piedras to Carolina, in the district of Sabana Llana, intending to erect thereon a tuberculosis hospital. The plaintiffs are the owners and lessees of properties adjoining said tract of land on the east and west sides thereof, and they bring this suit to enjoin the purchase of the land and the erection of the hospital.

From the foregoing provisions of law it appears that Soler, as commissioner of health, was authorized, and that it was his duty, to determine upon a suitable site for the location of a tuberculosis hospital, and to purchase the same for the people of Porto Rico, and it is evident that the performance of this duty involved the exercise of administrative or official discretion.

[1] It is not alleged in the bill that the defendant, in deciding upon the location, acted in bad faith and beyond the scope of the authority conferred upon him, and, in the absence of such an allegation, it is to be presumed that he acted in good faith and within the scope of his authority. In view of this situation, and the fact that the bill is prosecuted against Soler in his official capacity as commissioner of health, the question arises whether the action is not one in reality against the sovereign, the people of Porto Rico. As to this we entertain no doubt. The action is brought to enjoin the consummation of a contract in which the defendant individually has no interest, and in which the people of Porto Rico are alone interested. It is, in reality, an action against the sovereign (In re Ayers, 123 U. S. 443, 503, 8 Sup. Ct. 164, 31 L. Ed. 216; Minnesota v. Hitchcock, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. Ed. 954; Murray v. Wilson Distilling Co., 213 U. S. 151, 29 Sup. Ct. 458, 53 L. Ed. 742; Wells v. Roper, 246 U. S. 335, 38 Sup. Ct. 317, 62 L. Ed. 755), and, if it has not consented to be sued, the action cannot be maintained.

It is contended by the appellee that the defendant, Soler, in determining upon the location and purchase of this property for a hospital, was a special agent, and that, if this is so, the action can be maintained, for, under the provisions of section 1804 of the Civil Code of Porto Rico, the government has in such case consented to be sued.

But we think that the commissioner of health in the transaction in

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question was acting under his general authority and not under any special and limited authorization and that the action cannot be maintained against the people of Porto Rico, for, in that situation, it has not consented to be sued.

[2] As the appeal is from an interlocutory decree under section 129 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [Comp. St. 1916, § 1121]), we are authorized to determine whether the District Court had jurisdiction. Supreme Council of Royal Arcanum v. Hobart, 244 Fed. 385, 157 C. C. A. 11.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to enter a decree dismissing the bill; and the appellant recovers costs.

INDEPENDENT HARVESTER CO. v. TINSMAN.

(Circuit Court of Appeals, Seventh Circuit. September 6, 1918.)

No. 2558.

1. SALES ⟸43(3)—RESCISSION—REPRESENTATION OF FACT.
   Representation that an invention can be used without infringing any existing patent may be one of fact, rather than mere opinion, as regards right to rescind a contract of sale made in reliance thereon.
2. JUDGMENT ⟸585(4)—RES JUDICATA—DIFFERENT CAUSES OF ACTION.
   Judgment on a note is not an estoppel to suit to rescind for fraud the contract under which the note was given; that issue not having been actually litigated in the action on the note, and the causes of action being different.
3. SALES ⟸126(1)—SUIT FOR RESCISSION—LACHES.
   Bill to rescind for fraud having been filed within a few months after the fraud was discovered, and within less than the period of limitations after the making of the representations, suggestion of laches, in the absence of a showing of special circumstances, is without force.
4. SALES ⟸43(2)—RESCISSION—MISREPRESENTATION—INTENT.
   Material misrepresentation, made to induce purchase and actually relied and acted on, is sufficient for rescission, and the seller's intention is immaterial.
5. SALES ⟸123—RESCISSION—CONDITIONS PRECEDENT.
   Eviction from enjoyment of patent is not a condition precedent to right of purchaser to rescind for fraudulent misrepresentation that invention infringed no existing patent.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Independent Harvester Company against Samuel H. Tinsman. From an adverse decree, complainant appeals. Reversed, with directions.

Charles S. Burton, of Chicago, Ill., for appellant.
Charles C. Bulkley, of Chicago, Ill., for appellee.

Before BAKER and EVANS, Circuit Judges.

BAKER, Circuit Judge. This appeal challenges a final decree based on a ruling that appellant's bill failed to state a cause of action in equity.

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A brief outline will suffice for a background against which to consider the points of assault.

In November, 1909, Tinsman represented to Thompson, appellant's president, that Tinsman had invented a new cultivator, that he was thoroughly versed in the cultivator art, and that his invention could be patented and could be fully used without infringing any subsisting patents. Thompson was inexpert and without knowledge or information respecting the state of the art, so informed Tinsman, and Thompson relied upon Tinsman's representations, as Tinsman knew, in entering into a written contract for the invention and Tinsman's services in making a commercial embodiment. Under the contract appellant paid Tinsman $500 and gave him seven notes for $1,000 each, payable one a year for seven years. In 1904 Tinsman took out a cultivator patent, which prevented the use of his 1909 improvements. This 1904 patent Tinsman had sold and assigned to others before he came to Thompson. Three additional prior patents also prevented the free manufacture and sale of the cultivator that Tinsman was building for appellant. Before appellant learned these facts two notes were paid and suit was started on the third. Prayer was for rescission, restoration of consideration paid, and injunction against prosecution of the suit on the third note. By a supplemental bill appellant showed that pending this suit Tinsman had obtained judgment in the suit on the third note, and prayed that he be enjoined from taking out execution thereon.

[1] 1. Appellee says that statements respecting infringement are only expressions of opinion, as this court ought to know from its experience in patent cases. No matter how difficult it may be from the evidence in patent cases, courts are forced to make a finding of fact with respect to infringement. Appellee, however, was free to limit himself to an expression of opinion; but, according to the bill, he made representations of fact regarding the place of his 1909 improvements in the cultivator art.

[2] 2. What is the effect of the stated fact that judgment has been entered upon the third note? As to the cause of action based upon that note all issues are closed, not only those that were actually litigated, but also those that might have been. But fraud as a ground for rescission of the contract is a different cause of action, and the judgment on the note is not an estoppel against counting on fraud in procuring the contract unless that issue was actually litigated in the suit on the note. And the bill does not disclose that it was. Packet Co. v. Sickles, 24 How. 333, 16 L. Ed. 650; Davis v. Brown, 94 U. S. 423, 24 L. Ed. 204; Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 681; Chemical Co. v. Kirven, 215 U. S. 252, 30 Sup. Ct. 78, 54 L. Ed. 179.

[3] 3. Appellee contends that laches is a bar. In Maine, where appellant was and is located, and where the contract was made and to be performed, six years is the period after which actions at law or in equity on account of fraud shall not be commenced. R. S. Me. c. 83, § 99. And in Illinois, where appellee is a citizen and resident, and where he is being sued, the limitation is five years. R. S. Ill. par. 7217, § 22. Time does not begin to run until the fraud has been, or

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might with diligence have been, discovered. Kirby v. Lake Shore, etc., Ry. Co., 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569; Bailey v. Glover, 21 Wall. 342, 22 L. Ed. 636. As the bill was filed within a few months after the fraud was discovered, and within less than five years after the representations were made, the suggestion of laches, in the absence of any showing of special circumstances which would justify equity in shortening the legal period, is wholly without force.

[4] 4. Appellee assails the bill because it contains no direct averment that Tinsman knew that the representations were false when he made them. In an action of deceit by vendee against vendor, intentional misrepresentation by the vendor is an essential element. But in a bill for rescission, the question whether the vendor intentionally falsified is immaterial. It is enough that the representation was contrary to fact, was material, was made to induce the vendee to act, and was actually relied and acted upon by the vendee to his injury. Smith v. Richards, 13 Pet. 26, 10 L. Ed. 42; Turner v. Ward, 154 U. S. 618, 14 Sup. Ct. 1174, 23 L. Ed. 391; Benton v. Ward (C. C.) 47 Fed. 253; Simon v. Goodyear Rubber Shoe Co., 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745; Hindman v. First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; Kell v. Trenchard, 142 Fed. 17, 73 C. C. A. 202; In re American Knit Goods Manufacturing Co., 173 Fed. 480, 97 C. C. A. 486.

[5] 5. Appellee also insists that, because appellant was never evicted from enjoyment of the patent, it has no right to rescind. A right of rescission arises on discovery of the fraud, not on eviction. Otherwise, the greater the fraud, the less chance there would be for the right of rescission ever to be exercised. If the party defrauded were given so little that no third party would ever attempt to take it away from him, the defrauding party would be forever safe. Such a strange doctrine would put a great premium on rascality. As a matter of fact, it is elementary that, when asking a court of equity to rescind a contract, it is not even necessary to tender back any benefits that may have been enjoyed, or to offer to make compensation therefor, as the decree of the court will see that equity is done. Even cases which hold that eviction is a condition precedent to the vendee's right to refuse payment on the ground that the title given by the vendor was defective are very careful to state expressly that eviction is not a condition precedent in cases of fraud. Peters v. Bowman, 98 U. S. 56, 25 L. Ed. 91; Consumers' Gas Co. v. American Electric Co., 50 Fed. 778, 1 C. C. A. 663.

The decree is reversed, with direction to overrule the motion to dismiss the bill.

NOTE.—Judge KOHLSAAT was present at the argument and agreed in consultation that the decree should be reversed, but he died before the opinion was prepared.

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In re CLARK REALTY CO.

RICHTER v. GOETZ.

(Circuit Court of Appeals, Seventh Circuit. August 13, 1918. Rehearing Denied November 19, 1918.)

No. 2553.

1. BANKRUPTCY ⟸314(6)—TAX CERTIFICATES—PAYMENTS.
Under Bankruptcy Act, § 64a (Comp. St. 1916, § 9648), providing for the payment of taxes, it is the duty of the trustee in bankruptcy to pay tax certificates issued to purchasers, when premises of the bankrupt which were subject to mortgage were sold for nonpayment of state taxes.

2. JUDGMENT ⟸668(1)—CONCLUSIVENESS—PERSONS CONCLUDED—CAPACITY.
Though petitioner was party to a proceeding wherein the petition of the mortgagee to compel the trustee to pay tax certificates was denied, *held*, that petitioner, having acquired the certificates, was not estopped by that decision from securing payment, as he was seeking relief in a new capacity.

3. BANKRUPTCY ⟸322—PROCEEDINGS—PAYMENT OF TAX CERTIFICATES.
Though petitioner was allowed to prove against the bankrupt's estate for the difference between the indebtedness due and the value of property covered by mortgage securing the debt, and for the purpose of computing such value the amount of outstanding taxes was deducted. *Held*, petitioner, having acquired tax certificates, was entitled to have the same paid out of the general estate, but the claim for difference should be reduced.

4. BANKRUPTCY ⟸324—TAX CERTIFICATES—INTEREST.
The holder of tax certificates on mortgaged property belonging to a bankrupt estate *held* limited in the way of interest to 6 per cent. per annum.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

In the matter of the Clark Realty Company, bankrupt. On petition by August Richter, Jr., trustee, to compel Julius J. Goetz, trustee in bankruptcy, to pay certain tax certificates, etc. From an order of the District Court, affirming an order of the referee denying the relief sought, petitioner appeals. Reversed, with directions.

See, also, 148 C. C. A. 342, 234 Fed. 576.

Appellant, named as trustee in a certain mortgage given by the bankrupt, Clark Realty Company, for $150,000, petitioned the court to compel appellee, trustee in bankruptcy of the Clark Realty Company, to pay certain taxes assessed in 1913, and which became due and payable January 1, 1914. The premises were sold for nonpayment of taxes and tax certificates were duly issued to the purchasers pursuant to the statutes of the state of Wisconsin governing that subject. In the year 1917 appellant purchased these tax certificates and they were duly assigned to him.

The mortgagor, Clark Realty Company, was duly adjudged a bankrupt on February 3, 1914, and appellee was named its trustee in bankruptcy April 3, 1914. Appellee immediately took possession of the property covered by the mortgage and collected the rents until August 28, 1914, when he surrendered and abandoned the property pursuant to an order of the court.

Appellant petitioned the court to order appellee to pay him the amount represented by the tax certificates, with such interest as under the statutes of Wisconsin such a holder is entitled to recover. The District Court, affirming the order of the referee, denied the relief sought, and this appeal resulted.

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Appellee relied upon a previous decision of the District Court, affirmed by this court. 234 Fed. 576, 148 C. C. A. 342. In that application appellant sought to have the court direct appellee to pay these same taxes, out of the rents and profits by appellee collected, to the then holders of the tax certificates.

Leo Mann, of Powell, Wyo., and Lines, Spooner & Quarles, of Milwaukee, Wis., for appellant.

Lawrence A. Olwell, of Milwaukee, Wis., for appellee

Before BAKER and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge (after stating the facts as above). [1] As the holder of the tax certificates, appellant was, in the absence of any showing of special circumstances barring him from enforcing such a right, entitled to an order directing the payment of such taxes out of the estate of the bankrupt. His right to such payment was not limited to the fund realized out of the rents and profits collected by the trustee from the lands covered by the mortgage. The duty of the trustee to pay the taxes is clearly set forth in section 64a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 563 [Comp. St. 1916, § 9648]), which reads as follows:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court."

Commenting upon this statute the court says in Dayton, Trustee, v. Stanard, Treasurer of Pueblo County, 241 U. S. 588, 36 Sup. Ct. 695, 60 L. Ed. 1190:

"Considering the plain provision in section 64a of the Bankruptcy Act of 1898 that 'the court shall order the trustee to pay all taxes legally due and owing by the bankrupt * * * in advance of the payment of dividends to creditors,' * * * we entertain no doubt of the propriety of requiring that the certificate holders, who had paid the taxes and assessments at the sales, be reimbursed upon the cancellation of their certificates, or of requiring that the reimbursement be out of the general assets. The taxes and assessments were not merely charges upon the tracts that were sold, but against the general estate as well."

This statute and the construction placed upon it by the court is but another expression of the policy of the United States to exact priority in favor of the United States, the state, county, or municipality, in all cases of taxes where insolvency has intervened.

[2] Appellee contends, however, that appellant is estopped by the decision in Re Clark Realty Co., 234 Fed. 576, 148 C. C. A. 342.

We think otherwise. While the parties in that proceeding were the same in name as in the proceeding now before us, and the relief sought was somewhat similar, the facts upon which the petitioner now relies differ materially from the facts disclosed in the petition in the former proceeding. In the former application appellant was not the holder of the tax certificates. The application was there made by a mortgagee to have the court direct the trustee to redeem certain tax certifi-

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cates held by a third party out of a special fund collected by the trustee in bankruptcy. While the court on such an application could have granted the relief, its refusal so to do was not, upon the facts shown, error. Quite different would have been the situation had the applicant been (as he now is) the certificate holder. Petitioner now seeks relief as the holder of the tax certificates. Consequently the petitioner, though the same in name, is legally a different party, because he is suing in a different capacity and upon a legal demand which was not and could not properly be included in the earlier proceeding. Under the section and the decision quoted above, the petitioner, therefore, is entitled to have the assets of the bankrupt devoted to the payment of the taxes.

[3] Appellee further claims that if the relief is granted, two allowances for the same claim will have been made. This contention results from the filing and allowance of a claim in appellant's favor for the difference between the admitted indebtedness of the bankrupt to appellant and the value of the security covered by the mortgage. In determining this difference the court deducted from the fair valuation of the property covered by the mortgage the amount of the outstanding taxes. This allowance was made when the tax certificates were in the hands of third parties. Under such circumstances the court properly deducted the outstanding tax certificates from the value of the security. But appellant by subsequently acquiring the tax certificates should not be barred from collecting them. He is entitled to receive the sum represented by the certificates, but his claim representing the difference between the amount of the bankrupt's indebtedness to him and the value of the security, should be reduced in accordance with the provisions of sections 57k and 57*l* of the Bankruptcy Act (Comp. St. 1916, § 9641) to the extent of these tax certificates.

[4] While entitled to recover the amount due as taxes, appellant is limited in the way of interest to 6 per cent. per annum. Dayton, Trustee, v. Stanard, Treasurer of Pueblo County, supra.

The decree is reversed, with directions to enter an order in accordance with this opinion.

NOTE.—Judge KOHLSAAT concurred in the foregoing conclusions, but died before the opinion was prepared.

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RICHTER et al. v. ROCKHOLD.

SAUL et al. v. SAME.

(Circuit Court of Appeals, Fifth Circuit. November 11, 1918.)

Nos. 3167, 3168.

1. BANKRUPTCY ⟸136(2)—SUMMARY ORDER—WHAT CONSTITUTES.
An order directing the bankrupt to pay or secure to the trustee the cash surrender value of insurance policies providing for change of beneficiary *held* not a summary order against the beneficiary named; the order not purporting to affect her rights.

2. BANKRUPTCY ⟸143(12)—INSURANCE POLICIES—RIGHTS OF TRUSTEE.
Where a life policy provided for change of beneficiary and recognized a loan value, though the insurer declined to pay or recognize a cash surrender value, *held* that, as it appeared there was little, if any, difference between the loan and cash surrender value, an order directing the bankrupt to pay or secure same to trustee was proper, for the bankrupt could secure the surrender value from the company, etc.

Petition to Superintend and Revise from the District Court of the United States for the Northern District of Texas; George W. Jack, Judge.

In the matter of the bankruptcy of Jacob Richter. Petition by the bankrupt and another to superintend and revise an order affirming an order of the referee requiring the bankrupt to pay or secure to George F. Rockhold, trustee, the cash surrender value of insurance policies. Likewise a petition to superintend and revise a similar order made in the bankruptcy of Morris Saul. Orders affirmed.

W. T. Henry, of Dallas, Tex. (Sam Leake, of Dallas, Tex., on the brief), for petitioners.

Julius H. Runge, of Dallas, Tex., for respondent.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. Petitions to superintend and revise in the two cases present the same question, and will be disposed of by consideration of the case of Richter.

The petition is for revision of an order affirming an order of the referee requiring the bankrupt, within 30 days, to pay or secure to the trustee the cash surrender value of two insurance policies, and providing that, if this value (fixed by the order) were so paid, the policies should be delivered to him, and that otherwise they should pass to the trustee as assets of the estate. It was provided that—

"A copy of this order be given by mail to the bankrupt, to his wife, Bella Richter, and to the New York Life Insurance Company for their observance."

[1] The order complained of cannot be considered a summary order against Bella Richter. She is named as beneficiary in a policy, under the terms of which the beneficiary may be changed. Whether her rights be as in a policy in which the right to change is not retained, subject to be defeated, or be inchoate or in expectancy, the

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order cannot have the effect, and does not purport to have the effect, of affecting these rights.

[2] The policy allows a change of beneficiary, and provides "a loan value," but does not refer to "a cash surrender value." The company issuing the policy declines to pay or recognize a cash surrender value.

In Hiscock v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, the cash surrender value was not provided for in the policy, but was recognized by the insurance company. So in Cohen v. Samuels, 245 U. S. 52, 38 Sup. Ct. 36, 62 L. Ed. 143. In the opinion in Malone v. Cohn, 236 Fed. 882, 150 C. C. A. 144, by this court, the question is asked: Does its failure to expressly provide for a present cash surrender value stand in the way of the bankrupt acquiring the right to hold, own, and carry the policy by paying or securing the trustee an ascertained sum of money? And, arguing the negative, the court cites Hiscock v. Mertens, to the effect that—

"The failure of the policy to provide expressly for a present cash surrender value does not have this effect, if, in fact, it has such a value by the concession or practice of the company issuing it."

There was, however, in the case no evidence of any concession or practice of the company recognizing a cash surrender value.

So far as appears, however, no case has, in terms, held that where the policy does not provide for a cash surrender value, and there is no concession or practice of the company recognizing it, and there is a refusal of the company to pay the cash surrender value, or to otherwise recognize its existence, the provisions of section 70a of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. 1916, § 9654]) may nevertheless be made to apply. This question is now distinctly presented.

The testimony of an actuary, called as a witness in this case, was to the effect:

"That, in the business of life insurance, there is no difference between the loan value and the surrender value of life insurance policies, except a slight difference in the method of computation. * * * The basis of the computation of the cash surrender value of the policy and the loan value is the same, both being based on the reserve, and the loan and cash surrender value are equivalent."

A differentiation is made by a witness connected with the insurance company issuing the policy. Among his answers to interrogatories is the following:

"Payment of the cash surrender value of the policy by the company completely terminates the policy and all insurance benefits thereunder; but, after a loan is made on the policy, the insurance thereunder may be, and is usually, continued by the payment of the same premium, with interest on the loan: in the event of the death of the insured, or the maturity of the policy, the loan is deducted from the amount payable on the policy."

Whether or not a company, by its policy or otherwise, recognizes a cash surrender value, the value exists. If there is a difference between the loan value and the cash surrender value, the difference would, ordinarily, be in favor of the latter. By payment of the cash

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surrender value, the company escapes all future liability. The value to the company is there, and what it amounts to in dollars is a matter of ascertainment by computation, if it is not indicated by the policy. It is a value that has been created by and from the business or estate of the bankrupt, and his creditors are entitled in law and good morals to the benefit of it. On the other hand, the creditors having received this value, there can be no reason why the bankrupt should not get the benefit of life insurance which he might not at that time be able to secure, and at a premium rate less than would be demanded upon a new policy.

It is within the rights and the ability of the bankrupt to secure from the life insurance company the amount required by the order to continue his policy, and if he does not pay the cash surrender value, as legally and properly ascertained, the referee should take such steps as may be necessary and proper to secure for the creditors the benefit of the asset evidenced by the policy.

The orders sought to be revised are confirmed.

GILLESPIE v. RIGGS et al.

(Circuit Court of Appeals, Fourth Circuit. October 1, 1918.)

No. 1636.

1. FRAUDULENT CONVEYANCES ⟸241(3)—EQUITABLE RELIEF.
   A simple contract creditor, who has no lien or security of any kind, and who asserts no right to subject any specific property to the payment of his debt, cannot invoke the aid of equity for the collection of his claim, and is not entitled to have conveyances by his debtors set aside on the theory that they were made to hinder.
2. COURTS ⟸366(1)—PRECEDENTS—STATE DECISIONS.
   The decisions of the highest state court, interpreting the local statutes, are binding on the federal courts.
3. CREDITORS' SUIT ⟸32—EXECUTORS AND ADMINISTRATORS' ⟸535—FRAUDULENT CONVEYANCES ⟸221—SURETIES—JUDGMENT AGAINST PRINCIPAL—RESTRAINING CONVEYANCE.
   In West Virginia, a judgment against an executor is only prima facie evidence of liability of the sureties on the executor's bond, so a legatee, securing judgment, cannot maintain a bill against sureties on the bond to restrain them from conveying their property, or to set aside their conveyances as in fraud of creditors.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Bill by John J. Gillespie against Caleb B. Riggs and others. From a decree dismissing the bill (248 Fed. 843), complainant appeals. Affirmed.

See, also, 241 Fed. 311, 154 C. C. A. 191.

Thomas P. Jacobs, of New Martinsville, W. Va., and David F. Pugh, of Columbus, Ohio (McCoy & Swiger, of Sistersville, W. Va., on the brief), for appellant.

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Charles E. Hogg, of Point Pleasant, W. Va. (Olin C. Carter and C. B. Riggle, both of Middlebourne, W. Va., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The appellant, John J. Gillespie, plaintiff below and hereinafter so called, is the sole heir at law and sole legatee under the will of his father, William H. Gillespie, who died in 1897, and whose executor is the defendant Walter R. Smith. In August, 1914, in a suit brought for an accounting in the circuit court of Tyler county, W. Va., plaintiff recovered a judgment against the executor for some $36,000, besides costs. Execution was issued soon afterwards and returned unsatisfied, and the judgment remains wholly unpaid. The sureties on the executor's bond were not made parties to this suit, and there is no judgment against them.

In October, 1914, plaintiff brought in the court below an action at law against the surviving sureties, six in number, and they set up in defense that he had released one of them in 1909, and that all were thereby discharged. Thereupon he instituted a suit in equity to cancel this release, on the ground that it has been procured by fraud, and to enjoin its use as a defense in the law action. Answer of denial was filed, the case tried, and a decree entered in March, 1916, releasing the surety in question from liability, and enjoining the use of the release, except to secure to the other defendants credit for such sum as the released surety would be liable for, if he had not been released. The law action remains pending and untried.

In April, 1916, this suit was commenced. The bill of complaint, after reciting at length the facts above summarized, sets out in detail various transfers of real estate by certain of the defendants, sureties on the executor's bond, which transfers they are alleged to have made for the purpose of hindering, delaying, and defrauding the plaintiff, and of evading their liability as such sureties. It is not alleged that these defendants are insolvent, or that they have not other property sufficient to discharge the obligation. The relief prayed for is in substance a cancellation of the transfers already made, and an injunction against further transfers by the surety defendants. On their motion the bill was dismissed for want of jurisdiction, and plaintiff appeals.

[1] It is beyond question that a mere contract creditor, who has no lien or security of any kind, and who asserts no right to subject any specific property to the payment of his debt, cannot invoke the aid of equity for the collection of his claim. The principle is broadly declared by the Supreme Court in Hollins v. Brierfield C. & I. Co., 150 U. S. 371, 378, 14 Sup. Ct. 127, 128, 37 L. Ed. 1113, as follows:

"The plaintiffs were simple contract creditors of the company, their claims had not been reduced to judgment, and they had no express lien by mortgage, trust deed, or otherwise. It is the settled law of this court that such creditors cannot come into a court of equity to obtain the seizure of the property of their debtor, and its application to the satisfaction of their claims; and this, notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. The line of demarcation between

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equitable and legal remedies in the federal courts cannot be obliterated by state legislation. Scott v. Neely, 140 U. S. 106 [11 Sup. Ct. 712, 35 L. Ed. 358]; Cates v. Allen, 149 U. S. 451 [13 Sup. Ct. 883, 37 L. Ed. 804]."

[2, 3] This being so, it is manifest that no case is here made for equitable cognizance, unless the status of plaintiff, as respects the surety defendants, is quite different from that of a contract creditor. His contention is that the decree he got against the executor is binding on the sureties, although they were not parties to the suit, and therefore he is entitled to the same relief as though he had a judgment against them. His whole argument rests on that proposition. But obviously the decree is not binding on the sureties in any absolute sense. Plaintiff has no lien on their property and no right of seizure and sale under execution. The most that can be claimed for the decree is that it is competent evidence against the defendants in the law action (Stovall v. Banks, 77 U. S. [10 Wall.] 583, 19 L. Ed. 1036), and that it makes a prima facie case against them in that action (Crim v. England, 46 W. Va. 480, 33 S. E. 310, 76 Am. St. Rep. 826). In the last-named case it was said:

"The general law is that a judgment against an administrator or executor for a debt, or a decree for a balance in his hands, is conclusive upon the sureties in his bond, though they are not parties. * * * But in the Virginias it is not conclusive, but only prima facie. State v. Nutter, 44 W. Va. 385 [30 S. E. 67]; 1 Lomax, Ex'rs, 331; Hobson v. Yancey, 2 Grat. [Va.] 73; Craddock v. Turner, 6 Leigh. [Va.] 116. I am of opinion that the finding of assets in the administrator's hands is not conclusive, but prima facie, because of a peculiar Virginia statute found in Code 1891, c. 85, § 24, that no executor or surety shall be chargeable beyond assets by reason of any omission or mistake in pleading, and may offer any defense admissible in an action against the executor suggesting a devastavit. I think it is that which makes the difference between our law and the general rule."

Accepting this construction of the West Virginia statute by the highest court of that state, as we are bound to do, it must be held that the decree in question is at most only prima facie evidence of the liability of the sureties, and that they are at liberty to set up in the law action any defenses which were available to the executor in the original suit. It is certainly conceivable that some of their defenses may overcome, in whole or in part, the prima facie case made by the decree, and that plaintiff may not succeed in getting a judgment against them. Nevertheless he asks a court of equity to restrain the defendants from disposing of their property, on which he has no lien or specific claim, in order that he may be able to collect the judgment he expects to get in the pending law action to which, notwithstanding their adverse pleas, he alleges they have no defense. We are persuaded that the case made by him comes under no recognized head of equity jurisprudence, and that his bill was properly dismissed under the authority of Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, Cates v. Allen, 149 U. S. 452, 13 Sup. Ct. 883, 37 L. Ed. 804, Hollins v. Brierfield C. & I. Co., supra, and Davis v. Hayden, recently decided by us, 238 Fed. 734, 151 C. C. A. 584.

Affirmed.

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KING LUMBER CO. v. NATIONAL EXCH. BANK OF ROANOKE, VA.

In re KING LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. October 23, 1918.)

No. 1638.

1. BANKRUPTCY ⟸440—ALLOWANCE OF CLAIMS—REVIEW.
The allowance of a claim of more than $500 can be reviewed only by an appeal within 10 days, as provided in Bankruptcy Act, July 1, 1898, § 25a (Comp. St. 1916, § 9609), and not by petition to superintend and review in matter of law, provided for by section 24b (section 9608).

2. BANKRUPTCY ⟸446—PETITION TO SUPERINTEND AND REVISE—SCOPE OF REVIEW.
A disputed question of fact on which the allowance of a claim depended cannot be reviewed on petition to superintend and revise in matter of law provided for by Bankruptcy Act July 1, 1898, § 24a (Comp. St. 1916, § 9608).

Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Charlottesville, in Bankruptcy; Henry Clay McDowell, Judge.

In the matter of the King Lumber Company, bankrupt. The claim of the National Exchange Bank of Roanoke, Va., to share in a composition, etc., which was rejected by the referee on the bankrupt's objection, was allowed on review, and the bankrupt petitions to superintend and revise in matter of law. Petition dismissed.

Charles W. Allen, of Charlottesville, W. Va. (Allen & Walsh, of Charlottesville, W. Va., on the brief), for petitioner.

W. J. Henson, of Roanoke, W. Va. (Woods, Chitwood & Coxe and Jackson & Henson, all of Roanoke, Va., on the brief), for respondent.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

KNAPP, Circuit Judge. In April, 1916, the King Lumber Company, a general contractor, borrowed from the National Exchange Bank of Roanoke the sum of $15,000, payment of which was secured by assignment of that amount of the moneys due and to become due on its contract with the city of Roanoke for the erection of a municipal building. In December following the lumber company was adjudicated bankrupt. Later it made an offer of composition which the creditors voted to accept. The offer contained this provision:

"There is due the King Lumber Company, the bankrupt, about the sum of $21,000 by the city of Roanoke, Va., on account of the construction of the City Hall; $15,000 of this amount was in April, 1916, assigned to the Exchange National Bank of Roanoke, Va., and there are sums due supply men and subcontractors, much more than sufficient to take up the balance of said sum of $21,000. This sum of $21,000 is to be distributed between the National Exchange Bank and said supply men in the order to which they may be entitled, and to be determined by the law and chancery court of the city of Roanoke, in a suit now pending therein for that purpose, and this sum is entirely abandoned, so far as the King Lumber Company is concerned, if its offer of composition is accepted."

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In the suit referred to it was decided by the Supreme Court of Appeals of Virginia (121 Va. 460, 93 S. E. 699), that the supply men and subcontractors were entitled to priority of payment from the fund in question, with the result that the balance left for the bank was some $10,000 less than the face of its debt and interest. For this deficiency, whatever it might prove to be when all the supply men and subcontractors had been paid in full, the bank in due time filed a claim with the referee, setting up in detail the facts above summarized. Objections of the lumber company were sustained, and the claim rejected by the referee, on the ground in substance that the claimants of the Roanoke fund had agreed, when the offered composition was accepted, to look to that fund only for the payment of their debts, and to waive all right to prove the same in the bankruptcy proceedings. On review by the court below the ruling of the referee was reversed, and the claim allowed, with directions for payment to the bank, in accordance with the terms of the composition offer, of "30 per cent. of such part of its original claim as has not been satisfied out of the Roanoke city fund." The lumber company thereupon filed in this court a petition to superintend and revise, under section 24b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. 1916, § 9608]). The bank moves to dismiss.

[1, 2] The sole question raised by the petition is alleged error in allowing a claim of more than $500. The lumber company contended that the bank was not entitled to prove a claim because it had agreed to take what it could get out of the Roanoke fund without resort to other assets. When this contention was overruled, and the claim allowed, the only way in which the decision could be brought here for review was by appeal within 10 days as provided in section 25a of the act (section 9609). This was distinctly held in Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725, in which the Supreme Court says:

"We think this subdivision (24b) was not intended to give an additional remedy to those whose rights could be protected by an appeal under section 25 of the act. That section provides a short method by which rejected claims can be promptly reviewed by appeal in the Circuit Court of Appeals, and, in certain cases, in this court. * * * Under section 24b a question of law only is taken to the Circuit Court of Appeals; under the appeal section controversies of fact as well are taken to that court, with findings of fact to be made therein if the case is appealable to this court. We do not think it was intended to give to persons who could avail themselves of the remedy by appeal under section 25 a review by petition under section 24b."

Moreover, as this authority holds, only questions of law can be brought to this court by petition to superintend and revise. But the controversy here presented turns on a disputed question of fact. The provision in the composition offer above quoted informed all creditors that the Roanoke fund would be insufficient to pay both the bank and the supply men, but it failed to state whether the party not paid in full from that fund could come in as an unsecured creditor for the deficiency and get the percentage offered by the bankrupt. What the understanding or agreement was in that regard became the subject of sharply conflicting testimony, and on the determination of this issue of

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fact depends the allowance or rejection of the bank's claim. Manifestly such a controversy cannot be reviewed on a petition to superintend and revise.

On both grounds the petition must be dismissed.

DEVINE v. BUFFALO, R. & P. RY. CO.

(Circuit Court of Appeals, Third Circuit. December 6, 1918.)

No. 2398.

COMMERCE ⟸27(5)—LIABILITY FOR INJURY TO SERVANT—SAFETY APPLIANCE ACT.

An employé of an interstate railroad company, whose injury was caused by the failure of the company to comply with the requirements of Safety Appliance Act March 2, 1893, § 2 (Comp. St. 1916, § 8606), as to automatic couplers, may recover therefor, although not himself employed in interstate commerce.

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Action by Albert L. Devine against the Buffalo, Rochester & Pittsburgh Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John G. Whitmore, of Ridgway, Pa., and Stone, Wright & Chalfant, of Pittsburgh, Pa., for plaintiff in error.

Anderson, Mathews & Wall, of Youngstown, Ohio, and Prichard & Trent, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

PER CURIAM. In the court below Devine brought suit against the Buffalo, Rochester & Pittsburgh Railway Company to recover for damages sustained by him while working as a brakeman on a train on its road. He recovered a verdict, and on entry of judgment thereon the railway company sued out this writ.

From the plaintiff's statement it appears the defendant's road extends from Pittsburgh, Pa., to Buffalo, N. Y., and the ground of action was that the railway had failed to comply with the federal Safety Appliance Act (Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [Comp. St. 1916, § 8606]), in that the couplers between which the plaintiff was injured "would not at said time couple with each other automatically upon impact, without the necessity of employés of defendant going between the ends thereof to render personal assistance." The said road being itself a highway of interstate commerce generally, and the negligence charged being a failure on its part to comply with the federal Safety Act, it follows that, if the plaintiff sustained his charge of the defendant's statutory negligence, and that his injury was caused by such negligence, he was entitled to recover, even if he was not himself engaged in interstate commerce when he was injured. Railroad v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874. Such being the case, the proof

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given by the plaintiff that he was engaged in interstate commerce when injured—the competency of which is here questioned—becomes a matter of no moment. The verdict and the judgment thereon would have been justified, had there been no such proof.

Further complaint is made that there was no such proof of the plaintiff's earning power as warranted the submission of that question to the jury. We have examined the record, and we find proof of the plaintiff's earning capacity and actual earnings before the accident. That proof of his earning capacity after the accident was not given was because the defendant objected to such proof, and it cannot now be heard, in the face of the court sustaining such objection, to urge as error that such proof was not furnished.

The judgment below is affirmed.

ALSOP v. McCOMBS et al.

(Circuit Court of Appeals, Eighth Circuit. April 25, 1918.)

No. 5024.

COURTS ⇐352—FEDERAL COURTS—STATE PRACTICE—VOLUNTARY NONSUIT.

Under Rev. St. Mo. 1909, § 1980, providing that "the plaintiff shall be allowed to dismiss his suit * * * at any time before the same is finally submitted," which by Rev. St. § 914 (Comp. St. 1916, § 1537), governs federal courts in that state, a plaintiff may of right take a nonsuit at any time before the jury has actually retired.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action at law by James N. Alsop against Ruddell M. McCombs and others. Judgment for defendants, and plaintiff brings error. Reversed.

Chester H. Krum, of St. Louis, Mo. (George W. Jolly, of Owensboro, Ky., on the brief), for plaintiff in error.

Jeffries & Corum, of St. Louis, Mo., and Oliver & Oliver, of Cape Girardeau, Mo., for defendants in error.

Before HOOK, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. Suit upon contract for damages. From a judgment upon a directed verdict at the close of plaintiff's evidence a writ of error was taken.

At the close of plaintiff's evidence he moved the court for a voluntary nonsuit, which was denied. This was followed by a statement by the court that a verdict would be directed. Again plaintiff moved for nonsuit, which was denied. The sole error assigned is the refusal to grant the nonsuit. Under the "conformity statute" (R. S. § 914 [Comp. St. 1916, § 1537]), the practice of the state courts must govern. Section 1980, Revised Statutes of Missouri 1909, provides:

"The plaintiff shall be allowed to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury, or to the court sitting as a jury, or to the court, and not afterward."

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This court, in Chicago, M. & St. P. Ry. Co. v. Metalstaff, 101 Fed. 769, 41 C. C. A. 669, after quoting the above statute and citing numerous Missouri cases, decided that the plaintiff might "take a nonsuit at any time before the jury has actually retired."

The judgment is reversed.

LUTEN v. WASHBURN et al.

(Circuit Court of Appeals. Eighth Circuit. November 11, 1918. Rehearing Denied January 21, 1919.)

No. 4742.

PATENTS ⟸328—CONSTRUCTION—VALIDITY.

The Luten patents, No. 852,970, claims 14, 15, and 16, No. 853,202, claim 17, No. 979,776, claim 1, and No. 989,272, claim 3, all for reinforced concrete construction, *held* invalid; not showing invention in view of the prior art.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit by Daniel B. Luten against George Washburn and Weld County, Colo. From a decree dismissing the complaint, plaintiff appeals. Affirmed.

Russel T. MacFall, of Indianapolis, Ind., and Frank M. Hall, of Hillsdale, Mich. (Frank H. Drury, of Chicago, Ill., and Miles G. Saunders, of Pueblo, Colo., on the brief), for appellant.

A. J. O'Brien, of Denver, Colo. (Walter E. Bliss and Joseph C. Ewing, both of Greeley, Colo., on the brief), for appellees.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. The appellant commenced this action against appellees for infringement of United States letters patent numbered 852,970, 853,183, 853,202, 853,203, all dated May 7, 1907, 979,776, dated December 27, 1910, and 989,272, dated April 11, 1911, all issued to himself. The District Court held the patents void for lack of invention and dismissed the complaint. This is an appeal from that decree.

The patents relate to metal reinforced concrete bridges and similar structures. Appellees were alleged to have infringed the patents in the construction of what is known as "Sheep Draw Bridge" in Weld county, Colo. The specifications of the bridge called for a reinforced concrete bridge of the beam and slab type, of 30-foot span, supported on reinforced concrete abutments, 20 feet in width. In this court counsel for appellant has abandoned all claims for infringement, except as to claims 14, 15, and 16 of patent 852,970, claim 17 of patent 853,202, claim 1 of patent 979,776, and claim 3 of patent 979,272. The record shows that appellant has obtained 18 consent or pro confesso decrees declaring the patents in suit valid and infringed in different United States District Courts. In contested suits involving the claims here in-

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volved, or similar claims, the Luten patents have been decided to be invalid for lack of invention in the following cases: Luten v. Allen, 254 Fed. 587, and Luten v. Young, 254 Fed. 591, in the United States District Court, District of Kansas; Luten v. Whittier, 251 Fed. 590, —— C. C. A. ——, in the Circuit Court of Appeals, Sixth Circuit; Luten v. Wilson et al., 254 Fed. 107, in the United States District Court, District of Nebraska; Luten v. Marsh et al., 254 Fed. 701, in the United States District Court, Southern District of Iowa; Ex parte Luten, 237 O. G. 917; In re Luten, 37 App. D. C. 379. So far as we know, the claims now before us, or similar claims, have not been held valid in any contested case. The claims read as follows:

Patent No. 852,970.

14. "A bridge or arch of concrete or other suitable material having wings joined thereto by rods imbedded in said wings and extending into the abutments."

15. "A bridge or arch of concrete or other suitable material having wings joined thereto by rods imbedded in said wings and extending into and through the abutments."

16. "A bridge or arch of concrete or other suitable material having wings joined thereto by rods imbedded in one of said wings and extending through the abutment into the opposite wing."

Patent No. 853,202.

17. "A bridge of concrete or similar material having a reinforced spandrel or girder extending across the abutment or pier, and cantilevered on the abutment or pier, with tension members extending across the abutment or pier near the upper surface of the spandrel or girder."

Patent No. 979,776.

1. "A reinforcement for concrete girders, beams, etc., comprising a lower horizontal tension rod and upper and lower shearing rods, each having a central horizontal part, inclined parts extending outwardly from opposite ends of the central part and horizontal parts extending outwardly from the ends of said inclined parts, the central horizontal part of the lower shearing rod being longer than that of the upper shearing rod, and the horizontal ends of the upper shearing rod being longer than those of the lower shearing rod, substantially as set forth."

Patent No. 989,272.

3. "The combination of an upright member with a transverse member and knee brace all of hardened plastic with imbedded tension members reinforcing the upright member and transverse member continuously adjacent the surfaces opposite the knee brace and extending away from said opposite surface of the transverse member intermediate its middle and the knee brace and other tension members embedded longitudinally through the knee brace."

An examination of the claims clearly shows that appellant's claim to invention, so far as the subject-matter thereof is concerned, is based upon the particular positioning of steel rods or metal bands in concrete or plastic material employed in the construction of bridges or culverts. This court, in Luten v. Sharp, 234 Fed. 880, 148 C. C. A. 478, speaking by Judge Sanborn, said:

"The use of steel and iron rods, wire mesh, expanded metal, and like articles imbedded in different ways in cement girders, beams, floors, posts, and other articles made of cement, to strengthen and reinforce them, was old, well known, and had long been practiced before the patented inventions of Luten here in question were discovered, and the question for review is one of fact."

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The question of infringement was alone in issue in that case. Luten testified in the present case as follows:

"That principle of reinforced concrete is admittedly old—that steel is to be used in tension. I never have made any contention that I invented steel in tension in concrete bridges, or the use of steel in tension in many other places. What I have maintained is that I have placed the steel in a new way that produces better results, in a more efficient form. * * *

"Now, in a concrete bridge, the greatest efficiency is always secured by resisting tension or pull with steel rods. That has been established for half a century; not, perhaps, with curved tension members, but the basic idea is very old. There is no question about that."

The French patents, numbered 88,547 and 88,546, issued to François Coignet, April 6, 1869, for improvement in making artificial stone and in monolithic structures, the United States patent for construction of joists, girders, and the like, issued to François Hennebique, October 4, 1898, No. 611,907, United States patent for construction of metal concrete arch bridges, issued to H. V. Hinckley, April 25, 1899, and United States patent No. 696,838, for concrete arch construction, issued to W. C. Parmley, April 1, 1902, disclose the prior art and anticipate the claims in suit. In Turner v. Lauter Piano Co., 248 Fed. 930, — C. C. A. — (certiorari denied October 21, 1918), the Court of Appeals of the Third Circuit said:

"There is to-day neither invention nor novelty in merely placing metal reinforcement in concrete at places at which strains come. The very principle of reinforcement, as the word denotes, is to give force to or strengthen the place that is weak by adding something that is strong. Invention in reinforcement is to be found only in discovering a new principle, or in employing new means embodying the old principle. Therefore, one striving to find a new principle, or to invent a new means of concrete reinforcement under the old principle, enters a well-known and widely practiced art, and must do something more than care for tensile strains at places where they are known to come."

This language was approved by us in Turner v. Deere & Webber Building Co., 249 Fed. 753, — C. C. A. —, and Judge Hook, in delivering the opinion of the court in the same case, in speaking of the use of concrete in building construction used the following language:

"Its resistance to compression and susceptibility to other stresses in certain positions were familiar to all who had to do with it, as were the general principles of reinforcing it with wire, rods, or strips of metal which possessed the quality the concrete lacked. When the plaintiff entered, the art had so progressed that the nature of the stresses and in a general way the places where the reinforcement should be disposed or arranged were a part of the common knowledge of builders, as in greater degree was the subject of struts, braces, and the like in carpentry. In pretentious or complicated construction, where ordinary experience did not suffice, mathematical computation was available. The evidence of prior practice in building and prior publications and patents show that little was left for patentable invention in placing the customary pieces of metal here or there, or turning them this way or that, in the mass of concrete."

In Drum v. Turner, 219 Fed. 188, 135 C. C. A. 74, we sustained the Norcross patent for a metallic concrete flooring without supporting beams. The invention in that case, however, was for a floor without supporting beams, not merely the location of the reinforcing rods. In

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Turner v. Mboore, 211 Fed. 466, 128 C. C. A. 138, and in Turner v. Deere & Webber Building Co., supra, we held the Turner patent for a reinforced concrete building construction void for lack of invention in view of the prior art. Appellees claim that, in view of the prior art and on general principles, the claims in suit disclose mechanical or engineering skill alone. Appellant claims that he has placed the steel or reinforcing rods in a new way, that produces better results in a more efficient form. So it is the positioning of the reinforcing rods that is called invention. The question to be decided then, is this: In view of the prior art and on general principles, was it invention at the date of the patents to place the reinforcing rods as indicated in the claims of the patents, or was it simply the putting together by the exercise of mechanical or engineering skill things old in the art, to perform functions long known, in a manner anticipated in prior patents? Neither the specifications, claims, nor drawings of the patents in suit give any specific directions as to where the reinforcing steel should be placed. Steel rods are placed in concrete structures to resist tension or pull. It would seem to necessarily follow that it would require mechanical or engineering skill only to locate in any particular structure where the tension was, and the same skill to determine where the steel should be placed to resist such tension; but this would not be invention, which alone is patentable.

"Industry in exploring the discoveries and acquiring the ideas of others; wise judgment in selecting and combining them; mechanical skill in applying them to practical results—none of these are creation; none of these enter into the inventive act." Robinson on Patents, § 78.

In view of what was old and well known at the date of the patents, we can see no invention in the claims in suit. The wing walls in connection with bridges were old, the tying of the wings to the abutments was not new, and the employment of metal rods in connection with concrete, to strengthen the material and cause it to remain intact, was well known. We therefore agree with the Court of Appeals of the District of Columbia, in the case of In re Luten, supra, when it said:

"All therefore that appellant did was to put together by the exercise of the simplest mechanical skill things old in the art, to perform functions long known, in a matter anticipated in prior patents."

Decree below affirmed.

TIFFANY v. PAPER PRODUCTS CO.

(Circuit Court of Appeals, Fifth Circuit. October 28, 1918.)

No. 3182.

1. PATENTS ⟸78—ANTICIPATION—PRIOR USE.

Under Rev. St. § 4886 (Comp. St. 1916, § 9430), use by others of an invention prior to patenting does not invalidate the patent, where the time did not exceed two years prior to the application and the patentee was the first to actually make the invention.

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2. PATENTS ⇐⇒81—PRIOR USE—EVIDENCE.
Evidence *held* insufficient to show that the patentee was the first to invent a device which was in use before the patent was granted.

3. PATENTS ⇐⇒328—INVENTION—WHAT CONSTITUTES.
The Gess patent, of March 7, 1911, No. 986,379, for an improvement in the construction of a cone tube for use in knitting machines as a support for masses of yarn, was invalid; there being no invention, as the improvement involved only mechanical skill.

4. PATENTS ⇐⇒17—INVENTION—SKILL INVOLVED.
The design of the patent laws is to reward those who make some substantial discovery which adds to our knowledge, etc., but it was never the object of those laws to grant a monopoly for every trifling device or shadow of a shade of an idea which would naturally occur to any skilled mechanic.

Appeal from the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Bill by Henry L. Tiffany against the Paper Products Company for infringement of patent No. 986,379. From a decree dismissing the bill (244 F. 178), complainant appeals. Affirmed.

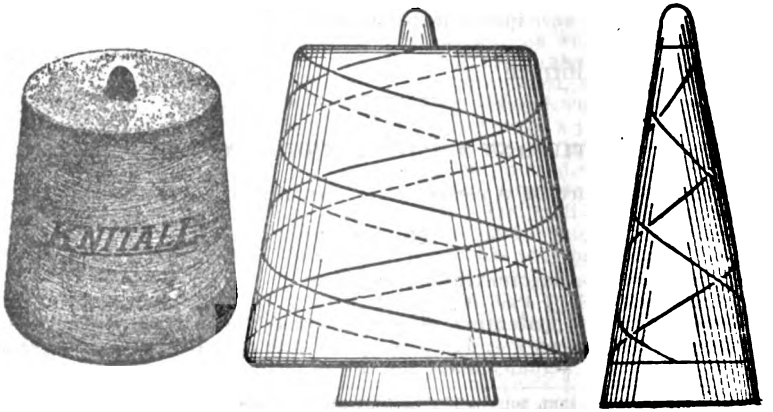
Frederick L. Emery and Irving U. Townsend, both of Boston, Mass., and Robert C. Alston, of Atlanta, Ga., for appellant.

John M. Coit, of Washington, D. C., and Wm. H. Trawick, of Cedartown, Ga., for appellee.

Before WALKER and BATTS, Circuit Judges, and JACK, District Judge.

JACK, District Judge. The appellant has appealed from a decree dismissing his bill of complaint, charging infringement of a patent to one Charles Gess, granted March 7, 1911, on application filed January 3, 1911, covering an improvement in the construction of a cone tube adapted for use in knitting machines as a support for masses of yarn, from which the yarn is drawn to the knitting machine which knits it into fabric.

The cone patented is made of compressed paper or pasteboard with roughened outer surface to hold the yarn, which is wound on it axially as shown in illustration:



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At the point of the cone the paper is smooth, and the edges turned in and rounded in an arch or dome shape, so as to practically or quite close the opening in the apex. The improvement on the old cone, which had been in use many years, was in thus smoothing and turning in the point. The new cone, in contradistinction to the old, is generally known as a round-nosed cone; the old cone being generally referred to as a square-nosed cone, though this latter term is misleading, as the point is not square, but circular, and flat, instead of arched, as in the Gess cone.

The chief advantage claimed for the Gess patent is that it removes the sharp edges, which are easily mashed outward, and on which the yarn, as the top of the cone becomes bare in unwinding, frequently catches and breaks.

In addition to the advantage claimed for the "round-nosed" cone in the unwinding of the yarn, it is claimed that its arched formation gives it greater strength, so that it stands greater weight and is less apt to be crushed in shipping. This, however, is not one of the advantages claimed for it in the specifications, and the drawing indicates a central opening left in the apex, although the patent suggests that the tip be inturned "preferably so as to substantially, if not wholly, close said tip end."

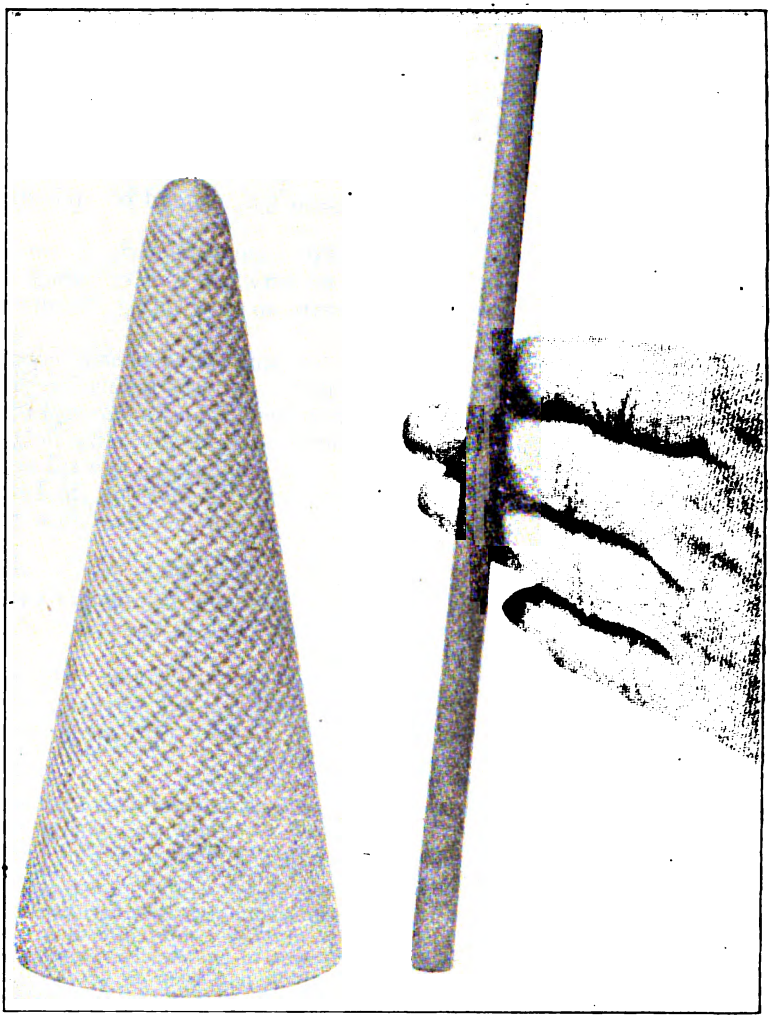
The fundamental purpose of the patentee was to make a cone from which all of the yarn could be unwound, eliminating the danger of the last few rounds catching and breaking on the edge of the cone; hence the name which he gave it, "Knitall."

The sole question at issue is the validity of the patent. The trial court, in dismissing the bill, held that the improvement in the cone did not involve invention, but was merely such an improvement as would have readily occurred to any one skilled in the art.

"Even assuming, then, that this round-nosed cone had not been anticipated in the prior art, if it is a thing which 'would naturally and spontaneously occur to any skilled mechanic or operator, in the ordinary progress of manufacturers,' it is not a patentable invention. The distinction between mere mechanical knowledge or the knowledge of one familiar with the particular art or trade, on the one hand, and the exercise of the creative faculty or the faculty of invention, on the other hand, is at times quite difficult. There may be some difficulty about it here, but it seems to me that the mere inturning of the edges of the square-nosed cone which had been in use for many years, and turning it in so that the ragged edges of the square-nosed cone would not be there to intercept the movement of the yarn or thread, is a thing which would occur readily to any one skilled in the art or even reasonably familiar with the business of spinning yarn and adapting the same to be used readily in knitting mills. It is not right to the public to class it as having been such an invention or discovery as is patentable."

The evidence shows that Gess' idea was not a new one. It had been applied by McCausland in the cop tube many years before. The cop tube, like the cone, was, and still is, used as a support for yarn. McCausland's patent specifically provides for the turning in of the edge of the smaller end of the tube (see illustration) and the same idea is also found in several wooden bobbins with rounded noses.

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The Gess Cone. McCausland Cop Tube.

It has, for a long time, been the custom to cap the "square-nosed" cone with a button or ball, of acorn shape, with a stem which fits down into the hole in the apex of the cone, thus giving the top of the "square-nosed" cone the same rounded, arched, shape as the Gess "round-nosed" cone.

Plaintiff, Tiffany, himself testified that he had seen many of these "acorns" used, before the Gess cone came on the market, entirely doing away with their use. With the acorn inserted, the cones were practically the same, save that the Gess cone consisted of only one piece,

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and the square-nosed cone of two. Combining the two into one did not involve invention.

Not only was Gess' idea in rounding the nose of his cone utilized long prior by McCausland in his cop tube, and by many manufacturers in the use of the acorn device, but the record fails to show that Gess was even the first to apply this old idea in the manufacture of cones. The evidence shows that the same McCausland who invented the cop tube, as early as September, 1909, over a year prior to Gess' application for patent, January 3, 1911, had installed a machine for the purpose, and was turning in the edges of secondhand cones.

[1, 2] The plaintiff claims, however, that such use by others under section 4886 of the Revised Statutes did not invalidate the patent, where the time did not exceed two years prior to the application. This is true, provided the patentee was the first to actually make the invention; but there is no proof in the record to show the date of the invention. Gess was not a witness. The only dates shown in the record are the dates of the application for the patent and the date the patent was issued. The record shows that plaintiff, Tiffany, who later became the assignee of Gess, as early as April, 1909, contracted with the Pairpoint Corporation to manufacture a number of these round-nosed cones. There is no evidence, however, to show any privity between Tiffany and Gess at the time, or that Tiffany acted as the agent or the licensee of Gess. The only testimony bearing on this point is that of Shurtleff, of the Pairpoint Corporation, who testified that Tiffany "discovered that a round-pointed, smooth-finished cone, that was closed at the tip end, would be a great improvement." He was asked by counsel for the plaintiff in what sense he used the word "discovered," and replied:

"He (Mr. Tiffany) first brought it to our attention, though I understand that the discovery was made by Mr. Gess."

Shurtleff does not state that he understood, from Tiffany or any one else, at the time the order was given, that the invention was that of Gess. It is only clear that he so understood at the time of the trial. Neither does Tiffany, who was a witness, testify that he was acting for, or as the licensee of, Gess. From the mere fact that he afterwards became the assignee of Gess and had the patent issued to him, it would not necessarily follow that he was acting for Gess at the time he made the contract with the Pairpoint Corporation. He may have gotten the idea from Gess, or from a third person.

[3, 4] Regardless, however, of the question as to who first conceived the idea, or put it into effect, it was but a simple and natural step in the progress of the art, and the patent should not have issued.

It is evident that the in-turning of the small end of the cone tube constituted a distinct improvement; but it required no inventive faculty, because of the very fact that it was so evident. It was but the natural thing to do. The evidence shows that employés, in factories using the square-nosed cones, frequently, as the yarn was wound off, pushed in the edges of the points with their fingers. The advantage of having the point turned in was thus obvious, and such as would, in due course, suggest itself to any skilled mechanic.

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Gess noticed that the edge of the top of the cone, while the yarn was being unwound, had a tendency to protrude outward in the way of the yarn. His idea was simply to bend it inward out of the way. This required merely the brain of a skilled workman, and not the genius of an inventor. The patentee had the foresight to see that this very simple and natural evolution of the cone tube would be of commercial value; but such business acumen did not make the idea patentable.

As was said by the Supreme Court in Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438:

"The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers, who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accounting for profits made in good faith."

And again in Pope v. Gormully, 144 U. S. 254, 12 Sup. Ct. 643, 36 L. Ed. 426:

"They appear to involve such immaterial changes as would be required to adapt a known device to use in a combination with other elements already existing, and such as would occur to any skilled mechanic. Indeed, the object of these patents, and the same remark may be made of all, or nearly all, involved in these suits, seems to have been principally to forestall competition, rather than to obtain the just rewards of an inventor."

We are of the opinion that there is no error in the decree of the lower court, and the same is affirmed.

FREEMAN-SWEET CO. et al. v. LUMINOUS UNIT CO.

(Circuit Court of Appeals, Seventh Circuit, October 15, 1918.)

No. 2651.

PATENTS ⊂=324(1)—INFRINGEMENT—APPEAL—RESTRAINING ORDER—PROPRIETY.

Where the trial court, after finding complainant's patent valid and infringed, suspended issuance of injunction pending appeal, on defendants' filing bond to cover profits, etc., *held*, that defendants were authorized to continue their business in the infringing article, and complainant will be restrained from sending circulars to their customers warning against purchasing defendants' goods, particularly where only part of their business was in the infringing article.

Suit by the Luminous Unit Company against the Freeman-Sweet Company and the Reflectolyte Company. From a decree for complainant (249 Fed. 876), defendants appeal. On motion by defendants (appellants) for a restraining order pending appeal. Order issued.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Paul Bakewell, of St. Louis, Mo., and Walter H. Chamberlin, of Chicago, Ill., for appellants.

Dodson & Roe, of Chicago, Ill., and Zell G. Rae, of Des Moines, Iowa, for appellee.

Before BAKER and ALSCHULER, Circuit Judges, and LANDIS, District Judge.

PER CURIAM. Appellee is owner of the Guth patent, No. 1,076,418, October 21, 1913, for improvements in lighting fixtures. The District Court held that claim 1 was valid and infringed by a certain lighting fixture manufactured by appellant Reflectolyte Company and sold by appellant Freeman-Sweet Company (249 Fed. 876); but the District Court suspended the issuance of an injunction, pending an appeal to this court in which the finding of validity and infringement is challenged, on condition that appellants should file a bond to cover profits and damages and should file monthly reports of sales and consignments. Appellants complied with the conditions; and the record has been filed, but the cause is not ready for submission.

Appellant Reflectolyte Company manufactures many types of lighting fixtures in addition to the one alleged and found to be an infringement, all of which are identified by the trade name "Reflectolyte." Appellee, pending the appeal, has been sending letters and circulars to the customers of Reflectolyte Company and to the retail trade generally, warning the addressees against buying "Reflectolyte" fixtures and threatening suit against those who should fail to comply with the warning.

Applying the doctrine of Kessler v. Eldred, 206 U. S. 285, 27 Sup. Ct. 611, 5 L. Ed. 1065, to this situation, we find that the District Court by its decree authorized appellants, on the conditions named, to continue their businesses in the alleged infringing structure as going concerns. That means that they are entitled to protection in such business against loss and damage by having their customers interfered with and having others who might want to become customers frightened away. And we further find that appellee's letters and circulars are misleading and deceptive, not only in failing to state that appellants have complied with the conditions of the decree, but also in making their threats broad enough to include all the fixtures put out under the trade name "Reflectolyte."

It is therefore ordered:

(1) That appellee, its agents, attorneys, and the like, be and they are hereby severally enjoined, pending final decision, from issuing any letters or circulars similar to those attached to the motion.

(2) That appellee within 10 days file with the clerk of this court a list of the names and addresses of all persons and concerns to whom appellee has mailed or otherwise sent any such letter or circular.

(3) That the clerk mail a copy of this order to each of said persons and concerns.

(4) That the costs of this motion, including all expense of the clerk incurred in complying with clause 3, be taxed against appellee.

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SEARS, ROEBUCK & CO. v. PEARCE.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1918. Rehearing Denied November 19, 1918.)

No. 2540.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—HEATING SYSTEM.
The Pearce patent, No. 705,287, for a heating and distributing system, discloses novelty and invention, and is valid; also *held* infringed.

2. PATENTS ⟸275—INFRINGEMENT—DAMAGES.
Upon the facts in this case, an action for infringement against a user, where the patented article is made and sold by the patentee, the damages recoverable are represented by the difference between its cost and his selling price.

3. JUDGMENT ⟸551—MERGER AND BAR—ACTION AT LAW AND SUIT IN EQUITY—INFRINGEMENT OF PATENT.
Where a patentee elects to sue at law for an infringement, and recovers full damages, the judgment is a bar to a subsequent suit in equity for an injunction based on the same infringement.

4. COSTS ⟸34—ACTION AT LAW FOR INFRINGEMENT.
On recovery in an action at law for infringement, the costs are taxable to defendant, although the action was based on two patents, and the issues as to one were withdrawn from the jury.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by William H. Pearce against Sears, Roebuck & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

Action at law for damages for infringement of patents Nos. 705,287 and 997,002. Verdict and judgment for plaintiff. Defendant in error, herein called plaintiff, the owner of two patents, brought suit against plaintiff in error, herein called defendant, and one Robert Gordon, for damages arising out of the alleged infringement of both patents. Before trial, Gordon, an independent contractor under contract with defendant, died, and the action was not revived against his estate.

The court took from the jury all issues involving patent No. 997,002, and submitted the issues arising out of the asserted infringement of claims 2 and 7 of patent No. 705,287, which covered "a heating and distributing system." Defendant had several buildings to heat, and, desirous of installing a heating plant in a new building, entered into a contract with Gordon, the specifications requiring "combination expansion joints and T-fittings and combination anchor and T-fittings * * * of the same type and make as those now installed in the present north tunnel." Provision was made against loss through the use of any appliance covered by patents.

The "combination expansion joints" referred to were manufactured and sold by Pearce and were covered by the patent under consideration. Pearce, however, was not a contractor, but manufactured the expansion joints which he sold to contractors. Gordon endeavored to secure these joints from Pearce, but because of the price, or for some other reason, did not do so. He then made drawings of the Pearce joints in use in defendant's building, and submitted the same to the Charles R. Crane Company, and obtained and installed them in defendant's heating plant, where they were accepted.

Defendant attacks the judgment because (a) patent No. 705,287 is invalid; (b) claims 2 and 7 of said patent were not infringed; (c) because of errors in instructions; (d) because the court allowed plaintiff costs.

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Lincoln B. Smith, of Chicago, Ill., for plaintiff in error.
Samuel E. Daily, for defendant in error.

Before ALSCHULER and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge (after stating the facts as above). [1] Is the patent valid and infringed? No separate and extended discussion of this phase of the case is warranted. We have carefully examined the argument of defendant, and have examined the prior art citations with care, to ascertain whether the discovery of Pearce disclosed novelty, or constituted invention, or presented a jury question, and answer the question in the affirmative.

Upon the question of infringement there was, and could be, no serious doubt. Pearce manufactured a combination joint that was used in one of defendant's heating plants. It satisfied defendant, and the specifications for a heating plant in the new building called for similar joints. The manufacture and sale of this joint was controlled by Pearce. Having failed to agree upon a price with Pearce, Gordon made drawings from the joints referred to in the specifications, and the Crane Company made them.

While defendant now asserts that the joints thus obtained did not comply with the specific requirements of the contract and were not the same as those previously installed, we are convinced that this is but an effort to escape liability and that the joints used were of the kind designated in the specifications.

This question of infringement, while submitted to the jury, was not a jury question. The evidence established infringement so conclusively that the court would have been justified in directing a verdict in plaintiff's favor on this issue.

Damages. Criticisms under this head may be divided into: (a) Announcement of erroneous rule of damages; (b) failure to leave the amount to the jury; (c) allowance for four, instead of three, joints.

[2] Defendant assigns error because its liability, if any existed, was that of a user, whereas the judge applied the rule of damages applicable to cases of infringement by manufacturers or sellers. In other words defendant's position is that the liability of Gordon or the Crane Company for making the expansion joints, was different from the liability of the defendant for using them. Carried to its logical end defendant's position is that if a certain article covered by a patent is desired by A., who objects to paying the patentee his price therefor, A. may escape liability over and above nominal damages by contracting with B. as an independent contractor to secure or make such patented article and install it for him.

Defendant manufactured and sold his patented joints. No question arose over his ability to supply the trade. His damage, therefore, in view of the evidence received in this case, was represented by the difference between his cost price and his selling price. Walker on Patents, vol. 4, p. 441. Concerning this sum, this difference between the cost and selling price, there was no dispute.

[3, 4] As illustrating their point, and demonstrating the inapplicability of this rule, defendant suggests that it is still subject to an injunction

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suit to prevent further use of the infringing joint, and therefore any rule of damages is unjust that holds it liable for all the damages represented by plaintiff's loss of sale. In this position we think counsel is in error. Plaintiff sued for and recovered its entire damage resulting from the infringement, and, having elected to pursue one remedy, will not be permitted to secure other relief inconsistent with what has been already obtained. In fact, counsel for plaintiff admitted in open court that the present money judgment was a bar to any restraining suit, so far as the four joints here involved were concerned.

The criticism that the court specified the amount which the jury was required to find, if any liability existed, is not well taken, for the reason that the amount of damages was not in dispute. In other words, if a liability existed at all, the amount was fixed and definite. There was no conflict of testimony in reference to it.

The record warranted the court's ruling that four, instead of three, joints were used in the heating plant. One of the four joints differed slightly from the other three, but in an unessential respect.

Defendant complains because of the allowance of costs against it, contending that, inasmuch as plaintiff originally relied upon two counts based upon two patents, one of which was dismissed, he was not entitled to costs.

In the presentation of this question it seems both counsel failed to appreciate that this is an action at law, wherein costs are always taxed against the losing party except where the statute otherwise directs. Trinidad Paving Co. v. Robinson (C. C.) 52 Fed. 347. The only exceptions seem to be those provided for in R. S. § 968 (section 1609, U. S. Comp. Stat. 1916), and R. S. § 973 (section 1614, U. S. Comp. Stat. 1916).

It follows that plaintiff was entitled to costs.

Judgment is affirmed.

Judge KOHLSAAT participated in the hearing of this appeal, and concurred in the conclusion, but died before the announcement of this opinion.

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In re WEST.

(District Court, E. D. Pennsylvania. November 4, 1918.)

No. 5941.

1. BANKRUPTCY ⟸191(1)—BANKRUPTCY OF TENANT—CLAIM FOR RENT.
Where a landlord, before the expiration of the lease of an earlier tenant, who was indebted for rent, demised premises to the bankrupt under a lease providing that it should not affect the former lease, or remedies for collection of rent, and the bankrupt took over property of the first tenant in the premises, *held*, the landlord's claim for rent against the first tenant could not be asserted against the bankrupt's estate as a priority claim; there being no right to distrain.

2. FIXTURES ⟸15—"TRADE FIXTURES"—REMOVAL.
"Trade fixtures" are those which a tenant places on property to promote the purpose of his occupation and which he may remove during the term.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trade Fixtures.]

3. BANKRUPTCY ⟸138(1)—FIXTURES.
Where a tenant rejected the landlord's proposal that gas fixtures, etc., which the tenant desired, should be installed by tenant and become landlord's property, *held*, that, tenant having installed fixtures which were sold with rest of his property after bankruptcy, landlord could not maintain claim therefor.

In Bankruptcy. In the matter of William West, individually and trading as the William West Company, bankrupt. On petition for review of order allowing claim of landlord for rent. Order reversed, and cause remitted to referee, with instructions. On certificate for review of claim of landlord to fixtures. Order reversed, and claim denied.

Reber & Granger, of Philadelphia, Pa., for petitioner.
Coyle & Keller, of Lancaster, Pa., for landlord.

On Petition for Review of Order Allowing Claim of Landlord for Rent.

DICKINSON, District Judge. This case presents an unusual fact situation. We have not had the aid of an oral argument, but a perusal of the briefs of argument submitted seem to justify this broad statement of what the situation presented is:

A man by the name of Harry West occupied as tenant certain premises for which he owed rent. He was succeeded in his occupation of the premises by the bankrupt, to whom the owner demised the premises formerly occupied by Harry West. All the rent owing by the bankrupt has been paid, but a balance of $365.73 of the rent due by the first tenant, Harry West, remains unpaid. No distraint was made by the landlord. He presents, however, a claim for rent, which the referee has allowed. The allowance is based, as we understand it, upon the proposition of fact, to paraphrase the finding of the referee, that the bankrupt "took over," not only the premises which had been demised to the former tenant, but also his stock of goods, and that at

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the time rent was owing by the former tenant to the landlord, a balance of which still remains unpaid.

The proposition of law is deduced from these facts that, when the bankrupt entered into possession of the premises and "took over" the personal property of the former tenant on the premises, he, to again paraphrase the language of the referee, took this stock subject to "the attendant liabilities," one of which was the right of the landlord to distrain for rent. From these premises the conclusion is drawn that the landlord has the right, not only to participate in the distribution of the assets of the bankrupt estate, but to have accorded to him priority of payment over other creditors.

The line of thought followed is that prior to the adjudication the personal property of the former tenant remaining on the premises was liable to distraint by the landlord, and that after the adjudication "this right to distrain under the law of Pennsylvania was converted into a valid priority claim" under the provisions of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544). Morris v. Parker, 1 Ashm. (Pa.) 187, is cited as an authority sustaining the right of the landlord to distrain.

The loss of the aid of an oral argument is felt, because we have been unable to rid ourselves of the feeling that the foregoing statement, for some reason which has not been disclosed by this record or the briefs of argument, does not adequately present the grounds for the order made by the referee.

[1] As presented, however, it would seem to involve this proposition: Premises are demised to A., who owes rent, and has personal property on the demised premises. This relation of landlord and tenant is dissolved, and the premises are then demised to B., who, under an arrangement made with A., "takes over" the personal property on the premises. An execution then issues against B., and out of the proceeds of sale the landlord may successfully assert priority of payment of rent due by A.

One of the facts upon which this conclusion of law is based, to wit, that there was personal property of the first tenant which came into the possession of the succeeding tenant, is averred not to be a fact properly found to be in the case presented, but, assuming this to be one of the facts in the case, we are unable to accept the proposition as sound. This is, for several reasons, so obvious as not to call even for their statement.

The supporting brief filed on behalf of the landlord seems to plant the right of the landlord upon an agreement of the bankrupt in the lease to him. The lease to the former tenant did not expire until April 1, 1917. The lease to the bankrupt was made before the expiration of this former lease, and the provision referred to was that the lease to the bankrupt should "in no wise affect" the former agreement of lease up to the beginning of the new demise, "nor any of the remedies for the collection of the rent" for the premises occupied by the former tenant. It is, we assume, clear that one of the agreed facts is that the first lease was ended by the agreement of the landlord and tenant, and was succeeded by the new lease, under which the bankrupt became the tenant under a new demise.

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The leverage of the whole argument is, of course, upon the proposition of the landlord's right to distrain. To assume, as the argument does, or for the landlord to assert, as he clearly does, a right to have distrained ignores certain features of the situation. One is that the relation of landlord and tenant between the claimant and the predecessor of the bankrupt had been dissolved. What effect had this upon the right of the landlord to distrain? In the second place, the claim of the landlord is now asserted against the property of the bankrupt estate, irrespective of whether it was property which had formerly belonged to the first tenant or not. The argument, in consequence, would seem to assume the right of a landlord to distrain upon the property of his tenant for rent due by a former tenant. The principle is, of course, accepted that a tenant may agree that something shall be rent which otherwise would not be, and the landlord may in consequence have a right to distrain for it.

For illustration, a tenant might agree that water rent or taxes assessed against the demised premises should be paid by the tenant in addition to the rent reserved, and such water charges and taxes should be deemed to be rent and might be distrained for as such. This, however, would be because the tenant had so agreed.

We find no such agreement in this lease. On the contrary, the quoted agreement is restricted and limited in its scope, and is really an expression of the agreement between the landlord and his former tenant that the abrogation of the lease during its term should not affect the liabilities of the tenant up to the time of the beginning of the new lease. Moreover, the whole argument is pivoted upon the proposition that the goods upon the "demised" premises are liable to distraint for rent, although they may be in fact the goods of a stranger.

This general proposition, subject to certain well-known exceptions and limitations, is sound enough; but the application which the argument makes of it again ignores the distinction between "demised" premises and premises which have been demised. It would scarcely be contended that the property of a third person on rented property was liable to be seized and sold in payment of claims of a landlord for rent due him by former tenants, although it were true that the premises on which the property was were the same premises which had been demised to these former tenants.

The foregoing discussion adequately presents the real question involved in this controversy, so far as we have been able to gather it from the briefs submitted. If we have misunderstood the question intended to be presented, we will entertain a motion for a reargument, the application therefor to be made within five days; otherwise the petition for a review is allowed, the order made by the referee is reversed, and the cause remitted to him, with instructions to disallow the claim of the landlord as one entitled to priority of payment.

On Certificate for Review of Claim of Landlord to Fixtures.

The real question involved in this petition for review is that of the ownership of certain gas and electric fixtures on premises demised to the bankrupt. Gas fixtures of a kind were in the building leased.

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It was deemed desirable to replace them with new fixtures. The tenant applied to the landlord to do this. The landlord refused. He, however, suggested to the tenant that he (the tenant) replace the old fixtures with new ones, the latter to become the property of the landlord. This proposition the tenant declined. The parties not being able to reach any agreement, the tenant finally met the situation by taking down the old fixtures, putting in new ones, and laying aside the old fixtures as the property of the landlord. The tenant was afterwards adjudged a bankrupt, and the new fixtures were sold as his property, for which the purchaser paid the sum of $286. The landlord then made claim to the fixtures, which the referee allowed, and made an order upon the trustee to return the purchase price to the purchaser.

We confess to the same feeling of embarrassment felt in the other petition for review in disposing of the question as presented in the printed briefs, because of the uncertainty of our having a grasp of the whole situation as intended to be presented.

[2, 3] All questions affecting fixtures are more or less difficult of answer, because the definite line which determines what the proper answers should be is one often and usually hard to fix. One view universally accepted is presented in the light of the practical situation. The thought is expressed in the term "trade fixtures," and is that whatever a tenant puts upon a property to promote the purpose of his occupation of the premises, he, retaining his ownership therein, may remove during the term. Substantially the same thought is embodied in the expressions, frequently met with, of whether the removal can be made without destruction of or injury to the premises.

The fixtures over which the controversy rages are electric light and gas fixtures. From this general description of it, the impression is received that they belong to the class of fixtures which presumably remain the property of the tenant, if he installs them, without any agreement on his part to make them the property of the landlord.

It is not wholly clear upon what ground as a legal basis the referee has based his order. The general view which he takes of the situation is clear enough. It is that, when the owner of the premises has adequately equipped them for occupation and use for a prescribed purpose, to require him to tear out that equipment and replace it with something different, in deference to the whim or fancy of the tenant, is something which the landlord is not called upon to do, and that "no legal or equitable rule compels the landlord" to do so. This, of course, is clear enough. The further view of the referee that the act of a tenant in replacing fixtures installed by the landlord with new fixtures which may not be acceptable to the succeeding tenant is an act "both unjust and inequitable" to the landlord. This may or may not be so. It depends upon the circumstances. The referee finds the circumstances of this situation not to have justified the tenant. Had the referee made any definite finding of fact with respect to a dedication by the tenant to the landlord, we would be very loath to disturb the finding. He, however, so far forth from so finding, expressly finds that there was no agreement reached by the parties, and

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that in fact not only they failed to agree, but that the tenant had refused to so agree.

The referee finds that the landlord was asked to make the substitution. This he refused to do. He made, however, the counter proposition that the tenant might install the new fixtures at his own expense, if he would agree that the new fixtures should become the property of the landlord. This counter proposition, as before stated, the tenant declined.

The referee returns as a fact that the tenant did make the change, and he bases his order upon the proposition that the tenant thereby accepted the conditions laid down by the landlord.

We are unable to accept this view. As the parties could not agree, the tenant had a perfect right to take the position that he could put in the new fixtures and retain his ownership therein. The landlord on his part, of course, had the equal right to claim, and, if he chose, to warn the tenant that, if the change was made, the fixtures would become the property of the landlord. No such warning was given; but, even if it had been, its only effect would have been to have relegated the parties to a decision of what their legal rights were, and the only effect of the assertion of their respective claims of right would have been to have presented for the decision of somebody the conflict of view between them.

The case of Bank v. North, 160 Pa. 303, 28 Atl. 694, which the referee cites in support of the order made by him gives us a very clear statement of the controlling principles involved. These principles, however, it seems to us, lead to a different conclusion from that reached by the referee. A different conclusion is also indicated by the other features of the present fact situation and the practical consequences flowing from the conclusion reached. Had the question been raised in reclamation proceedings, a finding in favor of the landlord would have affected no one other than himself and the bankrupt estate. To present the claim, however, after the fixtures had been sold as part of the bankrupt estate, affects the rights of the purchasers to the fixtures, and otherwise adds to the difficulties of the practical situation.

We see no escape from the conclusion that the order of return of the fixtures should not now be made, and that the petition for a review should be allowed, and the findings and order made by the referee reversed. We grant, however, the same leave granted in the other petition for a review to make an application for a reargument. If no such application is made within five days, the order above indicated is to stand.

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UNITED TIMBER CO. v. BIVENS.

(District Court, E. D. South Carolina. October 11, 1918.)

No. 189.

1. TIME ⟸10(10)—COMPUTATION—EXPIRATION.
Where a timber deed gave the grantee the right to demand an extension, etc., on expiration of the time fixed for removal, and the time expired on Sunday, a tender and demand, etc., made on the following secular day, will be treated as made on the day of expiration.

2. TIME ⟸9(10)—COMPUTATION—TIMBER DEEDS.
Where a timber deed giving the grantee 10 years for removal provided for an extension of time on demand by the grantee and payment of interest, etc., the 10-year period should be computed by excluding the day of the deed and counting the last day, and a demand and tender on such day was in time, the grantee's estate not having determined.

3. LOGS AND LOGGING ⟸3(11)—TIMBER DEED—CONSTRUCTION.
Where a timber deed gave the grantee 10 years for removal, and provided for an extension, etc., the grantee took a determinable fee, which would expire at the end of 10 years unless the period should be extended.

4. LOGS AND LOGGING ⟸3(11)—TIMBER DEEDS—DEMAND FOR EXTENSION.
Where a timber deed fixing a period for removal provided that the grantee should have additional time desired on payment of interest on original purchase year by year, a demand for 15 years' additional time, or so much as desired, coupled with a tender of one year's interest, *held* sufficient.

5. LOGS AND LOGGING ⟸3(11)—TIMBER DEEDS—EXTENSION OF TIME—REASONABLE TIME.
Where a timber deed allowing 10 years for removal, provided that the grantee should have such additional time as desired, *held* that a demand for 15 years' additional time, or so much as desired, was reasonable.

6. INJUNCTION ⟸36(3)—INTERFERENCE WITH ACCESS TO LAND.
Where the owner of land, who had granted the timber, together with rights of way for removal, denied the grantee access to the lands, asserting the period for removal had expired without extension, *held* that, as the grantee's rights had not been determined, equity had jurisdiction to enjoin the owner from denying access, etc., there being no adequate remedy at law.

In Equity. Suit by the United Timber Company against Joseph Bivens, Sr. Decree for complainant enjoining defendant.

See, also, 248 Fed. 554.

Legare Walker, of Sommerville, S. C., and L. D. Lide, of Marion, S. C., for plaintiff.

J. P. K. Bryan, of Charleston, S. C., and Holman & Boulware, of Barnwell, S. C., for defendant.

CONNOR, District Judge. The bill, answer, exhibits, and evidence disclose the following facts:

On the 14th day of April, 1902, Ann Bivens and Prudence Bivens, the owners of several tracts of land situate in Dorchester, formerly Colleton county, S. C., aggregating about 5,000 acres, in consideration of $2,000, conveyed to R. P. Tucker "all of the timber, standing and fallen," on said tracts of land, with rights of way, easements, etc.

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On the same day John D. Boyle, being the owner of several tracts of land in the same county, in consideration of $1,500, conveyed to R. P. Tucker the standing and fallen timber on said tracts of the dimensions described in the deed.

On the same day Joseph Bivens, Sr., being the owner of several tracts of land in the same county, in consideration of $2,000, conveyed to R. P. Tucker the standing and fallen timber thereon of the dimensions described.

Thereafter the title to each of said tracts of land was conveyed to, and was at the dates hereafter set forth vested in, the defendant.

On the 14th day of October, 1903, defendant, Joseph Bivens, Sr., in consideration of $150, conveyed to F. S. Farr, trustee, the timber on one tract of land in said county. Each of said deeds contain the following clause:

"That the said party of the second part, his heirs and assigns, shall have, and the same is hereby granted to him or them, the period of ten years beginning from the date hereof, in which to cut and remove the said timber from the said land; and in case the said timber is not cut and removed before the expiration of said period, then that the said second party, his heirs or assigns, shall have such additional time therefor as he or they may desire, but in the last-mentioned event the said second party, his heirs or assigns, shall, during the extended period, pay interest on the original purchase price above mentioned, year by year, in advance, at the rate of six per cent. per annum."

By successive conveyances the title to the timber on the several tracts of land was conveyed to, and vested in, the Onieda Timber Company, a corporation chartered under the laws of South Carolina.

Plaintiff alleges that—

"at the expiration of said period of ten years, to wit, on the 15th day of April, 1912 (the 14th of April falling on Sunday), in the exercise of the right, power, and authority vested in and conferred upon it, in and by the said timber deed, * * * the Onieda Timber Company gave due notice in writing to Joseph Bivens, the defendant herein, that it desired fifteen (15) years additional time to cut and remove the said timber, and to use and enjoy the said timber rights, ways, privileges, and easements; and, in pursuance of the terms of the said timber deed, the said Onieda Timber Company, at the time of the giving of the said notice, tendered, in lawful money of the United States, the sum of one hundred and twenty dollars, being the interest on the purchase price of said timber."

The defendant refused to accept such amount, and it was deposited in the clerk's office for the use and benefit of defendant. Tender of the same amount was made on the 14th day of April of each and every year thereafter.

Tender of the interest on the purchase price of the timber on each of the other tracts of land set out in the bill was made, and notice given that the same period of time was required for cutting and removing the timber. Thereafter, and prior to filing the bill herein, the right, title, privileges, and easements which vested in R. P. Tucker, F. S. Farr, and the Onieda Timber Company were conveyed to, and vested in, complainant.

Defendant refused to accept the interest tendered on the purchase price of the timber on either of the said tracts of land, and refuses to

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permit complainant to enter upon, cut, or remove any portion of the timber. Defendant admits that complainant is entitled to certain rights of way and easements over and across the lands. He denies that complainant is the owner of, or entitled to, the timber standing or fallen on said lands.

The two principal questions raised by the pleadings and the evidence are: (1) Was the tender of the interest made in apt time? (2) Was the time demanded by the Onieda Timber Company, 15 years for cutting and removing the timber, reasonable?

Both questions are earnestly and vigorously contested, Able and exhaustive arguments were made and briefs filed by counsel, with a wealth of authority.

[1-3] The briefs furnish an illustration of the truth of the observation of Justice Grier in Griffith v. Bogert, 18 How. 158, 15 L. Ed. 307:

> "Whether the terminus a quo should be included, it must be admitted, has been a vexed question for many centuries, both among learned doctors of the civil law and the courts of England and this country. It has been termed by a writer on civil law (Tiraqueau) the 'controversia controversissima.' He says that: 'It was in consequence of the uncertainty introduced on this subject by the disquisitions and disputes of learned professors that Gregory IX, in his decretals, introduced the phrase of "a year and a day," in order to remove the doubts thus created, as to whether the dies a quo should be included in the term.'"

It seems that the rule in common usage included the day a quo, but many exceptions were introduced in its application to leases, limitations, etc., when forfeiture would ensue. The cases are conflicting, and have established no fixed rule as to such exceptions. Lord Mansfield in Pugh v. Leeds, Cowp. 714, reached the conclusion that the cases for two hundred years had only served to embarrass a point "which a plain man of common sense and understanding would have no difficulty in construing." The multitude of cases which find their way to the appellate courts fall into groups from which courts have evolved more or less general rules.

The tender will be deemed to have been made on April 14, 1912. Defendant insists that the day of the date of the deed, April 14, 1902, should be included in the computation of the 10 years to which the right to cut and remove is limited; that the right to tender the interest and give notice of the extension of time required expired on April 13, 1912.

The complainant insists that the Supreme Court of South Carolina has adopted the rule for the computation of time which excludes the first day and includes the last. This is controverted by defendant. It is not clear that the question comes within the rule that the construction given by the state court to language used in a contract, made in such state, is binding upon the federal court. It may be said, with much reason, that the court should assume that the parties used the language in the sense in which it had been construed by the state court, and that this court, for the purpose of effectuating their intention, should adopt that construction.

It appears that the Supreme Court of South Carolina has given the subject careful consideration. In Williamson v. Farrow (1830) 1 Bailey (17 S. C. L.) 611, 21 Am. Dec. 492, the judge, writing for the

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court, after quoting the substance of the language of Lord Mansfield, says:

"The case before us, tried by this rule, will, I think, bring us to the conclusion that the day of the sale ought to be excluded. It was a sale on a credit of six months, and, if payment were not made at the end of that time, a resale was to take place on account of the purchaser. The intention of the parties, collected from the * * * subject-matter, and with a view to effect, and not destroy, the right of the purchaser, would manifestly lead us to the conclusion that the day of sale was intended to be excluded; for until the purchase was made, no credit could be given; and after it was made, and the credit had begun, it was to the purchaser important that he should have all the time. What was his natural conclusion? It certainly must have been that the credit began after the sale, and, as there are no fractions of a day, the day of sale must be excluded. * * * The rule may be deduced that whenever a forfeiture would be incurred by considering 'the day of the date,' or 'an act done,' as inclusive, then it shall be considered exclusive."

In cases of subsequent date the same rule is followed.

It is insisted, however, that in Hill v. Burton Lumber Co., 72 S. E. 1085 (1911), the court, dealing with a timber deed dated June 29, 1899, in which the grantee was given 10 years "from this date" to cut and remove the timber, included the first day. To estimate the value of this decision as an authority the facts must be understood. The deed was dated *June 29, 1899,* giving 10 years to cut. The grantee, construing it as conveying the timber in fee simple, on *January 8, 1910,* entered upon the land and began to cut. It appears that on *September 14, 1907,* the plaintiff, in consideration of "$250 to be paid annually in advance, commencing on *June 28, 1907,* for the term of five years, executed another conveyance to the defendant of all the timber on said tract excepting 100 acres of specified dimension," to hold the timber and rights of way for the full "term of five years from the *28th day of June, 1909.*"

It was conceded that on the 28th of June, 1909, defendant failed to pay the $250, but on October 11, 1909, the amount was tendered to the plaintiff, with interest, and refused, and on June 10, 1910, was again tendered and refused. The opinion of Chief Justice Jones makes it clear that the only question before the court was whether the deed of June 29, 1899, conveyed the timber in fee, with right in the grantee to remove it at its pleasure, or whether the title was a fee determinable, if not removed within 10 years from the date of the deed. The court held the latter to be the correct construction of the deed, citing a number of authorities. The Chief Justice, arguendo, said:

"As the ten-year limit for removal of timber under the above deed of June 29, 1899, expired June 28, 1909, it is clear that such deed affords no warrant for the acts of alleged trespass charged and admitted to have been committed on January 8, 1910."

Passing the question whether this language is not obiter—certainly not necessary to the decision of the question presented upon the record—it may be that the learned judge had in view the fact that, by the recitals in the deed of September 14, 1907, it was conceded that the time for cutting expired June 28, 1909. The defendant, to meet the difficulty presented by his failure to cut and remove the timber before June 29, 1909, contended that he had saved his rights by tendering the

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$250 under the provisions of the deed of September 14, 1907, at any time prior to June 28, 1910, but the court held that this amount was to be paid "in advance, commencing June 28th, 1909."

The value of this decision, as an authority for the contention made by defendant, is much weakened by the fact that the question now being considered was not, and could not upon the facts as presented be, the basis of the decision. It is not probable that the court intended, by the language used, to decide a question to which, in earlier decisions, their learned predecessors gave careful consideration, reaching a conclusion differing from that which is attributed to the learned Chief Justice and his Associates. Giving to the *decision,* which is clearly in harmony with the best judicial thought of other courts and the decisions of that court, unquestioning concurrence, it is not a controlling authority upon this court for the contention made by defendant upon the question now under discussion. Counsel for complainant call attention to language used by the trial Judges in Gray v. Marion County Lumber Co., 102 S. C. 289, 86 S. E. 640, and Beaufort Lumber Co. v. Johnson, 107 S. C. 147, 92 S. E. 271, and Midland Co. v. Prettyman, 93 S. C. 13, 75 S. E. 1012, which they contend sustain their views. In his dissenting opinion upon another question in the Johnson case, Judge Watts says the complainant had until February 19, 1915, to make the payment, the deed being dated February 19th, 10 years prior thereto. Judge Gage concurred with him. While expressions are used by the judges indicating differing views, the question presented here was not in issue.

While an examination of the numerous cases, in both state and federal courts, discloses variant opinions, the conclusion reached by the author of the exhaustive note to Halbert v. Land & Live Stock Asso., 49 L. R. A. 193 (247), is sustained by the authorities:

"There seems to be one general rule, with reference to counting the first and last days in the computation of a period of time, which, subject to exceptions based upon the language of the provision for time or upon the surrounding circumstances, seems to have remained the same throughout the whole period of the common law, and which remains practically the same under the statutes and rules of court. That rule is that in the computation of time one of the first and last days of the period shall be included and the other excluded. The question as to which * * * shall be included and which excluded, however, has been differently decided in different * * * jurisdictions, and has given rise to much conflict of opinion. The general common-law rule, as it originally existed, was that the first day was to be counted when the computation was to be from an act or event, but that it was not to be counted when the reckoning was to be from a day or from the day of an act or event. The more modern decisions have changed this rule, and, in the absence of a statute or rule of court controlling the question, the courts now compute time, as a general rule, by excluding the first day and including the last day; * * * and the general rule now existing, whether at common law or under the statutes, probably is that the first day of a period of time is to be excluded and the last day * * * included, but that either or both days may be either included or excluded, if the language of the provision is such as to require it, or if by doing so a penalty or forfeiture will be avoided."

The same conclusion is reached in a later note to State v. Elson, 15 L. R. A. (N. S.) 686.

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The rule, with its exceptions, is illustrated and enforced in a large number of cases cited in the notes. Homestead Fire Ins. Co. v. Ison, 110 Va. 18, 65 S. E. 463 (1909). In Sheets v. Selden, 2 Wall. 177, 17 L. Ed. 822, the question presented was when a lease expired. Judge Field says:

"The rent becoming due on the first of May, the one month from that time within which the payment was required to be made to prevent a forfeiture expired on the 1st day of June following. In the computation of the time the day upon which the rent became due was to be excluded. The general current of the modern authorities on the interpretation of contracts, * * * when time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period *from* or *after* a day named, is to exclude the day thus designated, and to include the last day of the specified period."

The rule is clearly stated by Chief Justice Shaw in Seekonk v. Rehoboth, 8 Cush. (Mass.) 371:

"We consider it now well settled, as a general rule, that when an act is to be done within a given number of days *from* the date, or day of the date, or act done, the day of the date is excluded; otherwise an act to be done in one day must be done on the same day, and, as there is no fraction of a day, such stipulation must create an obligation to do it instanter."

See, also, Seward v. Hayden, 150 Mass. 158, 22 N. E. 629, 5 L. R. A. 844, 15 Am. St. Rep. 183.

Looking to the intention of the parties, ascertained by reference to the subject-matter of the contract, it is manifest that they understood that the purchaser was to have 10 full years, of 365 days each, within which to cut and remove the timber. Fractions of a day will not be regarded. At the end of this period his right to the timber determined, unless he gave notice of the additional time required, and tendered the interest on the purchase price in advance. It is not probable that either party expected the purchaser to begin the work of cutting and removing the timber on a large body of land on the day upon which the contract was made and the deed executed. To do so required preparation, the hiring hands, taking team or machinery to the land. Courts must, in endeavoring to ascertain the intention of parties and giving a reasonable interpretation to their language and conduct, take notice of the usual and customary manner in which such contracts are made and performed. It is probable that the deed was drawn and executed during business hours of the day, that the parties were not on the land, and that the preparation necessary to performance was to be made after its execution. These considerations strongly impress my mind with the conviction that both grantor and grantee intended and understood that the day upon which the deed was executed should not be included in computing the period of time within which the cutting was to begin.

Adopting the construction placed upon deeds containing the same language used in this case by the Supreme Court of South Carolina, the grantee of the timber took by the deed a determinable fee. At the termination of 10 years the timber reverted to the grantors, unless extended by the tender of the interest and giving notice of the period de-

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sired for cutting. The right of complainant to claim the benefit of the option to demand an extension of time for cutting is dependent upon the answer to the primary question when the period of time given to cut and remove the timber ceased. As the right to demand additional time is made conditional upon the payment "in advance" of interest "during the extended period," and this is required to be done "in case the said timber is not cut and removed before the expiration of the said period" of "ten years beginning from the date hereof," the tender on the 14th day of April, 1912, is within the time fixed by the contract.

It is conceded that the Supreme Court of South Carolina has uniformly held, in accordance with the courts of other states, that to avail itself of the right to demand the extension the grantee must, within the time or before the expiration of the period given by the deed to cut and remove the timber, notify the grantor or owner of the land what time is required and tender the interest in advance. It is generally held by the state courts that the title of the grantee of the timber expires, determines, at the end of the period fixed for cutting and removing, and that the superadded clause gives an option to the grantee of which it may avail itself by compliance with its terms to demand the extension. The decisions of the state courts are cited in Crown Orchard Co. v. Dennis (D. C.) 220 Fed. 516, to which others of a later date may be added. It is not, for the purpose of disposing of the instant question, very material to inquire whether this is the correct view. If the tender was made during or before the expiration of the period of time given to cut and remove the timber, complainant was entitled to demand a reasonable time in addition to the period of 10 years.

[4] Defendant insists that the written notice given defendant, stating that complainant required "fifteen years additional time from and after the 14th day of April, 1912, within which to cut and remove the said timber, and to use and enjoy the said rights of way, privileges, and easements, during which extended period, or so much thereof as may be used for such purposes," does not comply with the terms of the contract; that the time demanded should have been for a fixed and definite period, without any qualification, such as, "or so much as may be used for such purposes." I am unable to adopt this view. The requirement of the payment of "interest year by year" excludes the suggestion that "a lump sum," equal to the interest for the entire period demanded, was contemplated. It is manifest that the purpose of the extension was to enable complainant to cut and remove the timber, and when this was done his right or license to go upon the land determined, except so far as certain easements granted in fee enlarged it. It may be that owners of timber lands have by these contracts either made, or unconsciously been drawn into making, hard and inequitable bargains, granting exclusive rights and imposing heavy burdens upon their lands for long periods of time. The courts cannot, by strained construction, defeat the operation of the words used, or deprive the grantees of the rights conferred. An examination of the numerous decisions of the courts, with some exceptions, discloses an appreciation of the practical difficulties presented by them and the hardship imposed by their en-

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forcement. But for the controlling authority of decided cases, I should find difficulty in imposing such burdens upon large and valuable tracts of land, upon unilateral contracts—when only one of the parties is bound, the other being permitted to abandon the contract and repudiate its obligations at its pleasure. I have been impressed with the language used by the eminently wise and learned late Chief Justice of Virginia in Young v. Camp Mfg. Co., 110 Va. 678, 66 S. E. 843. I am constrained to conclude that upon the authority of decided cases the notice complied with the terms of the contract.

[5] This leaves open the question whether the time required—15 years—was reasonable. This is a question of fact, to be decided upon testimony disclosing the conditions which should be taken into consideration in fixing a reasonable time to cut and remove the timber. I heard the witnesses orally. It is necessarily difficult for a court, having no other knowledge or information in regard to the conditions by which it must be guided, in respect to which the testimony is conflicting, more or less colored, by the relation which the witnesses bear to the parties and the subject-matter, to reach a very satisfactory conclusion. When the judge undertakes to put himself in the place of the parties to the contract at the date of the transaction, and from the viewpoint thus obtained say what they intended—that is, what both understood, what the owner of the land thought he was granting, the extent to which, in point of time, he was disabling himself from clearing his lands or bringing them under cultivation—he finds it difficult to see his way clearly. Courts have been impressed with the hardship worked by specifically enforcing these executory extension clauses of timber contracts, resulting in conflicting decisions. While there is much difference of opinion in the testimony of the witnesses, and it is largely a matter of opinion as to what constitutes reasonable time to cut and remove the timber on the lands included in the bill, I conclude that, in view of the size of the tracts and the situation of the parties, 15 years is not an unreasonable time within which to cut and remove the timber.

[6] Defendant insists that the only ground upon which complainant invokes the equitable jurisdiction of the court is found in the allegation that, unless relief is granted by injunction, it would be compelled to resort to a large number or multiplicity of actions at law for protection of its rights, and that the bill cannot be maintained until its legal title has been established in an action at law; that it must be adjudged that complainant has the legal title to the timber. It is argued that, although the evidence may show other grounds for equitable relief, complainant having relied upon the allegation that unless relief be granted, it will be driven to a multiplicity of actions, it is confined to that ground for relief. It may be conceded that a court of equity will not enjoin a trespass, except pendente lite, unless plaintiff has established its legal title to the property in an action at law. The basis of equitable jurisdiction in such as the instant case is found in the inadequacy of the remedy at law. A claim to the legal title to a tract of land of which defendant is in possession must be asserted and established in a possessory action at law or an action of trespass—this is elementary. If defendant is not in possession, a court of equity will entertain a bill

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to remove a cloud from or quiet title, and, if necessary, effectuate its decree by a permanent injunction.

Here, however, complainant does not claim to own, or be entitled to possession of, the land upon which the timber is standing and growing. He alleges title to the timber, with a license, supported by a valuable consideration, to enter upon the land owned by, and in the possession of, defendant, for the purpose of cutting and removing its timber. The claim may be likened to an easement or a right of way. The refusal of defendant to permit it to enjoy the license or easement deprives complainant of the use of its property. It is manifest that in an action at law the remedy for the denial of this right would be inadequate. If complainant undertook to enter upon the land and was forcibly resisted, a judgment for damages for the assault upon its employés would be of no value in securing the enjoyment of the right to cut and remove the timber. The case presented upon the bill and evidence would seem to come within the class described by Prof. Pomeroy, 1 Eq. 250 (3d Ed.):

"The very object of preventing a multiplicity of suits assumes that there are relations between the parties out of which other litigations of some form might arise. But this prior existing cause of action, this existing right to some relief of the plaintiff, need not be equitable in its nature. Indeed, in the great majority of cases in which the jurisdiction has been exercised, the plaintiff's existing cause of action and remedial right were legal; and it is because the only legal remedy which he could obtain was clearly inadequate to meet the demands of justice, partly from its own inherent imperfect nature, and from its requiring a number of simultaneous or successive actions at law, that a court of equity is competent to assume or exercise its jurisdiction. It follows, as a necessary consequence, and this point is one of great importance to an accurate conception of the whole doctrine, that the existing legal relief to which plaintiff, who invokes the aid of equity, is already entitled, need not be of the same kind which he demands and obtains from a court of equity; on the contrary, it may be, and often is, an entirely different species of remedy."

Complainant, after setting out its title to the timber, and the tender of the interest on the purchase price, and refusal by defendant to accept it, alleges that on September 10, 1917, it sent its employés upon one of the tracts upon which the timber had been conveyed, known as and referred to in the deeds as the "Blue House" tract, for the purpose of—

"clearing out a right of way for the location and construction of a tram road to be used in connection with the cutting and removing of the said timber from the said tract of land, and all the other tracts of land hereinbefore mentioned and described, and for the purpose of doing other work preparatory to the cutting and removing of the said timber from the said lands and in the proper and legitimate prosecution and exercise of its rights; that the defendant, in willful and wanton violation of the complainant's rights as hereinbefore set forth, and with intent to hinder, delay, harass, and impede the complainant in the exercise of its said rights, forbade complainant's agents and servants from entering upon the said lands for the purposes aforesaid," etc.; "that defendant thereupon, instituted a suit against complainant in the United States court, alleging that he had suffered actual damage on account of said entry and trespass in the sum of $500, and demanding vindictive damage in the sum of $50,000."

A copy of the complaint in the action at law is attached to the bill.

Defendant admits complainant's allegations of fact, but alleges that complainant's employés cut trees outside of the right of way to which

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he conceded complainant was entitled, and denied that "he has interfered, or has any intention of interfering, with the complainant in the lawful use of its permanent rights of way," etc.; that the tenders of interest, as the basis for its demand for an extension of the time for cutting and removing the timber, were not made within the time fixed by the contract, and that the time demanded was unreasonable. It is clear that the determination of this action would not settle the rights of the parties.

It is thus made apparent that the settlement of the controversy in this suit is dependent upon the solution of two questions: Was the tender made in apt time? This depends upon the construction of the language in the deed. Was the time demanded unreasonable? This is a question of fact. The timber in controversy is upon 11 tracts of land, aggregating many thousand acres, all belonging to defendant. Complainant's claim is based upon the same essential facts in respect to each tract.

Complainant's title to the timber is of no value unless it is permitted, or its right secured, to go upon the land for the purpose of cutting and removing it. No judgment, or number of judgments, in actions at law, would secure that right or its enjoyment.

While the general principle invoked by defendant in his attack upon the equitable jurisdiction of the court is conceded, as said by Prof. Pomeroy, "the rule is one of expediency and policy, rather than an essential condition and basis of equitable jurisdiction." Section 252.

In Kilbourn v. Sunderland, 130 U. S. 514, 9 Sup. Ct. 596, 32 L. Ed. 1005, Chief Justice Fuller said:

"The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

In Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82, it is said:

"Under section 723 of the Revised Statutes [Comp. St. 1916, § 1244], the remedy at law, in order to exclude equity, must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." Walla Walla v. W. W. Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341.

In Wylie v. Coxe, 15 How. 415, 14 L. Ed. 753, it is said:

"There may be a legal remedy, and yet, if a more complete remedy can be had in chancery, it is a sufficient ground for jurisdiction."

In Crown Orchard Co. v. Dennis, 229 Fed. 657, 144 C. C. A. 62, it was held, upon similar facts, that plaintiff was entitled to a permanent injunction.

The state courts have taken jurisdiction on the equity side of their dockets in cases involving the rights of grantees of timber, with rights of way, upon similar state of facts. If complainant is entitled to the extension of time to cut and remove the timber, its title thereto has not determined or reverted to the defendant. It is manifest that its rights cannot be adequately enforced in an action or a series of actions at law.

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Without further discussion, I will sign a decree enjoining defendant from preventing or interfering with complainant's employés and agents cutting and removing the timber in accordance with the terms of the deeds set forth in the bill. The defendant will pay the cost.

UNITED STATES v. BINDER.

(District Court, E. D. New York. June 22, 1918.)

WAR ⇐4—OFFENSES—VIOLATION OF ESPIONAGE ACT.

The publication of a book challenging the sincerity of the aims of the United States in entering war, and of a nature calculated to arouse dissatisfaction and induce opposition to its continuance by falsely stating that this country entered war to save England from defeat and to aid munition manufacturers, etc., *held* to violate Espionage Act, § 3, denouncing the willful making of false statements with intent to interfere with military operations, to cause insubordination or to obstruct the recruiting or enlistment service.

Stephen Binder was indicted for violation of Espionage Act, § 3, for making false statements with intent to interfere with the operation or success of the military or naval forces, etc. On demurrer to the indictment. Demurrer overruled.

GARVIN, District Judge. The defendant has been indicted upon three counts, each of which charges him with violation of section 3 of the act of Congress which went into effect June 15, 1917, known as the Espionage Act. This section is as follows:

> Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both. 40 Stat. 219, c. 30.

It is to be observed that three offenses are designated: (a) Willfully making or conveying false reports or false statements, with the intent specified; (b) willfully causing or attempting to cause insubordination, etc.; (c) willfully obstructing the recruiting or enlistment service, etc.

The first count charges the defendant with a violation of the second offense above set forth, and the second and third counts charge him with two separate violations of the first part of the section. The defendant has demurred to each of the counts of the indictment. The questions involved are whether or not the book entitled "Light and Truth" contains false statements which are of a character that

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would naturally cause insubordination, disloyalty, mutiny, or refusal of duty in the military forces of the United States, and whether or not it contains statements, true or false, which would have such an effect.

It seems to me entirely unnecessary to discuss the matter at any great length. The first paragraph of the preface reads as follows:

At a time when freedom of speech is silenced, the right of free Americans to criticize their government abridged, and this country practically ruled by English lords, great capitalists, and a handful of autocrats, this book was written and published as a defiance to our government's misrule and as the bold assertion of the injustice of America's entrance into the world's war.

On page 11 appears this:

To call it a war for American rights would be convincing if we had not submitted before the German violations to the English violations of our rights. No, the cause was deeper; it was to help England—to save her and her allies from defeat under the pretext that we commence war for American rights. It was the response to the call for help across the sea, the urgent plea of Anglo-Saxon blood to Anglo-Saxon blood in the New World in the gravest hour of England's national peril. It was to bolster up the dwindling hopes of big American financiers who had great fortunes at stake in the war gamble on England's side.

On page 28 appears:

Now remains the third and last means to conquer Germany, namely, by force of arms. To gain a clean victory over the German nation as she is arrayed would, however, mean the desolation of Europe, which would exceed human imagination, while the bitter sorrows and mourning of beloved ones would visit thousands of American families. Death and its attendant miseries are lurking on the thresholds of American homes, whose boys are told to fight for liberty over 3,000 miles from their own country and to defend their heritage in another part of the world.

Beginning at page 160 appears:

Many prominent citizens of German ancestry have been strong advocates for conscription, they having been misled by the promises of war-ready press of the advantages which the country and the young men should derive from compulsory military service. Now, they understand to what consequences the adoption of militarism in the United States leads when, after the country has been turned into a military camp, the power of American manhood is not at all to be used for the defense of America, but to be sent 3,000 miles away to a struggle in Europe in which we have less interest or could have been less interested than Holland or the Scandinavian countries, which took a wiser road than we did, and it may consequently seem foolish how anybody could be led so far astray from real democracy as to advocate conscription for which there is less need in the United States than in any other place in the world.

Many American youths who will have to travel to the battle fields of France may ask themselves if, to defend their home and native land, it is necessary to make that long journey and to be ready to lay down their lives in attacking an enemy which never had any intention of attacking or invading the United States. The young soldiers of German extraction may have one more sting added to this, namely, the prospect of killing their own people, the annihilation of that flesh and blood from which they came. Their fathers at home may also ponder over this question and accuse themselves of being partly responsible for this by their indifference in the lawmaking of the United States. Perhaps they voted at election, but that was the furthest they went. They did not write to their Congressman or speak to him. They did not organize and instruct their fellow citizens to oppose laws which are a menace to the freedom of America.

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When their boys were conscripted to fight their kinsmen across the seas, the German-American fathers knew that this was no war of self-defense, but they could not resist fate and cannot now resist the authority after their representatives having pulled their caps over their eyes and betrayed and sold them.

On page 256 appears:

That small group of Senators and Congressmen who opposed war is the best proof that the majority, in voting for the war, was carrying out the wishes of the munition makers, money aristocrats, and political autocrats. Some of them, the so-called larger majority of the conservatives, were in possession of war babies (stocks and bonds of war industries with their paying of dividends largely depending on the continuation of the war), others were related to munition and powder manufacturers or were themselves rich and had attained their office more by their money power than by intelligence, while the small group of more radically inclined representatives who opposed war were mostly poor men known for their leadership in Congress and Senate and their past records of defending the cause of the masses of the American people instead of selling them to the interests of big capital. Mr. Kitchin, the floor leader of Congress, declared in his celebrated speech before the votes were taken for or against this issue that before his God and his conscience he never could vote for war.

If those autocrats who always are ready to remind the people of our democracy had been willing to prove to the world the existence of the advanced American democratic spirit, they would have had the finest opportunity to leave the final say as to for or against war to a referendum of the American people, which they refused because they knew the majority could see the issue clear enough and would vote "no." Just as now free speech must be suppressed because truth is too dangerous to our present administration, so had the decision on the war of all the American people through a referendum to be suppressed because the money plutocrats and their political autocratic henchmen feared their attempt might be foiled at the last hour by the will of the people.

On page 267:

But we shall first have to abandon the deceiving phrase that it was a war for justice and right, and to establish firmly in the minds of the present and of the succeeding generations that it was waged, as stated in the first chapter, in order to save the financial structure of the money kings, to continue the blood profits of the munition traffickers, and to save our Anglo-Saxon overlords under whose spiritual ban our government has always been a partial supporter of England's cause throughout the Wilson régime.

By the unification during this war of the big business interests of America with the cause of the allies the American people are at present compelled to sacrifice blood and money in the world's war for the continuance and maintenance of the dictatorship of a combined clique of great financial captains of industry and their autocratic assisting politicians who are ruling the great people of the United States.

While these are some of the most extreme passages, the entire book is evidently intended to arouse dissatisfaction with the war and to induce readers to oppose its continuance. The authorities amply justify my conclusion that no such publication can be allowed, and the contention that the sentiments contained in it are mere expressions of opinion, which as such may be lawfully written and circulated, irrespective of the effect they may have in influencing our people to withdraw their support from the military and naval operations of the government at this critical time in the nation's history, cannot be sustained. United States v. Pierce et al. (U. S. D. C., N. D. of N. Y.) Department of Justice Bulletin No. 15, 245 Fed. 878,

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888; United States v. Krafft (U. S. D. C., D. of N. J.) Department of Justice Bulletin No. 6 (for Circuit Court of Appeals opinion, see 249 Fed. 919, — C. C. A. —); Masses Publishing Co. v. Patten, 246 Fed. 24, 158 C. C. A. 250, L. R. A. 1918C, 79, Ann. Cas. 1918B, 999; United States v. Gneiser et al. (U. S. D. C., N. D. of W. Va.) Department of Justice Bulletin No. 71.

The demurrer is overruled.

In re GROWE CONST. CO.

(District Court, N. D. New York. December 7, 1918.)

1. BANKRUPTCY ⊂=223—SPECIAL MASTER—FEES.
Where the parties to a reclamation proceeding, by consent referred to the referee as a special master, orally agreed that the successful party should pay the master's fee, etc., *held*, as the matter was not one devolving on the referee by virtue of his office, that he could collect only the compensation provided for by the court rules; there being no stipulation as therein provided for increased compensation.

2. BANKRUPTCY ⊂=22—RULES—CHANGE NUNC PRO TUNC.
The rule of court fixing the fees in case of reference to the referee as a special master cannot be changed nunc pro tunc, after reference, so as to allow him greater fees.

In Bankruptcy. In the matter of the Growe Construction Company, bankrupt. On motion by the Truscon Steel Company to compel the special master in a reclamation proceeding to file his report, without being paid his compensation, etc. Special master ordered to file his report on payment of specified amounts.

This is a motion by the Truscon Steel Company, represented by Riegelman & Bach, its attorneys on this motion, to compel Hon. Edwin A. King, special master in a reclamation proceeding in this court, to file his report in a reclamation proceeding, which is in favor of the said Truscon Steel Company, without being paid his compensation as such special master, and without being paid his disbursements, $60, paid to stenographer by said special master for taking and transcribing the testimony in the said case.

Riegelman & Bach, of New York City, for Truscon Steel Co.
Arthur S. Golden, of Schenectady, N. Y., for Vrooman.
Geo. J. Hatt, 2d, of Albany, N. Y., for Savage.

RAY, District Judge. May 9, 1917, the Truscon Steel Company, then Trussed Concrete Steel Company, by one T. F. Tillott, Esq., its attorney, Wm. C. Vrooman, by A. S. Golden, his attorney, and B. Jermain Savage, trustee in bankruptcy, by Geo. J. Hatt, 2d, Esq., his attorney, of their own initiative, entered into a stipulation in writing that the matter of the claim of said Trussed Concrete Steel Company, now Truscon Steel Company, to certain property of the value of $2,024.90, and in the hands of the above-named adverse claimants, Vrooman and Savage, be referred to Hon. Edwin A. King as special master, to hear, try, and determine. Pursuant to such written stipulation this court

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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made an order, which was duly entered, so referring the matter. T. R. Tillott, of Schenectady, N. Y., was then the attorney for said Trussed Concrete Steel Company, claimant, now Truscon Steel Company, and still is the attorney of record, but takes no part in this controversy.

[1, 2] The said Trussed Concrete Steel Company, now Truscon Steel Company, brought the matter on for a hearing before the said special master, and at the time fixed therefor, and before the presentation of the evidence was commenced, as is shown by the sworn answers by Vrooman and of the trustee in bankruptcy, Mr. Savage, an oral agreement was made between said Tillott and said Golden and said George J. Hatt, 2d, who represented the trustee, as to the payment of the fees, etc., of said special master, and it was then and there agreed by and between the said attorneys in the presence of the special master that his fees and expenses should be paid by the party to whom shall be awarded the title and possession of the property in dispute. It appears that the special master did not require this agreement to be reduced to writing; he relying, undoubtedly, on what was regarded as a gentleman's agreement. Several hearings were had, several witnesses sworn, and much time and labor expended, and the special master paid $60 to a stenographer for taking and transcribing the evidence and drawing his report. The special master worked 17 days, and, having examined the evidence, etc., and drawn his report in favor of the Truscon Steel Company, pursuant to said agreement, and evidently relying on same and the good faith of said attorneys, notified the said T. R. Tillott, attorney of record, then as now, for said Truscon Steel Company, that he had made his decision in its favor, and also the amount of his fees or charges and expenses as being $170 for his services, 17 days at $10 per day, and $60 paid stenographer—in all, $230. Mr. Tillott promised and agreed to pay Mr. King these charges, or that his client would, and that a check would be sent shortly. Instead of paying as agreed, the claimant has employed other attorneys and makes this motion.

On the faith of the agreement, Mr. King, as special master, accepted the reference and performed the service, and necessarily made the disbursement. The charge is reasonable. Mr. King is a most excellent lawyer, of high standing, long experience, and exceptionally well versed in the law relating to bankruptcy and such questions as were involved here. His integrity has never been questioned. This was not a matter which it was his duty to hear and determine. The parties selected him as special master to hear and determine the matter, because of his superior qualifications. The reference was not suggested by the court. The reference was a saving to the parties, as it made attendance at court at inconvenient times and places unnecessary.

If the successful claimant had paid the special master, who performed the service and earned the money and incurred the expense of stenographer, the amount so paid, if ordered by this court, could be made a taxable item against the other claimants to the property in question; but it takes the position it should have the fruits of the special master's labor and expense incurred, and that Mr. King shall go unrecompensed unless he can get his fees and expenses from the bankrupt estate. Evi-

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dently in this effort to violate or disregard the agreement made by Mr. Tillott it will incur as much expense as the special master's charges, or more expense than the amount of the special master's compensation demanded.

There is a rule of this court in force (rule 30) which provides that issues under rules 8 and 11 are to be referred to the referee as special master, and that he shall receive $5 per day for each day actually spent in hearing such reference and in preparing his report. Those issues, mentioned in rules 8 and 11, relate to adjudication, discharges, and composition, and such compensation is chargeable in the first instance to the party opposing. The same rule contains this provision:

"In other cases, where matters are referred to the referee as a special master requiring services not devolving upon him, by virtue of his office [referee]"—and such is this case—"he shall receive a like compensation, which shall be chargeable in the first instance on the party bringing on the reference and shall be paid by the party ultimately defeated in such reference. Should such reference in the cases last referred to be unusually difficult or extraordinary, a higher rate of compensation may be paid if stipulated by both parties and sanctioned by the judge."

This rule of this court was prepared and adopted by Judge A. C. Coxe in 1898, and the compensation then deemed proper has not been increased to keep pace with the increased cost of living, etc. In this case "a higher rate of compensation" than $5 per day was not "stipulated by both parties," although the fair inference from the agreement is that the parties expected to pay such reasonable charges as the special master should make and demand. As this rule has not been amended or changed, this court cannot change it nunc pro tunc. It will result in the special master being compelled to accept as a condition of filing his report a small and insufficient compensation for arduous and valuable service, of which the successful claimant will reap the benefit, if the report is confirmed by this court. The reference provided for a review by this court. I see no way at this time to protect the special master, and the order will be that he file his report with the clerk on receiving from the successful claimant, Truscon Steel Company, formerly Trussed Concrete Steel Company, the sum of $145, made up of $60, the amount paid the steriographer, and $85, for 17 days' work in the case as special master at $5 per day, and for services not devolving on him by virtue of his office as referee; it appearing that the bankruptcy case is one referable to him, and which was referred to him in due course as referee in bankruptcy for the performance of such services therein as devolved upon him by virtue of that office, but of which these in question here formed no part.

In these matters of reference to a special master, care should be taken to have prepared and filed a written stipulation, which should specify the fees, and this should be submitted to the judge for approval or disapproval in advance.

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Ex parte FRONKLIN.

(District Court, N. D. Mississippi. November 11, 1918.)

1. WAR ⇐11—ENEMY ALIENS—INTERNMENT—PRESIDENTIAL DISCRETION.
The courts cannot review the discretion vested in the President by Rev. St. § 4067 (Comp. St. 1916, § 7615), to determine the manner and degree of restraint to which alien enemies shall be subjected.

2. WAR ⇐11—INTERNMENT OF ALIEN ENEMIES—EVIDENCE.
Evidence *held* to show that petitioner was an unnaturalized German, and so might be taken into custody, under presidential warrant issued under Rev. St. § 4067 (Comp. St. 1916, § 7615), as an enemy alien.

At Law. Petition by Willis Fronklin for a writ of habeas corpus to the United States marshal for the Northern district of Mississippi. Writ denied.

D. A. Scott and E. M. Yerger, both of Clarksdale, Miss., for petitioner.

W. S. Hill, U. S. Dist. Atty., of Greenwood, Miss., and J. Lake Roberson, Asst. U. S. Dist. Atty., of Clarksdale, Miss., for the United States.

HOLMES, District Judge. The petitioner avers that he is a citizen of the United States and is unlawfully restrained of his liberty by the United States marshal for the Northern district of Mississippi.

The proof shows that the petitioner is held in custody by the marshal by virtue of an order of the President of the United States, issued under Regulation No. 12 of the President's proclamation of April 6, 1917, promulgated in pursuance of section 4067 of the Revised Statutes (Comp. St. 1916, § 7615), which order commands the marshal to detain at the usual place of confinement in his district, or, if such usual place be not suitable, at such other place as may, in his discretion, seem hygienic and safe, the petitioner, one Willis Fronklin, on the ground that his presence at large in this district "is a danger to the public peace and safety of the United States." The order also reads: "Such person is to be detained until the further order of the President."

[1, 2] Under said section 4067 the discretion is vested in the President to determine the manner and degree of restraint to which alien enemies shall be subjected. I have excluded all evidence of any acts or utterances with reference to the loyalty of petitioner, because I think the only question for determination on this hearing is whether he is a citizen of the United States or is a German alien enemy.

The petitioner has lived in Mississippi for about 15 years, during which time, up to the very time of his arrest, he has stated repeatedly that he was born in Hamburg, Germany. He told witnesses that he came to this country from Germany when he was about 4 years of age, that he remembered crossing a large body of water, and that his brother died on the way over and was buried at sea. He asked his wife, when he proposed matrimony, whether she had any objections to marrying a German. He is shown to have had a marked German accent

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when he first came to Mississippi. Taking the stand in his own behalf, he now claims that these statements were made by him to conceal his obscure parentage; that as a matter of fact he was born in the United States and raised by gypsies. He does not claim to have been naturalized.

From the evidence as a whole, I am convinced that the petitioner was born in Hamburg, Germany, and is a German alien enemy. Under section 4067, Revised Statutes, the President has determined that the petitioner (who is shown by the proof to be a German alien enemy) should be restrained or interned. I do not think this action of the President, exercised in the manner provided by law, is subject to review by the courts.

The petitioner will therefore be remanded to the custody of the marshal.

MEMORANDUM DECISIONS.

AUGUSTINE v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. October 28, 1918.) No. 5305. In Error to the District Court of the United States for the District of Nebraska. Frank M. Tyrrell and J. H. Walker, both of Lincoln, Neb., for plaintiff in error. T. S. Allen, U. S. Atty., of Lincoln, Neb.

PER CURIAM. Cause docketed, and writ of error dismissed, on motion of defendant in error, under rule 16 (188 Fed. xi, 109 C. C. A. xi) without costs to either party in this court.

BILBY v. BRIGHAM. (Circuit Court of Appeals, Eighth Circuit. May 6, 1918.) No. 4943. Appeal from the District Court of the United States for the Eastern District of Oklahoma. W. O. Rittenhouse and H. M. Brown, both of Wagoner, Okl., for appellant. David A. Kline, of Muskogee, Okl., for appellee.

PER CURIAM. Appeal dismissed, with costs, on motion of appellee, for failure of appellant to file brief.

BOND et al. v. HUME. (Circuit Court of Appeals, Fifth Circuit. November 21, 1918.) No. 2309. In Error from the District Court of the United States for the Western District of Texas, Austin Division; Thomas S. Maxey, Judge. Action by Allan Bond and another against J. L. Hume. Judgment for defendant, and plaintiffs bring error. Reversed. See 243 U. S. 15, 37 Sup. Ct. 366, 61 L. Ed. 565. W. D. Caldwell, of Austin, Tex., for plaintiffs in error. Frederick C. Von Rosenberg, of Austin, Tex., for defendant in error. Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. After submission of this cause, a question was certified by us to the Supreme Court, as to the applicability of an Act of the Legislature of Texas, known as the "Bucket Shop Law" (Rev. Crim. Stats. 1911, c. 3, art. 538 et seq.), to a contract for the sale and future delivery of cotton, made and to be performed in the state of New York, and in accordance with the rules of the New York Exchange. The District Court had held that

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plaintiffs' (plaintiffs in error's) first amended petition did not set out a cause of action, because the contract sought to be enforced by it was unenforceable, because it was in conflict with the public policy of the state of Texas, evidenced by that act, and had rendered judgment dismissing the petition, upon demurrer sustained. It was from this judgment that the writ of error was taken to this court. The Supreme Court held that the cause of action asserted in the petition, accepting the averments of the petition as true, was susceptible of enforcement in the courts of Texas and in courts of the United States in that state. Bond v. Hume, 243 U. S. 15, 31 Sup. Ct. 366, 61 L. Ed. 565. This determination results in the reversal of the judgment of the District Court. The judgment of the District Court is accordingly reversed, and the cause remanded to the District Court, for further proceedings in conformity with the opinion of the Supreme Court. Reversed and remanded.

BRYAN v. ARNOLD. (Circuit Court of Appeals, Eighth Circuit. July 29, 1918.) No. 5220. Appeal from the District Court of the United States for the District of Colorado. R. R. Riley and George B. Gould, both of Colorado Springs, Colo., and J. E. Robinson, of Denver, Colo., for appellant. William C. Robinson, of Colorado Springs, Colo., for appellee.

PER CURIAM. Appeal dismissed, at costs of appellant, per stipulation of parties.

CHARLEY v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. August 12, 1918.) No. 5233. In Error to the District Court of the United States for the District of New Mexico. Frank J. Lavan and Catron & Catron, all of Santa Fé, N. M., for plaintiff in error. S. Burkhart, U. S. Atty., of Albuquerque, N. M.

PER CURIAM. Cause docketed, and writ of error dismissed, on motion of defendant in error, under rule 16 (188 Fed. xi, 109 C. C. A. xi), without costs to either party in this court.

CITY OF PRESCOTT, ARK., v. TOLAND et al. (Circuit Court of Appeals, Eighth Circuit. May 24, 1918.) No. 4893. In Error to the District Court of the United States for the Western District of Arkansas. Thomas C. McRae, William V. Tompkins, D. L. McRae, and Chas. H. Tompkins, all of Prescott, Ark., for plaintiff in error. W. E. Hemingway, George B. Rose, D. H. Cantrell, J. F. Loughborough, and Vincent M. Miles, all of Little Rock, Ark., for defendants in error.

PER CURIAM. Judgment of District Court reversed, without costs to either party in this court, and remanded, with instructions to render judgment for plaintiffs below, etc., per stipulation of parties.

DE GREE v. HINCHMAN. (Circuit Court of Appeals, Ninth Circuit. October 30, 1918.) No. 3202. In Error to the District Court of the United States for the District of Alaska, Division No. 1. J. H. Cobb, of Juneau, Alaska, for plaintiff in error. Cheney & Ziegler, of Juneau, Alaska, for defendant in error.

PER CURIAM. Motion of counsel for defendant in error for dismissal of writ of error, for noncompliance by plaintiff in error with provisions of rules 23 and 24 of the rules of practice of this court (231 Fed. v, vi, 144 C. C. A. v, vi), granted, and writ of error dismissed.

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DODSON v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 29, 1918.) No. 5171. In Error to the District Court of the United States for the Eastern District of Oklahoma. J. I. Howard, of Oklahoma City, Okl., for plaintiff in error. W. P. McGinnis, U. S. Atty., and C. W. Miller, Sp. Asst. U. S. Atty., both of Muskogee, Okl.

PER CURIAM. Cause docketed, and writ of error dismissed, without costs to either party in this court, for want of prosecution, on motion of defendant in error.

DU BOIS ELECTRIC CO. v. PANCOAST'S ADM'R. (Circuit Court of Appeals, Third Circuit. November 27, 1918.) No. 2371. In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge. Action by the Fidelity Title & Trust Company, administrator of the estate of V. W. Pancoast, against the Du Bois Electric Company. There was judgment for plaintiff, and defendant brings error. Reversed. W. C. Miller, of Clearfield, Pa., for plaintiff in error. M. W. Acheson, of Pittsburgh, Pa., for defendant in error. Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. The principal facts of this case will be found in the opinion delivered on the former writ of error. Du Bois Electric Co. v. Fidelity Title & Trust Co., 238 Fed. 129, 151 C. C. A. 205, L. R. A. 1917C, 907. We there decided that the only ground for holding the Electric Company liable for the injury to Pancoast "would be a continuing duty resting on the company so to maintain the banner that persons on the street should not be endangered." On the trial now under review some evidence was offered on this question, and the verdict must be based on a finding that the company had undertaken the duty of maintenance, as well as the duty of hanging the banner and taking it down. In our opinion, the only testimony in support of such a finding was too meager and too vague to justify the verdict, and the trial judge should therefore have given instructions in favor of the defendant. The judgment is reversed.

FEDERAL LAND & SECURITIES CO. v. DUCLOS. (Circuit Court of Appeals, Eighth Circuit. September 3, 1918.) No. 5085. In Error to the District Court of the United States for the District of Wyoming. William B. Ross and Ray E. Lee, both of Cheyenne, Wyo., for plaintiff in error. Matthew Gering, of Plattsmouth, Neb., and Albert D. Walton, of Cheyenne, Wyo., for defendant in error.

PER CURIAM. Writ of error dismissed, with costs, for failure to print record and file briefs.

FERRIOT v. ATLANTIC, W. & N. R. CO. et al. (Circuit Court of Appeals, Fifth Circuit. November 6, 1918.) No. 3244. Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge. Suit by Henry C. Ferriot against the Atlantic, Waycross & Northern Railroad Company and another. From a decree dismissing the bill, complainant appeals. Affirmed. Winfield P. Jones, of Atlanta, Ga., and Arthur H. Browne, and Sam A. Montgomery, both of New Orleans, La., for appellant. Sheppard Bryan, of Atlanta, Ga. (Grover Middlebrooks, of Atlanta, Ga., on the brief) for appellees. Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

PER CURIAM. Findings of fact, made by the special master and approved by the trial court, were to the effect that the evidence adduced did not sustain the claims asserted by the bill. Those findings fully justified the decree dismissing the bill. In our opinion the record does not disclose anything that would warrant a reversal of the decree appealed from. That decree is affirmed.

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FOWLER et al. v. CAMPBELL et al. (Circuit Court of Appeals, Eighth Circuit. May 18, 1918.) No. 5048. Appeal from the District Court of the United States for the District of Minnesota. A. L. Agatin, of Duluth, Minn., C. A. Severance and Robert E. Olds, both of St. Paul, Minn., and Frank D. Adams and George W. Morgan, both of Duluth, Minn., for appellants. Fryberger, Fulton & Spear, of Duluth, Minn., for appellees.

PER CURIAM. Appeal dismissed, at costs of appellants per stipulation.

FOWLER v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. October 28, 1918.) No. 5306. In Error to the District Court of the United States for the District of South Dakota. George A. Jeffers, of Rapid City, S. D., for plaintiff in error. Robert P. Stewart, U. S. Atty., of Deadwood, S. D.

PER CURIAM. Cause docketed, and writ of error dismissed, without costs to either party in this court, for want of prosecution, on motion of defendant in error and consent of plaintiff in error.

GEORGE E. JAMES CO., Inc., v. McGRATH. (Circuit Court of Appeals, Ninth Circuit. October 7, 1918.) No. 3182. In Error to the District Court of the United States for the District of Alaska, Division No. 1. Gunnison & Robertson, of Juneau, Alaska, for plaintiff in error. Hellenthal & Hellenthal, of Juneau, Alaska, for defendant in error.

PER CURIAM. Writ of error dismissed, pursuant to stipulation filed September 25, 1918.

GEYER v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 7, 1918.) No. 3216. In Error to the District Court of the United States for the Southern Division of the Southern District of California. James H. Ryckman, of Los Angeles, Cal., for plaintiff in error. Robert O'Connor, U. S. Atty., and Gordon Lawson, Asst. U. S. Atty., both of Los Angeles, Cal.

PER CURIAM. Motion of defendant to dismiss writ of error for noncompliance by plaintiff in error with provisions of rule 16 of this court (208 Fed. ix, 124 C. C. A. ix) granted, and writ of error dismissed.

HOUCK et al. v. ELMER et al. (Circuit Court of Appeals, Eighth Circuit. May 23, 1918.) No. 4805. Appeal from the District Court of the United States for the Eastern District of Missouri. J. D. Johnson, Loomis C. Johnson, Clifford B. Allen, R. P. Williams, C. B. Williams, S. W. Fordyce, Jr., John H. Holliday, Thomas W. White, and Harry A. Frank, all of St. Louis, Mo., Follett W. Bull and Walter M. Johnson, both of Chicago, Ill., and Lon O. Hocker, of St. Louis, Mo., for appellants. Henry W. Taft, E. C. Henderson, and Albert Rathbone, all of New York City, and W. F. Evans, Franklin Ferriss, Charles Nagel, Allen C. Orrick, Thomas Bond, and Blodgett & Rector, all of St. Louis, Mo., for appellees.

PER CURIAM. Appeal dismissed, without costs to either party in this court, on motion of appellants and stipulation of parties.

JONES et al. v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 11, 1918.) No. 3149. In Error to the District Court of the United States for the District of Montana. Carl M. Thompson, of Roundup, Mont., and Collins, Campbell & Wood, of Forsyth, Mont., for plaintiffs in error. Burton K. Wheeler, U. S. Atty., and James H. Baldwin, Asst. U. S.

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Atty., both of Butte, Mont., and Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont.

PER CURIAM. Dismissal of writ of error for noncompliance by plaintiffs in error with rules 23 and 24 of rules of practice of this court (231 Fed. v, vi, 144 C. C. A. v, vi) with leave to plaintiffs in error to ask for reinstatement of cause, if they can show merit in the matter.

THE LAKEWOOD. (Circuit Court of Appeals, Second Circuit. April 24, 1918.) No. 212. Appeal from the District Court of the United States for the Southern District of New York. Libel by the New York Central Railroad Company against the ferryboat Lakewood, her engines, etc.; the Central Railroad Company of New Jersey, claimant. Decree for libelant, and claimant appeals. Affirmed. Macklin, Brown & Purdy, of New York City (P. M. Brown, of New York City, of counsel), for appellant. Harrington, Bigham & Englar, of New York City (D. R. Englar, of New York City, of counsel), for appellee. Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed.

McCURDY, County Treasurer, v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 13, 1918.) No. 5050. Appeal from the District Court of the United States for the Western District of Oklahoma. Preston A. Shinn, of Pawhuska, Okl., for appellant. John A. Fain, U. S. Atty., of Lawton, Okl.

PER CURIAM. Decree of District Court reversed, without costs to either party in this court, and cause remanded, with directions to dismiss the bill of complaint, on confession of error and consent to reversal by appellee.

NICHOLS v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. September 13, 1918.) No. 5259. Appeal from the District Court of the United States for the District of Colorado. Melvin C. Goss, of Boulder, Colo., for appellant. Harry B. Tedrow, U. S. Atty., of Boulder, Colo., and John A. Gordon, Asst. U. S. Atty., of Denver, Colo. See, also, 253 Fed. 989, —— C. C. A. ——.

PER CURIAM. Decree affirmed in part and reversed in part, without costs to either party in this court, etc., per stipulation of parties.

NICHOLS v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. September 13, 1918.) No. 5260. Appeal from the District Court of the United States for the District of Colorado. Melvin C. Goss, of Boulder, Colo., for appellant. Harry B. Tedrow, U. S. Atty., of Boulder, Colo., and John A. Gordon, Asst. U. S. Atty., of Denver, Colo. See, also, 253 Fed. 989, —— C. C. A. ——.

PER CURIAM. Decree affirmed in part and reversed in part, without costs to either party in this court, etc., per stipulation of parties.

NICHOLSON v. DEAVER. In re RAWLINS MERCANTILE CO. (Circuit Court of Appeals, Fifth Circuit. November 13, 1918.) No. 3260. Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge. In the matter of the Rawlins Mercantile Company, bankrupt. On petition for review by B. S. Deaver, trustee, findings of referee in favor of J. S. Nicholson, intervening claimant, were reversed (251 Fed. 164), and said claimant appeals. Affirmed. Charles Akerman, of Macon, Ga., for appellant. George S. Jones and Orville A. Park, both of

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Macon, Ga., for appellee. Before PARDEE, WALKER, and BATTS, Circuit Judges.

PARDEE, Circuit Judge. In this case the trial judge filed a written opinion, found in the transcript, fully stating the facts and issues of the case, with his findings and conclusions of law. Considering the same in the light of the assignments of error, we find none of the errors assigned is well taken, and the judgment should be affirmed; and it is so ordered.

NICKEL et al. v. WARDELL, Collector of Internal Revenue of First District of California. (Circuit Court of Appeals, Ninth Circuit. October 16, 1918.) No. 3168. Appeal from the District Court of the United States for the Second Division of the Northern District of California. Edward F. Treadwell, E. S. Pillsbury, and Alfred Sutro, all of San Francisco, Cal., for appellants. Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., for appellee.

PER CURIAM. Pursuant to request of counsel for appellants, appeal dismissed.

OLSON & MAHONEY, Inc., et al. v. EVERSON et al. (Circuit Court of Appeals, Ninth Circuit. September 25, 1918.) No. 3208. Appeal from the District Court of the United States for the First Division of the Northern District of California. See, also, 231 Fed. 559. William Penn Humphreys, of San Francisco, Cal., for appellants. Andros & Hengstler, of San Francisco, Cal., for appellees.

PER CURIAM. Appeal dismissed by clerk, pursuant to rule 20 (208 Fed. xi, 124 C. C. A. xi) and agreement of counsel.

SHUR v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. June 4, 1918.) No. 5029. In Error to the District Court of the United States for the District of Minnesota. Victor L. Power, of Hibbing, Minn., and M. E. Louisell, of Duluth, Minn., for plaintiff in error. Alfred Jaques, U. S. Atty., of Duluth, Minn.

PER CURIAM. Writ of error dismissed, without costs to either party in this court for want of prosecution, on motion of defendant in error.

SIMMONS v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 6, 1918.) No. 4948. In Error to the District Court of the United States for the Western District of Oklahoma. W. A. Briggs, of Woodward, Okl., for plaintiff in error. John A. Fain, U. S. Atty., of Lawton, Okl.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, for want of prosecution.

SKINNER, Internal Revenue Collector, v. DE WITT. (Circuit Court of Appeals, Eighth Circuit. October 28, 1918.) No. 5014. In Error to the District Court of the United States for the District of Colorado; James D. Elliott, Judge. Action by Herbert M. De Witt against Mark A. Skinner, Collector of Internal Revenue, etc., to recover taxes, etc., assessed under Act May 9, 1902, § 4, against plaintiff as a manufacturer of adulterated butter. There was a judgment for plaintiff and defendant brings error. Affirmed. Harry B. Tedrow, U. S. Atty., of Denver, Colo. (John A. Gordon, Asst. U. S. Atty., of Denver, Colo., on the brief), for plaintiff in error. James J. McFeely of Denver, Colo., for defendant in error. Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. This is an action by De Witt to recover of the collector of internal revenue taxes, penalties, and interest assessed against him

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as a manufacturer of adulterated butter and paid under protest. The issue of fact was whether his use of a small quantity of lime in a large vat of water in which particles of butter were softened was "for the purpose or with the effect" of removing rancidity from the butter. Act May 9, 1902, c. 784, § 4, 32 Stat. 194. A judgment upon a former trial was reversed by this court. 146 C. C. A. 437, 232 Fed. 443. At the second trial the jury found for the plaintiff, and this writ of error is directed to the judgment in his favor. The request of the collector, the defendant, for an instructed verdict, was properly denied. There was substantial evidence to support the verdict that followed. The trial court had no doubt of it on motion for a new trial, nor have we. We also think that the assignments of error upon the admission and rejection of certain evidence are so clearly without merit that they need not be discussed. The judgment is affirmed.

SMITH v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. June 20, 1918.) No. 5095. In Error to the District Court of the United States for the Eastern District of Oklahoma. J. H. Mathers and J. L. Hodge, both of Ardmore, Okl., for plaintiff in error. W. P. McGinnis, U. S. Atty., of Muskogee, Okl.

PER CURIAM. Writ of error dismissed, without costs to either party in this court for want of prosecution, etc.

SPRING VALLEY WATER CO. v. CITY AND COUNTY OF SAN FRANCISCO et al. (Circuit Court of Appeals, Ninth Circuit. October 9, 1918.) No. 2808. Appeal from the District Court of the United States for the Second Division of the Northern District of California. For opinion below, see 252 Fed. 979. Edward J. McCutchen, A. Crawford Greene, and McCutchen, Olney & Willard, all of San Francisco, Cal., for appellant. Percy V. Long, City Atty., and Robert M. Searles, Asst. City Atty., both of San Francisco, Cal., for appellees.

PER CURIAM. Appeal dismissed by clerk, under rule 20 (208 Fed. xi, 124 C. C. A. xi), and pursuant to agreement of counsel.

SPRING VALLEY WATER CO. v. CITY AND COUNTY OF SAN FRANCISCO et al. (Circuit Court of Appeals, Ninth Circuit. October 9, 1918.) No. 2910. Appeal from the District Court of the United States for the Second Division of the Northern District of California. For opinion below, see 252 Fed. 979. Edward J. McCutchen, A. Crawford Greene, and McCutchen, Olney & Willard, all of San Francisco, Cal., for appellant. Percy V. Long, City Atty., and Robert M. Searles, Asst. City Atty., both of San Francisco, Cal., for appellee.

PER CURIAM. Appeal dismissed by clerk, under rule 20 (208 Fed. xi, 124 C. C. A. xi), and pursuant to agreement of counsel.

WILLARD v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 9, 1918.) No. 5049. In Error to the District Court of the United States for the Western District of Oklahoma. E. J. Giddings, George H. Giddings, and T. A. Carson, all of Oklahoma City, Okl., for plaintiff in error. John A. Fain, U. S. Atty., of Lawton, Okl.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, on motion of defendant in error, for want of prosecution.

End of Cases in Vol. 253

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VOLUME 254

PERMANENT EDITION

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND
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FEBRUARY — MARCH, 1919

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OF THE

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Hon. W. H. SEWARD THOMSON, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.

[1] Died January 20, 1919.

[2] Appointed January 27, 1919.

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Hon. SAMUEL ALSCHULER, Circuit Judge ..... Chicago, Ill.

[3] Died December 13, 1918.

[4] Appointed March 5, 1919.

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[5] Appointed March 1, 1919.

[6] Confirmed January 7, 1919.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

STERNBURG v. M. COHEN & CO. et al.

(Circuit Court of Appeals, First Circuit. December 18, 1918.)

No. 1375.

1. BANKRUPTCY ⟸228—REFEREE—FINDING.
No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankruptcy referee; but, as his position and duty are analogous to those of a special master, the rules applicable to a master's report apply to a referee's finding of fact, and if it is based on conflicting evidence, involving credibility, and the referee has heard the witnesses, the District Judge should not disturb his finding, unless there is most cogent evidence of mistake.

2. BANKRUPTCY ⟸228—REFEREE—FINDING.
A finding of the referee, which was mainly based on deduction from established facts, and which was to the opposite effect of an earlier report, may well be disregarded by the trial court.

3. BANKRUPTCY ⟸414(3)—DISCHARGE—FAILURE TO KEEP BOOKS.
On petition of a bankrupt for discharge, *held* that, under the evidence, a denial of the discharge, on the ground that, with intent to conceal his financial condition, the bankrupt concealed, destroyed, and failed to keep books, was warranted.

Appeal from the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

In the matter of Israel Sternburg, bankrupt. On objections of M. Cohen & Co. and others, creditors, the petition of the bankrupt for discharge was denied, and from the order refusing discharge (249 Fed. 980) he appeals. Affirmed.

Charles H. Dow, of Boston, Mass. (Samuel Sigilman, of Boston, Mass., on the brief), for appellant.

Joseph B. Jacobs, of Boston, Mass. (Jacobs & Jacobs, of Boston, Mass., on the brief), for appellees.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. This is an appeal from an order of the District Court refusing the bankrupt his discharge. The appellees

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set forth four objections to the petition for discharge, the first of which is:

"That with intent to conceal his financial condition he destroyed, concealed and failed to keep books of account or records from which such condition might be ascertained."

The District Court sustained the first objection, and on that ground refused the discharge. The remaining objections were not passed upon.

The essential facts are as follows: On December 19, 1916, an involuntary petition was filed by three friendly creditors against Israel Sternburg. Prior to adjudication terms of composition were offered which were referred to the referee to ascertain and report the facts. The referee reported against the offer, and the composition was not confirmed. The bankrupt's petition for discharge was referred to the same referee to ascertain and report the facts. In the referee's report concerning the discharge he incorporated by reference the report made by him in relation to the offer of composition.

It appeared that the bankrupt conducted a retail clothing store on Castle street, Boston, selling wholly for cash, his receipts averaging from $200 to $300 a week; that his expenses for rent, light, help, and his own drawing account of about $60 per week, were $125. In the spring of 1916 the bankrupt got hard up for money, and went to everybody he could to raise it, paying money lenders at the rate of one per cent. per month. He borrowed from relatives and others with whom he long had had friendly relations. As to the lack of books, the referee found in his first report, filed June 19, 1917, as follows:

"Although the bankrupt had some years before kept a book of account, I do not regard his failure to keep books in connection with his business conducted on a cash basis as sufficient to sustain the specification, but taken in connection with his failure to account for or deposit moneys after November 13, 1916, except for the one deposit of $307 on December 1, I regard such conduct as evidencing an intent to conceal his true financial condition. The transfer of a policy of insurance to his wife, on which he subsequently paid a premium in a substantial sum, the purchase for his wife of a valuable garment even after the filing of the petition in bankruptcy and payment therefor out of funds of which he was trustee for his creditors, and also the loss of at least $50 of such moneys in playing cards with Simons and Einstein, and the giving of a note to his nephew, Lew Goldman, for $250, the same being for certain commissions on sales extending over a long period on a percentage basis, which the bankrupt himself seemed in some doubt about, are important upon the question of good faith and proper conduct, which are essential elements in cases where composition is offered to one's creditors."

In his second report, filed March 5, 1918, the referee, dealing with substantially the same specifications, found as follows:

"As to the others (i. e., the specifications), as pointed out in my former report, there was here a clear preparation for bankruptcy by the transfer of a policy of insurance to his wife, and preferential payments (for, while the petition was not voluntary, it was friendly), but the policy had little or no paid-up value, and its transfer was a matter of record. Preferential payments, though in this case, I believe, clearly recoverable, and furnishing the basis for my recommending that the proposed composition was not for the best interests of creditors, will not in and of themselves bar a discharge.

"On the remaining specifications it comes to the matter of whether a cash

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business, such as this was, requires the keeping of books, as the whole contention on the score of concealment of assets has to do with the disposition of a sum not exceeding $100, and probably even less, being the difference between undoubted expenses and receipts which have now to be established by oral evidence. It has been impossible for me to regard the transactions of this bankrupt in any other light than that of a man struggling to get out of his difficulties, and that there was from start to finish no actual intent to conceal his true financial condition. I think the case clearly distinguishable from In re Kaplan (D. C.) 245 Fed. 222, both as to the conduct of the bankrupt before as well as after the petition was filed."

The District Court at the conclusion of the arguments gave oral judgment (thereafter reduced to writing) as follows:

"It is evident that we are dealing here with a bankruptcy which was essentially fraudulent; and the bankrupt's acts and omissions are to be considered with that fact in mind. The failure was carefully prepared for, weeks ahead. Up to November 13th there had been deposits of more or less regularity in the bank. Beginning on that date they entirely ceased, with one exception (said to have been of borrowed money), which was made to meet a note coming due. As to how much money was taken in during the five or six weeks between that time and the appointment of the receiver on December 29, 1916, there is not a scrap of written evidence, and no evidence at all except the oral testimony of the bankrupt. He was carefully forelaying for bankruptcy during this interval, paying up the notes on which his brothers-in-law had indorsed, giving bonds (which would be avoided by bankruptcy), with them or other relatives as sureties, to dissolve attachments, etc. Although the gross receipts of his business were about $250 a week, and he saw failure ahead, he kept absolutely no accounts of any kind. Even after the petition was filed he continued to make preferential payments to protect relatives, and to use money which he then had for gambling at cards. The amount so lost was not, on his own statement, large, but it was substantial. See In re Shrimer (D. C.) 228 Fed. 794, 36 Am. Bankr. Rep. 404.

"In spite of the learned referee's finding to the contrary, I cannot escape the conclusion that the failure to keep anything in the way of accounts or memoranda during the important interval just preceding the failure was associated in the bankrupt's mind with his intention to go into bankruptcy in such a way as to advantage his relatives and himself at the expense of his creditors, and was, in part at least, for the purpose of having no statements or accounts which would prove troublesome. See McKibbon v. Haskell, 28 Am. Bankr. Rep. 588, 198 Fed. 629, 117 C. C. A. 343 (C. C. A. 8th Cir.).

"The filing of the petition, while not divesting the bankrupt of title to his property, constitutes him in effect a trustee for the benefit of his creditors from that time until adjudication when that follows. Bailey, Trustee, v. Baker Ice Machine Co., 239 U. S. 268, 275, 276, 36 Sup. Ct. 50, 60 L. Ed. 275. Granting that he has power to dispose of his property in the ordinary course of business in the intervals, and even that he may do so, by making preferential payments not tainted with actual fraud (but without so deciding), he certainly has no right to use his property for gambling after the petition is filed; and it seems probable that property so used is fraudulently conveyed within section 14; but it is unnecessary to decide this point."

[1] In behalf of the bankrupt it is urged that this court should follow the second finding of the referee and reverse the finding of the District Court. Conceding that "no precise quantitive weight is in this district assigned to the findings of fact made by the referee" (In re Swift [D. C.] 118 Fed. 348), the appellant contends nevertheless that, in so far as the referee's findings depend upon the credibility of witnesses seen and heard by him, that finding should not be disturbed unless he is clearly in error. We are content to follow the doctrine laid

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down by the Circuit Court of Appeals for the Sixth Circuit in Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184, in an opinion by Circuit Judge (afterwards Justice) Lurton:

"No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's finding of fact must be substantially that applicable to a master's report. Tilghman v. Proctor, 125 U. S. 137, 8 Sup. Ct. 894, 31 L. Ed. 664; Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; Emil Kiewert & Co. v. Juneau, 78 Fed. 708, 24 C. C. A. 294; Tug River Co. v. Brigel, 86 Fed. 818, 30 C. C. A. 415. Much in both cases must depend upon the character of the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. But, if the finding is based upon conflicting evidence involving questions of credibility and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion, and the weight of authority is that the district judge, while scrutinizing with care his conclusions upon a review, should not disturb his finding unless there is most cogent evidence of a mistake and miscarriage of justice. Loveland on Bankruptcy, § 32a; In re Swift (D. C.) 118 Fed. 348; In re Rider (D. C.) 96 Fed. 811; In re Waxelbaum (D. C.) 101 Fed. 228; In re Stout (D. C.) 109 Fed. 794; In re Miner (D. C.) 117 Fed. 953."

[2] In the case at bar the question for determination is mainly, if not entirely, one of deduction from established facts. It does not turn chiefly upon questions of credibility arising in conflicting evidence. Moreover, the referee's conclusion in his second report that in this case "there was from start to finish no actual intent to conceal his [the bankrupt's] true financial condition," may be regarded as no more than offsetting his earlier conclusion to the opposite effect; nor does his later report set forth any very satisfactory reason for his changed view concerning the bankrupt's intent. Under these circumstances, the district judge was well warranted in drawing his own conclusions from the admitted facts and evidence, little influenced by the last conclusion of the referee.

[3] It is beyond dispute that the bankrupt against whom the friendly petition was filed in December, 1916, found himself in embarrassed circumstances as early as the spring of that year. It is a reasonable inference, as found by the District Court, that he had bankruptcy in contemplation for a considerable time before the friendly petition was filed. During that period he did what he could to exonerate the relatives from whom or on whose credit he had borrowed. He transferred an insurance policy to his wife on November 2, 1916, and thereafterwards, on or about December 10, 1916, paid a substantial sum as an overdue premium on that policy. Apparently that sum was $137; the record is not entirely clear as to the amount. Even after the the filing of the petition in bankruptcy he indulged himself in friendly games of poker with his relatives, losing to them at least $50 of money which obviously belonged to his creditors. Under these circumstances, inferences in favor of his good faith in changing his meager bookkeeping methods are not easily drawn.

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While, as the referee finds, his mere failure to keep ordinary books of account for a cash sales business would not in and of itself be a bar to his discharge (compare In re Hodge [D. C.] 205 Fed. 824, 826, and In re Newbury and Dunham, 209 Fed. 195, 126 C. C. A. 207), yet the bankrupt's failure to make after November 13 any deposits in the bank account, which he did keep, is persuasive evidence that he intended thereby to conceal his real financial condition. A deposit book and a check book showing the disposition of cash may be most important means of determining the financial condition of a small merchant carrying on a business like that of the bankrupt. There is no adequate explanation of his failure after November 13 to make deposits as he had hitherto done. It is argued that he used the proceeds of his cash sales mainly in paying seven notes aggregating $1,625. Undoubtedly these payments would account for part of the proceeds of the sales; but the very fact that he paid these in cash instead of by check from deposits regularly made warrants an inference that he may have received, as the appellees claim, sums substantially in excess of the amounts thus accounted for. At any rate, as found by the District Court, his utter failure during this critical period, when he was in contemplation of bankruptcy, either to make any deposits from the proceeds of sales, or by any other method of bookkeeping to keep track of the amount of money which he received, and his disposal thereof, fully sustains the finding of the District Court "that his failure to keep books was with intent to conceal his financial condition."

The finding of the District Court sustaining the first specification and denying the bankrupt his discharge must be affirmed.

The decree of the District Court is affirmed, and the appellees recover their costs of appeal.

WING v. SEDGWICK.

SAME v. McCALLUM.

(Circuit Court of Appeals, First Circuit. October 3, 1918. Petition for Rehearing, December 11, 1918.)

Nos. 1334, 1335.

1. CORPORATIONS ⟸109(1)—SUBSCRIPTIONS TO STOCK—CONSTRUCTION OF CONTRACT.

Authority given syndicate managers by each several signer of an underwriting agreement for the stock of a corporation to borrow money to the amount of his subscription, to make immediate payment for the stock, "upon such terms" as they might be able to arrange with the lenders, and to pledge the agreement as security, *held* broad enough to empower them to execute their note to the corporation and to deposit the agreement with a trustee as collateral.

2. CORPORATIONS ⟸92—CAPITAL STOCK—LEGALITY OF ISSUE.

Under General Corporation Law N. J. § 48, providing that nothing but money shall be considered as payment for capital stock of a corporation, except in case of purchase of property, where a note was made to a corporation in which it sold participation certificates for cash, stock issued to the amount of such cash was full-paid and valid.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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3. CORPORATIONS ⟸148(2)—STOCK UNDERWRITING AGREEMENT—CONSTRUCTION.

Where an underwriting agreement for stock of a corporation authorized syndicate managers to borrow money to pay for the stock, and to pledge the agreement as security, "without the duty on the part of such lender to inquire into the performance by the syndicate managers of any of their obligations hereunder," the rights of lenders could not be affected by the fact that the money borrowed was not all applied to the purchase of stock.

4. CORPORATIONS ⟸123(10)—STOCK UNDERWRITING AGREEMENT—ACTION BY PLEDGEE.

The declaration in an action by a trustee on an underwriting agreement for stock of a corporation, which in accordance with its terms was pledged with plaintiff to secure a note in which participation certificates were issued and sold, *held* to state a cause of action in favor of the holders of such certificates.

In Error to the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

Actions by Thomas E. Wing, trustee, against Alexander Sedgwick and against Alexander McCallum. Judgments for defendants (244 Fed. 199), and plaintiff brings error. Judgments vacated, and cases remanded.

Burt D. Whedon, of New York City (Philip W. Russell and Wing & Russell, all of New York City, and C. A. Hight and Coolidge & Hight, all of Boston, Mass., on the brief), for plaintiff in error.

Hector M. Hitchings, of New York City, and William R. Sears, of Boston, Mass. (Whipple, Sears & Ogden, of Boston, Mass., on the brief), for defendants in error.

Before BINGHAM and JOHNSON, Circuit Judges, and BROWN, District Judge.

BINGHAM, Circuit Judge. These are writs of error from judgments in favor of the defendants in the United States District Court for Massachusetts upon demurrers to declarations. Each action was brought against an underwriter to recover his individual subscription to an underwriting agreement which was pledged with the plaintiff, as trustee, to secure a certain loan or loans provided for in the underwriting agreement, as will hereafter more particularly appear.

The declarations in each action were the same, the only difference being in the amount of the individual underwriter's subscription and the sums due thereon. In No. 1334 it was alleged: (1) That the plaintiff was a citizen of the state of New York; (2) that the defendant was a citizen of Massachusetts; (3) that on or about the 1st day of September, 1907, the defendant, desiring to provide for the purchase of certain shares of the capital stock of the Refugio Syndicate, a New Jersey corporation, made a contract, in writing, with George W. McElhiney and Ernest A. Wiltsee, called therein "syndicate managers," whereby the defendant undertook to pay $9,200 to the said McElhiney and Wiltsee as such syndicate managers, at the times and upon the terms and conditions therein set out (a copy of the contract, marked "Schedule A," was annexed to the declaration and

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made a part thereof); that within 90 days from the date of said contract subscriptions to the amount of at least $500,000 were made thereto, so that the said contract, in accordance with its terms, became binding and effective, and thereafter subscriptions to the full amount of $800,000 were made to said contract; (4) that thereafter, and pursuant to the contract (Schedule A), and to carry out the purpose and provisions thereof, the said McElhiney and Wiltsee subscribed as such syndicate managers, and agreed to take and pay for 8,000 shares, of the par value of $100 each, of the capital stock of Refugio Syndicate; (5) that the said syndicate managers, being by the contract (Schedule A) authorized to borrow the sum of $800,000 and to incur a liability for the interest thereon as such syndicate managers, for the purpose of paying for the aforesaid stock so subscribed for, did, pursuant to the terms of said contract, make and execute and deliver, as syndicate managers, their promissory note, payable on March 1, 1909, to bearer, for the sum of $800,000, and said syndicate managers, as therein authorized, pledged said contract (Schedule A) as collateral security for the payment of their said note, together with the capital stock of Refugio Syndicate held by them as syndicate managers, with the Guardian Trust Company of New York, as trustee under a certain agreement in writing dated March 2, 1908, a copy of which is annexed hereto, made a part hereof, and marked "Schedule B"; that the aforesaid note was duly certified by the trustee in accordance with the provisions of said Schedule B; (6) that on the same day, to wit, March 2, 1908, Refugio Syndicate, desiring to realize upon the said $800,000 note before the date of its maturity, in accordance with a plan and agreement arrived at between it and the said syndicate managers before the execution and delivery of said note under which participations in said note could be advantageously sold, made an agreement in writing with the Guardian Trust Company of New York, under which agreement it deposited with the Guardian Trust Company of New York the said $800,000 note and provided for the issue by the said Guardian Trust Company of New York of certificates of participation in said note to purchasers thereof (a copy of the agreement, called the "deposit agreement," marked "Schedule C," was annexed to the declaration, and made a part thereof); (7) that after January 1, 1909, and at least 30 days prior to March 1, 1909, the syndicate managers called upon defendant to pay on March 1, 1909, the amount agreed to be paid by him in his said contract (Schedule A); (8) that the defendant failed and refused, and still refuses, to pay the said amount, except the sum of $1,150 on or about July 15, 1909, and the sum of $1,150 on or about March 18, 1910; (9) that on March 1, 1909, the aforesaid note for $800,000 matured, was duly presented for payment, and was not paid, and is still unpaid; (10) that on or about the 28th day of September, 1910, there were outstanding certain participations in the said $800,000 note, and at that time, by agreement between the Guardian Trust Company of New York, Refugio Syndicate, and the holders of such outstanding participation certificates, the so-called deposit agreement, a copy of which is marked "Schedule C," was canceled, and the said $800,000 note was redelivered by the Guardian Trust Company of New

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York to Refugio Syndicate, and the then holders of participations therein accepted from Refugio Syndicate its certificates of participation in the place and stead of certificates of participation theretofore issued to them by the Guardian Trust Company of New York; (11) that on September 28, 1910, the Guardian Trust Company of New York, by instrument in writing and in accordance with the provisions of agreement, Schedule B, resigned as trustee, which said resignation was duly accepted and consented to, and upon the same day, to wit, September 28, 1910, the plaintiff was duly appointed trustee in the place of Guardian Trust Company of New York, duly qualified as substituted trustee, and is now, and ever since has been, acting as such substituted trustee; (12) that on September 28, 1910, Consolidated Gold Fields of South Africa, Limited, a corporation duly organized and existing under the laws of the kingdom of Great Britain, loaned to said Refugio Syndicate the sum of $300,000 upon the promissory note of said Refugio Syndicate dated the same day, wherein it promised to pay the sum of $300,000 to Consolidated Gold Fields of South Africa, Limited, on or before one year from date thereof; (13) that as collateral security for the payment of said note, said Refugio Syndicate delivered to said Consolidated Gold Fields of South Africa, Limited, the said $800,000 note of the syndicate managers (subject to outstanding participations therein), which said note was, and still is, secured by the trust agreement, Schedule B, hereto annexed; (14) that on October 25, 1911, the said $300,000 note of Refugio Syndicate being past due and unpaid, Consolidated Gold Fields of South Africa, Limited, sold the said $800,000 note of the syndicate managers at public auction in the city of New York, and the same was bid in by James McDougall, the highest bidder, at such sale, for the account of said Consolidated Gold Fields of South Africa, Limited, the present owner and holder of said note, subject to the said outstanding participations therein; (15) that the plaintiff has at all times since September 28, 1910, been ready, able, and willing, and he hereby offers, to transfer and deliver to defendant upon payment of the balance due under his said agreement (Schedule A) the amount of stock in Refugio Syndicate which, under paragraph second of said agreement, he is entitled to receive; (16) that the payment of the amount due and owing as alleged in paragraphs seventh and eighth herein—namely, $6,900—was further demanded of the defendant by the plaintiff, duly acting as trustee for the holders of the aforesaid note and participations therein (for whose benefit this suit is brought) on November 1, 1911, but no part thereof has been paid; (17) that all the acts of said syndicate managers in connection with the making and delivery of their said $800,000 note to Refugio Syndicate, the pledging of the contract (Schedule A) and the stock of Refugio Syndicate as security for said note with Guardian Trust Company under the agreement, Schedule B, and the deposit of said note by Refugio Syndicate with Guardian Trust Company and the issuance and sale of participations therein under the agreement, Schedule C, were done with the full knowledge and consent of the defendant, who afterwards ratified and approved the same.

The grounds of demurrer assigned by the defendant are: (1) The

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declaration does not state a legal cause of action; (2) that it fails to state a legal cause of action substantially in accordance with the provisions of chapter 173 of the Revised Laws of Massachusetts; (3) that it fails to state a legal cause of action for the reason that it appears therefrom that the plaintiff brings the same as trustee appointed in the place of Guardian Trust Company of New York under an alleged agreement or agreements, and that it appears from said declaration that upon the same day upon which the plaintiff alleges that he was appointed the agreement or agreements aforesaid were canceled and a certain $800,000 note therein dealt with was delivered up, so that it appears that from and after said 28th day of September, 1910, it was impossible for the plaintiff to be trustee by reason of said agreement or agreements, or otherwise, in the premises, so that he has no standing to bring this action; (4) that it fails to state a legal cause of action for the reason that it appears therefrom that the plaintiff brings the same as trustee appointed in place of Guardian Trust Company of New York under an alleged agreement or agreements, and that it also appears from said declaration that Guardian Trust Company had sold the $800,000 underwriting agreement, therein referred to, to Consolidated Gold Fields Company, Limited, therein mentioned, and that by and through said sale it had parted with all power over said underwriting agreement and with all power or right to sue on the same, so that it appears that the plaintiff could have no power as its successor to bring suit thereon.

We do not find it necessary to say more with reference to the third and fourth grounds of demurrer than that they are not well founded in fact. The declaration does not set forth, as the defendant states, that upon the same day upon which the plaintiff was appointed trustee the trust agreement, under which his appointment was effected, was canceled. Nor is it alleged in the declaration that the Guardian Trust Company of New York, which preceded the plaintiff as trustee, had sold the underwriting agreement to the Consolidated Company prior to plaintiff's appointment. The sole question, therefore, is whether the declaration states a legal cause of action.

[1] The action is brought upon the underwriting agreement of September 1, 1907, which was entered into between McElhiney and Wiltsee as syndicate managers and the defendant and others as underwriters. In this agreement it appears that a corporation known as the "Refugio Syndicate," having an authorized capital stock of $1,000,000, consisting of 10,000 shares of the par value of $100, had been organized under the laws of New Jersey; that each underwriter had paid for and owned such proportion of 2,000 shares of the stock of the company as his subscription to the underwriting agreement bore to the total subscriptions thereto; that the underwriters were desirous of providing for the purchase of the remaining 8,000 shares of the stock, and in view of that entered into the agreement whereby they appointed the syndicate managers their agents, with certain powers as to borrowing money and as to pledging securities therefor. In this agreement each underwriter bound himself to assign to the managers the number of shares of stock then owned by him in the 2,000 shares previously purchased, and to receive therefor from the

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managers a certificate showing his interest in the syndicate. He also agreed to pay the amount of his subscription as it appeared upon the contract, and was to receive for each $800 of his subscription "$1,000 face value in said capital stock." The subscription of each underwriter was to be paid in cash upon the call of the managers, and indorsed on the aforesaid certificates of interest, but no call was to be made prior to January 1, 1909, except in a certain case not necessary to mention. After January 1, 1909, calls were payable upon 30 days' notice. Each subscriber severally, and not jointly, authorized the managers to borrow from any lender or lenders "a sum not to exceed in principal indebtedness his cash subscription" for such period as would make the same due not earlier than March 1, 1909, and "upon such terms" as the managers should be able to arrange with the lenders, and to secure such loan or loans each subscriber severally authorized the managers to pledge therefor his subscription to the underwriting agreement duly assigned, his shares of the stock previously paid for and the new capital stock therein underwritten. It was also provided that the note or obligations of the managers should be binding upon the underwriters in favor of the lender or its assigns, without the duty on the part of such lender to inquire into the performance by the managers of any of their obligations thereunder. The managers were authorized, upon the written approval of a majority in interest of the underwriters, to sell the whole or any part of the stock for cash at 125 per cent. of its par value, but in case they did not sell the same prior to March 1, 1909, then said stock, upon full payment in cash of the underwriters' subscriptions, was to be divided among the underwriters. In case of the default of an underwriter in the performance of any of his agreements the managers had the right to exclude him from further interest in the underwriting agreement and to forfeit any payment he may have made thereunder, and in case of default in the payment of any amount agreed to be paid by the underwriter thereunder, the lender or lenders had the right to sell the stock pledged at public or private sale, and the proceeds, after payment of the expenses incident to the sale, were to be applied by the lender to the payment of the obligation of the defaulting underwriter, who was to remain liable for any deficiency. The agreement was not to become binding unless subscriptions to the amount of $500,000 were made within 90 days from its date. The managers were to have the sole direction, management, and conduct of the syndicate, and the enumeration of particular or specific powers was not to be considered as in any way limiting or abridging the general power or discretion intended to be conferred upon and reserved to them for the purposes of the agreement.

According to the allegations of the declaration, the managers, having entered into the foregoing contract, in pursuance thereof and for the purpose of carrying it into effect, subscribed and agreed to pay for 8,000 shares of the stock of Refugio Syndicate. Thereafter, on March 2, 1908, they made their promissory note for $800,000, payable to bearer March 1, 1909, and delivered the same to Refugio Syndicate for the purpose of paying for said stock in accordance with a plan and agreement between them and the company entered into be-

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fore the delivery thereof, whereby participations in said note could be sold and sums realized for the payment of the stock, and as collateral to the note and the borrowing thereon, they pledged with the Guardian Trust Company of New York, as trustee under a trust agreement of the same date, to wit, March 2, 1908, the underwriting agreement, Schedule A, and all of the capital stock of the Refugio Syndicate (the terms of the pledge are set out in the trust agreement, Schedule B), and that on the same day, to wit, March 2, 1908, the Refugio Syndicate, in accordance with the plan and agreement arrived at between it and the managers before the execution and delivery of the note under which participations in said note could be advantageously sold, made an agreement with the Guardian Trust Company of New York under which it deposited with the Trust Company the $800,000 note and provided for the issue by the Trust Company of participation certificates in the note to purchasers thereof (this is the deposit agreement, Schedule C).

[2] The chief contentions of the defendant are that the arrangement, under which the $800,000 note was deposited by the managers through the Refugio Syndicate with the Trust Company and the issuance of participation certificates thereon, was not a borrowing within the powers conferred upon the managers under the underwriting agreement, Schedule A, and consequently the pledging of the underwriting agreement and of the stock was unauthorized within the terms of that agreement, and further that, inasmuch as the general corporation law of New Jersey (section 48), under the laws of which state the Refugio Syndicate corporation was organized, provided that "nothing but money shall be considered as payment of any part of the capital stock of any corporation organized under this act, except as hereinafter provided in case of the purchase of property," the stock issued was illegal, and was not a consideration for the note or the borrowings obtained through the participation certificates issued thereon, that the stock was not only illegally issued, but that it was not full-paid stock, and that the underwriting agreement contemplated that the defendant's liability to pay his underwriting subscription was conditioned upon his receiving full-paid stock legally issued.

We have heretofore pointed out that, by the underwriting agreement, each subscriber for himself, and not jointly, authorized the managers to borrow for him a sum not to exceed "in principal indebtedness" his subscription, and that it was within their discretion to determine whether the borrowing should be on a single note for $800,000 or on notes for different amounts in the aggregate not exceeding $800,000, and that in either event the liability of an individual underwriter therefor should not exceed in principal indebtedness his individual subscription, and that they were not confined to any particular method of borrowing. The declaration alleges that participation certificates in the $800,000 note were issued by the Guardian Trust Company to the Refugio Syndicate, under which borrowings were had, and that the suit was brought by the trustee for the benefit of the holders of the participations and the note. Such being the case, we are of the opinion that, so far as money was obtained on participation certificates by the Refugio Company under the arrangement above set forth,

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borrowings were made by the managers within the terms of the underwriting agreement, and that the stock issued by the Refugio Syndicate to an amount equivalent to the money thus received was full-paid stock.

But the defendant says that the managers were not authorized by the underwriting agreement, Schedule A, to pledge the underwriting subscriptions and the stock with the Guardian Trust Company as trustee in the manner and according to the terms provided in the trust agreement, Schedule B; that the underwriting agreement only contemplated a pledge to the lender or lenders, and not the payment of expenses of a trustee for rendering services as provided for in the trust agreement, Schedule B. The underwriting agreement, however, authorized the managers to borrow on behalf of each underwriter "upon such terms as the syndicate managers may be able to arrange with the lenders," and to pledge for "said loan or loans his subscription hereto duly assigned to the satisfaction of the lender or lenders," and also the capital stock. As they were authorized by each underwriter to borrow "a sum not to exceed in principal indebtedness his cash subscription" (in the aggregate $800,000), in such sums and from such number of lenders as they deemed best, and "upon such terms as they were able to arrange with the lenders," and to pledge the securities in a manner "to the satisfaction of the lender or lenders," it cannot be doubted but that the parties contemplated a trustee might be appointed with whom the securities might be pledged to secure the loan or loans, and that provision might be made for paying the trustee for his services.

[3] It is evident that the underwriters hoped and expected to receive full-paid stock on payment of their subscriptions, but it is equally evident that their hopes and expectations were based upon their confidence in their agents, the managers, in seeing that the money raised through the borrowings reached the hands of the Refugio Syndicate; for they expressly stipulated in their underwriting agreement, that "the note or other obligations of the syndicate managers shall be binding upon the subscribers and their assigns in favor of the lender and its assigns, and without the duty on the part of such lender to inquire into the performance by the syndicate managers of any of their obligations hereunder." The lenders being under no obligation to see that the money borrowed was applied to the payment of the stock, the underwriter's obligation to pay his subscription was not conditioned upon his receiving full-paid stock.

It is alleged that on September 28, 1910, the Guardian Trust Company resigned as trustee and that the plaintiff was duly appointed in its place. Article 13 of the trust agreement, Schedule B, provided for and authorized such action, and rightly, as we think, within the contemplation of the underwriting agreement.

It is further alleged that on September 28, 1910, by agreement between the Guardian Trust Company, the Refugio Syndicate and the holders of the then outstanding participation certificates, the deposit agreement, Schedule C, was canceled, and the $800,000 note was turned over to the Refugio Syndicate, and that the Refugio Syndicate then issued, in exchange for participations then outstanding, its partici-

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pation certificates. It is not alleged that the cancellation of the deposit agreement was with the agreement and consent of the managers who were the agents of the underwriters. It would seem that, inasmuch as the deposit agreement, under which the note was deposited with the trustee and the participations were issued, was authorized by the managers, and their authorization was essential to constitute a borrowing by them under the authority conferred by the underwriting agreement, its cancellation in the absence of their consent could not have been effected. Its attempted cancellation, however, would not affect the rights of the then holders of outstanding participations to the extent that they had advanced money on the certificates.

[4] It is further alleged that, after the cancellation of the deposit agreement, Schedule C, the Refugio Syndicate borrowed $300,000 of the Consolidated Gold Fields Company and pledged the $800,000 note, subject, however, to the participations then outstanding, to secure said loan; that this note not having been paid, the Gold Fields Company sold the $800,000 note at public auction for the purpose of foreclosing the security, and became the purchaser at the sale. This transaction, to the extent that borrowings were had on the $800,000 note, if entered into with the consent of the managers and for the purpose of paying for the stock, would not contravene the authority conferred upon them by the underwriting agreement, but, to the extent that it put it in the power of the Gold Fields Company to acquire an interest in the $800,000 note beyond the sum so loaned, it would be in contravention of the underwriters' agreement, and, whether done with or without the consent of the managers and for the purpose of paying for the stock, the Gold Fields Company would acquire nothing in the $800,000 note, over and above the sum actually loaned. It is not alleged, however, that the $300,000 was borrowed to pay for the stock and with the managers' consent. In the absence of such allegations this loan could not be regarded as a borrowing by the managers within the contemplation of the underwriting agreement, and the underwriting subscriptions would not be collateral thereto. While we think the declaration does not state a cause of action as to the $300,000 loan, we are of the opinion that it does state one in so far as recovery is sought in behalf of the owners, legal or equitable, of participation certificates issued for sums loaned upon them.

The defendant Sedgwick's subscription was for $9,200, and the managers were authorized to borrow for him that amount, and, as by the terms of the underwriting agreement he bound himself to pay that sum, we think the plaintiff is entitled to recover the same, less the payments he had made; but, inasmuch as it is apparent that the borrowings had did not equal the sum of $800,000, the plaintiff would be bound to hold and pay over to the managers for the Refugio Syndicate such part of the sum recovered as exceeded the amount required to pay Sedgwick's proportionate part of the borrowings actually made. We also think Sedgwick is bound to pay the interest on his proportionate part of the loan and his proportionate part of the reasonable expenses incurred by the trustee, the managers having been authorized to fix the terms of the borrowing and pledge.

It does not seem to us that the New Jersey statute prevents the

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plaintiff from maintaining this action. If it be assumed that the stock was illegally issued, that would not invalidate the underwriting agreement for that agreement did not contemplate the procurement of an illegal issue of stock. The lenders had nothing to do with the procurement of the stock or with seeing that it was legally issued. This was a matter that the underwriter intrusted to the managers, and the lenders, through the trustee, were bound only to turn over, on the payment of his subscription, the underwriter's proportionate part of the stock pledged.

What we have said as to No. 1334 applies with equal force to No. 1335. The demurrers in each action must be overruled.

The judgments of the District Court are vacated, and the cases are remanded to that court for further proceedings not inconsistent with this opinion, with costs to the plaintiffs in error.

On Petition for Rehearing.

PER CURIAM. In our opinion handed down the 3d day of October, 1918, the questions intended to be decided were only such as were raised by the demurrer to the declaration. No question was presented, or could have been presented, as the pleadings then stood, as to whether the defendant had a defense which he might set up to defeat the plaintiff's right to recover any surplus due on Sedgwick's underwriting agreement over and above the amount borrowed on participation certificates for his benefit, and nothing in our opinion precludes him from making such defense. The declaration stated a prima facie case entitling the plaintiff to recover the full amount of the subscription, holding the surplus, if any, for the benefit of the managers or the Refugio Syndicate, and this is all that was meant by the passages in our opinion referred to in the defendant's petition for rehearing.

The plaintiff's declaration alleged that Sedgwick's underwriting subscription was for $9,200, and that he had paid thereon the sum of $2,300. It did not appear how many certificates of participation were outstanding or the amount held by Sedgwick, and we did not consider his right to set them up as a defense to the action.

What is here said with reference to Sedgwick applies with equal force to McCallum.

The petition for rehearing is denied.

BOSTON & M. R. R. v. STEWART.

(Circuit Court of Appeals, First Circuit. December 6, 1918.)

No. 1345.

TRIAL ⊂=232(3)—INSTRUCTIONS—DUTIES OF JURY.

An instruction approved that, while a juror should not lightly surrender an opinion which he conscientiously holds, when he finds himself in minority he should stop and consider whether he is more likely to be surely right than the majority upon a question about which there can be no absolute certainty.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action at law by Thomas Stewart against the Boston & Maine Railroad. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 241 Fed. 991, 154 C. C. A. 663.

Edward K. Woodworth, of Concord, N. H. (Streeter, Demond, Woodworth & Solloway, of Concord, N. H., on the brief), for plaintiff in error.

Alexander Murchie, of Concord, N. H. (Hollis & Murchie, of Concord, N. H., on the brief), for defendant in error.

Before BINGHAM and JOHNSON, Circuit Judges, and MORTON, District Judge.

JOHNSON, Circuit Judge. The defendant in error, hereinafter called the plaintiff, suffered a very severe injury at Manchester, N. H., on October 6, 1914, which resulted in the loss of one leg below and the other above the knee, by reason, as he alleged, of the negligence of the plaintiff in error, hereinafter called the defendant. He was employed in the dye house of the Amoskeag Manufacturing Company, and had left his home a little before 7 o'clock in the morning to go to his work, and while on his way through the yard of the Amoskeag Company was using a part of the track of the defendant company, where the space between the rails was planked over and used by employés of the Amoskeag Company in passing to and from their places of employment. He was proceeding toward the north, and had reached a point in the vicinity of the northwest corner of the boiler house of the Amoskeag Company when he saw a shifting train, composed of an engine and several cars, coming south on the same track on which he was walking. He testified that when the engine was within about 100 feet from him he attempted to step from the track over the east rail, but that his left foot was caught and securely held by what he thought at the time was a switch; and, although he claimed he shouted, he did not attract the attention of the engineer or the fireman on the engine, both of whom testified that they did not see him and did not know an accident had occurred until after they had stopped the train upon a signal from one of the trainmen.

The negligence alleged by the plaintiff was the failure of those operating the train to discover his situation and stop the train before it reached him. The plaintiff introduced the evidence of two witnesses who saw him just before the accident when he was trying to extricate his foot, and one of whom started to go to his assistance, but did not reach him before the accident happened.

The defendant claimed that the plaintiff was not injured because his foot was caught, but that he was struck by one of the cars of the passing train as he attempted to pass between the train and a railing at the northwest corner of the boiler house; that the distance between this railing and a large freight car was only about 3 inches, and that the plaintiff was struck at this point by a wide car—a Pennsylvania Railroad car—and knocked down under the wheels of that car. It intro-

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duced evidence to show that the plaintiff was not upon the track in front of the engine as the train approached, but had reached the railing at the corner of the boiler house after the engine went by and several cars had passed; the Pennsylvania Railroad car being the thirteenth car in the train from the engine. It became, then, a disputed question of fact whether the plaintiff received his injuries as he claimed, or whether they were the result of his own lack of care in placing himself where he could be struck by one of the passing cars.

There was no switch near the northwest corner of the boiler house and the maximum distance here between the planking and the east rail was 2½ inches, which was the exact width of the heel of the shoe worn by the plaintiff at the time of the accident; but the sole of his shoe was 3⅞ inches wide. South of the northwest corner of the boiler house there was a guard rail next the east rail, the distance between which and the east rail was much wider than between the planking and the rail.

The case was tried twice in the District Court, and at the first trial a verdict was returned for the defendant, which was set aside and a new trial granted by the trial judge because of newly discovered evidence. At the second trial the plaintiff testified that he thought he was a little north of the corner of the boiler house at the time of the accident; that he thought his foot was caught in a switch, but could not swear to it; that he thought the whole of his foot was caught, but was not certain, but that it was firmly held, so that he could not move it. On cross-examination, when shown a photograph of the tracks and seeing there was no switch near the northwest corner of the boiler house, he testified as follows:

"And when you first told about this accident, and for some time afterwards, you stated that your foot was caught in a switch, didn't you? A. I did, and I thought that.

"And when you were asked if that was so, when you were asked if the plank, the boards, or the planking between the rails had anything to do whatever with your foot being caught, you were very sure it did not? A. I don't think it did.

"As a matter of fact, you now think that your foot was caught between the planking and the rail, do you not? A. It must be because there is no switch there, what you call it, I don't know the names.

"A switch? A. It must have been something of that kind."

The witness was then shown a mark "like a sort of a double cross in pencil on the planking" in the photograph, which it was claimed by counsel was made by the plaintiff at the first trial as indicating where he thought the accident occurred, and was asked if that did not "indicate about the place where you were when your foot was caught," and his answer was:

"Oh, well, that might be a little this way or that way; but that is as near as I can—I couldn't say it was there in a certain place, you know; but that is as near as I can tell it."

The defendant requested the presiding judge to instruct the jury, first:

"There is no evidence to warrant a finding that the plaintiff was caught by anything except between the east rail and the planking."

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Second:

"There is no evidence to warrant a finding that the accident happened at any point except opposite some portion of the railing extending north from the corner of the boiler house and at a point north of the boiler house."

The failure of the court to give these instructions is assigned as error. The court correctly instructed the jury that the principal question was whether the plaintiff was caught at all, either between the planking and the rail or between the guard rail and the rail; that the negligence alleged was not in the construction of the roadbed in any particular place, but the failure of those in charge of the train to see the situation of the plaintiff and stop the train before it reached him.

Whether the plaintiff was caught at all, and where he was caught, were questions of fact for the jury under all the evidence in the case, and the instructions requested, if given, would have taken their determination from the jury. We think there was no error in refusing to give them. Whether the plaintiff was caught and held so he could not extricate himself, or received his accident as claimed by the defendant, was a pure question of fact whose determination was peculiarly within the province of a jury. Neither the plaintiff nor any of the witnesses could locate the exact spot where the accident occurred, which is not strange in view of the excited condition in which they must have been.

After the jury had had the case under consideration from 3:30 p. m. on the day when it was committed to them, until 10 o'clock the next day, they were called in by the presiding judge and given further instructions, and to these instructions the defendant seasonably excepted, and assigns them as error. The court called the attention of the jury to the case of Commonwealth v. Tuey, 8 Cush. (Mass.) 1, which he told them had been adopted by the Supreme Court of New Hampshire in the case of Ahearn v. Mann, 60 N. H. 472; and also that in the Massachusetts case and in the New Hampshire case it was held:

"That those in the minority should not unreasonably stand upon their own opinions, but should be admonished by the fact that the majority of their associates were assembled with them for the same purpose, and with the same responsibility."

He also made it plain that a juror was not to yield his honest opinion, for he said:

"The logic of that does not mean that a juror should lightly surrender an opinion which he conscientiously finds himself holding, but it does admonish the juror or jurors in minority to stop and consider whether it is probable that he who is here under oath to help decide this case, and finds himself confronted by men of equal intelligence and responsibility in the majority against him, is more likely to be surely right than they upon this highly disputed question about which no man can be absolutely certain anyway. Is it probable I am right or that the majority are right?"

The instructions given were quite lengthy, and were in substance that, in a large proportion of cases, absolute certainty could not be expected, and while the duty of a minority to listen to the arguments of a majority was impressed upon the jury, the jury were told:

"The logic of that does not mean that a juror should lightly surrender an opinion which he conscientiously finds himself holding."

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Part of the charge in the New Hampshire case which the judge quoted to the jury made it evident that no juror was to yield his honest and well-settled convictions for the sake of reaching a verdict, and was as follows:

"Absolute certainty cannot be attained, and is hardly to be expected in the majority of civil causes; and while no juror is required to yield his honest and well-settled convictions to the judgment of others for the sake of reaching a verdict, it is the duty of a juror, when he finds himself differing with the majority of his fellows, equally honest and capable as himself of judging of the weight of evidence, to examine thoroughly and carefully the ground of his own opinion."

These instructions were very similar to those sustained in Allen v. United States, 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528, which were in substance:

"That in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, * * * if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority."

And the court said:

"While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself."

We think there was no error in the instructions given, qualified as they were by the statement that each juror should not lightly surrender an opinion which he conscientiously found himself holding, and also by the language in the New Hampshire case from which the presiding judge quoted and adopted in which the jury was told that the juror who was in the minority was not required to yield his honest and well-settled convictions to the judgments of others for the sake of reaching a verdict.

The judgment of the District Court is affirmed; the defendant in error to recover his costs of appeal in this court.

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DIEGO v. ROVIRA et al.

(Circuit Court of Appeals, First Circuit. December 6, 1918.)

No. 1275.

1. EVIDENCE ⟸341—DOCUMENTS—WATER RIGHTS—MAYOR'S REPORT.
A copy of a report by the mayor of a town in Porto Rico, made in 1867, in response to a circular sent out by the department of public works, of a concession of the water of a stream to a person named, but which stated that the date and nature of the concession were unknown, *held* not admissible as evidence of a concession.

2. WATERS AND WATER COURSES ⟸152(8) — WATER RIGHTS IN PUBLIC STREAM—PRESCRIPTION.
The right of defendants *held* established by prescription under Rev. St. Porto Rico, 1913, § 3486, to use the waters of a public stream to the extent impounded by a dam maintained since 1868, with the right to maintain the dam in repair and at the same height.

Appeal from the District Court of the United States for the District of Porto Rico; Hamilton, Judge.

Suit in equity by Pedro de Diego y Gonzalez against Jose Rovira and another. From the decree, complainant appeals. Modified and affirmed.

Francis E. Neagle, of New York City, for appellant.

Joseph B. Jacobs, of Boston, Mass. (Hugh R. Francis, of San Juan, Porto Rico, and Jacobs & Jacobs, of Boston, Mass., on the brief), for appellees.

Before BINGHAM and JOHNSON, Circuit Judges, and BROWN, District Judge.

JOHNSON, Circuit Judge. This is an appeal from a decree of the District Court of Porto Rico enjoining the appellees, Jose and Joaquin Rovira, doing business under the firm name and style of Rovira Hermanos, as lessees, and the succession of Juan Ignacio Capo, as owners, of certain real estate, from maintaining a dam at its present height across a small stream called the Quebrada Caimital. That part of the stream with which the case is concerned lies in the municipality of Guayama in the island of Porto Rico. The land of the Capo estate lies a short distance above the land of the appellant, and both border upon the Quebrada Caimital, also known in this part of it as Quebrada Arriba.

The testimony was undisputed that from about 1850 down to the date of the bill a dam of some sort had been maintained on the site of the present dam, with a canal leading from the dam to the land of the Capo estate, which had been used for purposes of irrigation. The stream is a very small one, and very little water flows in it, particularly during the seasons of drought, which are common on the south side of the island, where it is located. The dam was constructed of brick, about 30 feet long, extending across the whole width of the stream and but little more than a foot high. The canal that leads

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from the dam is only about one foot wide and one foot high. The appellant, as owner of the lower estate upon the stream, makes use of his property for a dairy and for pasturing cattle. In the great hurricane of 1868 the dam and canal were partially destroyed; but from the evidence it appears that the greater damage at this time was done to the canal.

The appellees claim the right to use all the waters of the stream for purposes of irrigation by virtue of a concession to one Don Juan Donzac before the year 1853, and also by prescription. The appellees, Rovira, received a sublease of the property August 11, 1914, and soon after they entered into occupation of the land, made some repairs upon the dam, and some time in February, 1916, added to its height several inches, by placing a construction of concrete on top of the brick work, and also repaired the leaks in the dam, so that the dam thereafter entirely stopped the flow of water to the land of the appellant during the dry season, when it was all used for irrigation on the Capo estate. The appellant claimed that he had enjoyed the right from time immemorial to water his cattle in the stream below the dam adjacent to his property, and to use the waters there for dairy purposes. The parties agree that the waters of the Quebrada Caimital are public waters.

By the Civil Code of Porto Rico, § 416 (section 3486 of the Revised Statutes of Porto Rico), it is provided that the use of public waters may be acquired in two ways:

(1) By administrative concession.

(2) By prescription after 20 years.

"The limits of the rights and obligations of these uses shall be those shown in the first case by the terms of the concession, and in the second case by the manner in which the waters have been used."

It is also further provided by section 432 of the Civil Code (section 3502 of the Statutes of Porto Rico) as follows:

"Anything not expressly determined by the provisions of this chapter shall be governed by the special law of waters."

The Law of Waters was a Spanish statute, which was extended over Porto Rico by royal order, February 5, 1886, and in the compilation of the Revised Statutes of Porto Rico appears as sections 2387 to 2645, both inclusive. It is clear that the rights of the parties are governed by the Civil Code, if expressly determined by its provisions, and, if not, by the special law of waters.

[1] To prove a concession of all the waters of the Quebrada Caimital, the appellees introduced in evidence a copy of a record of the report of the mayor of Guayama, made in accordance with royal orders issued on July 11, 1867, and February 29, 1868, relative to water concessions. This record was produced by the keeper and librarian in the department of the interior of the government of Porto Rico.

Because of the royal order of July 11, 1867, providing for a statute of irrigation in the island of Porto Rico, a circular was sent out by the department of public works to the mayors of the different towns on the island, asking for a report on the water concessions that had been

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granted in their municipalities, for the purpose of organizing a hydrological service.

In response to this circular the mayor of Guayama made a report, part of which applies to the waters of the stream in question. The copy of the record of the report offered is as follows:

"Department of Guayama. Statement of Water Concessions Existing in this department: Districts—Guayama.

"Source of the waters—stream of Quebrada Arriba. Purpose of the waters—irrigation of canes and water supply to the steam engine. Nature of the concession—unknown. Date of the concession—unknown. Name of the first grantee—Don Juan Donzat. Volume of water granted—the whole creek. Extension of land irrigable under the concession—more than 100 hectares. Remarks—from this irrigation the plantations of Don Jose Sabater and the Curet sisters participate on certain days."

To the introduction of this evidence the appellant objected, and the receipt of it in evidence is assigned as error. It is not in dispute that Don Juan Donzac (also written Donzat) was the original owner of the property where the dam in question is located, and that title has passed from him by several mesne conveyances and leases to the appellees, and in the deed of the property given by the beneficiaries under the will of Don Juan Donzac, September 27, 1853, the water rights are conveyed in the following terms:

"One irrigation canal, the irrigation rights and concession from the creek called Arriba or Caimital."

We think the copy of the record of the report of the mayor of Guayama to the board of public works was not competent to prove a concession to Don Juan Donzac. It does not purport to be a record of any concession, but only of the information which was gained by the mayor of Guayama in regard to concessions from the Quebrada Arriba. Nor does it purport to be based upon an examination of records or upon documentary evidence, since it expressly states that the nature and date of this alleged concession are unknown, although it does state that the volume of water granted by it is the whole creek. It would seem to be nothing more than an expression of opinion by the mayor of Guayama, and was not competent to prove that a concession had been granted.

[2] The appellees also claim, however, to have acquired by prescription a right to use all the waters of the creek, by virtue of section 416 of the Civil Code, which provides that a right to the use of water may be acquired by an uninterrupted use for 20 years, and that the limits of the rights and obligations of these uses shall be shown "by the manner in which the waters have been used," and also by article 149 of the Law of Waters, which is as follows:

"Art. 149. He who shall have enjoyed the use of public waters for a period of twenty years without opposition on the part of the authorities or a third person shall continue to enjoy it, even though he cannot prove that he obtained the proper authority."

Although the testimony is contradictory and confusing as to the extent of the use of the waters stored by the dam and its periods of interruption, there was evidence that since 1868 a dam has been main-

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tained on its present site, and the waters stored by it used each year for the purpose of irrigating the land of the Capo estate.

A careful reading of the whole record convinces us that in times of drought the dam, as maintained from 1868 down to 1914, the date of the sublease to the appellees, Rovira, deflected all the waters of the stream into the canal, except what might have leaked through the dam or seeped through the soil in subterranean channels and reached the surface in pools opposite the land of the appellant, but that in time of excessive rainfalls and during a wet season the canal was not sufficiently large to carry all the waters of the stream, and that some flowed over the dam. There is no evidence in the case to show an uninterrupted use of any definite quantity nor for any definite time by the appellant.

Section 418 of the Civil Code provides:

"The right to make use of public waters is extinguished by the lapse of the concession and by nonusage during twenty years."

The appellant claims that the dam and canal were wholly destroyed by the great hurricane of 1868, and thereafter until 1914, when the dam was repaired by the appellees, Rovira, it afforded practically no obstruction to the flow of water to the appellant's property, and that no repairs were ever afterward made upon the dam until the sublease to the appellees, Rovira; but it nevertheless appears from his own witnesses that in quite recent years, before any repairs were made by the defendants, Rovira, the Capo estate obtained irrigation water from the Quebrada Caimital by means of the dam and canal.

Evidence was introduced by the appellees that from 1868 down to 1914 water was used whenever desired for irrigation upon the Capo estate, and that when it was not desired to use it for irrigation the canal was closed, and the water flowed over the dam, and that some water leaked through the dam.

The presiding judge below saw the witnesses and had an opportunity to judge their credibility. He also had the advantage of a view of the dam and the section of the stream near it and opposite the land of the appellant. He found that while there was at that time, which was a time of drought, very little water on the surface, there was evidently water beneath the surface available by pools, whether natural or artificial; but—

"after the Quebrada leaves the plaintiff's property it is practically a dry bed, although quite wide and stretching with well-defined banks past the Ceiba and other trees for hundreds of yards until it joins the larger Quebrada, called in evidence the 'Minondo.'"

While he did not pass upon the question whether the appellees had obtained the right to the use of the waters of the stream by prescription, yet he did find insufficient proof that the concession granted to Don Juan Donzac had been lost by nonusage for the period of 20 years.

We think the appellees and those under whom they claim did enjoy the use of the waters of the Quebrada Caimital for the period of 20 years; that this right by section 418 of the Civil Code of Porto Rico

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could not be lost, except by nonusage during 20 years, which was not proven; and that the decree of the court below that the appellees are entitled to use for purposes of irrigation the waters of the stream which can be stored by a dam of the height of the one that existed there prior to August 11, 1914, was justified by the evidence.

We find it unnecessary to resort to the special law of waters to determine the rights of the parties, for they are governed by the Civil Code, and it is only when rights cannot be determined by it that they are to be governed by the special law of waters. The questions presented in this case, as we view them, are the acquisition by prescription the right to the use of the waters of a public stream, and whether these rights when acquired have been lost by nonuser, and upon both the provisions of the Civil Code furnish all the means necessary for their determination. It is true that the amount of water which was being used by the appellees and those in privity with them has not been determined, nor has that used by the appellant; but the height of the dam, as it has existed for more than 60 years, would determine the amount of the waters of the stream which the appellees could legally use, and provides the fairest test of the amount of water that has been used by the parties, in the absence of proof as to the extent of use by either.

We are of the opinion, therefore, that the learned judge in the court below arrived at a correct conclusion in holding that the appellees had the right to maintain a dam of the height which had existed there before August 11, 1914, and that all additions which have been made to its height should be removed by them at their own expense. While we do not place our decision upon the same ground as the District Judge placed his, that the appellees "are the lawful owners of a water concession, originally made to one Don Juan Donzat, and as such are entitled to the use of all the waters of the Quebrada Caimital," we do concur in that part of his decree in which he finds that they are entitled to the use of all the waters of the Quebrada Caimital which may be diverted by the dam described in the pleadings, "but only at the height of the said dam prior to the change of August, 1914." We find that the appellees had acquired this right by the use of the waters of the stream which were stored by the dam as it originally existed, for a period of more than 20 years, that they had not lost this right by nonusage, and that the appellant, neither by a temporary use, nor by participation in the common use of the waters of the stream, has acquired any right adverse to this right.

We think, under the authority of article 186 of the Law of Waters, the appellees had the right to repair their dam. It is true that the article provides that the governor of the province must be informed of these repairs; but the failure to give this information does not work any forfeiture.

The fact that the dam was in a leaky condition did not prevent the appellees from stopping the leaks in it by repairs, and no decision by the courts of Porto Rico was cited to show that the owner of a dam may not repair it and stop leaks in it, making a tight dam of the same height, in place of the leaky dam which may have existed before.

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The appeal is dismissed. The decree of the District Court is modified, to conform to this opinion, by striking out from the second paragraph thereof the words "are the lawful owners of a water concession originally made to one Juan Donzac, and as such," and, as thus modified, is affirmed; the appellees to recover their costs in this court.

CREWDSON v. SHULTZ.

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3176.

1. JUDGMENT ⟸725(6)—RES JUDICATA—MATTERS CONCLUDED.
The judgment in an action to recover past-due interest on a note not matured *held* conclusive between the parties in a subsequent action to recover the principal in so far as the issues were in substance identical.

2. BILLS AND NOTES ⟸357—ACTION BY PLEDGEE—EXTENT OF RECOVERY.
Under Rem. Code Wash. 1915, § 3418, providing that, where the holder of a negotiable instrument has a lien thereon, he shall be deemed a holder for value to the extent of his lien, as construed by the Supreme Court of the state, in an action on a note by a pledgee, where there is a question as to the right of the maker to recover thereon, the recovery should be limited to the interest of the plaintiff.

Appeal from the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Action by Frank W. Shultz against Charles N. Crewdson and another. Judgment for plaintiff, and defendant Crewdson brings error. Modified and affirmed.

Shultz, appellee, brought action against Crewdson, appellant, and one Outcault, to recover principal, $5,000, and interest from August 10, 1915, at 6 per cent. per annum upon a promissory note made by them at Spokane, Wash., on August 10, 1912, to the order of J. B. Valentine, due five years after date, and before maturity indorsed and delivered by Valentine to Shultz. Crewdson answered, admitting indorsement, but denying delivery to Shultz, or that Shultz was the owner, admitting that no part of the principal or interest had been paid, except interest due to August 10, 1915, and denying any indebtedness to Shultz. He also pleaded three affirmative defenses: (1) That Shultz was not a bona fide holder for value before maturity. (2) That plaintiff took the note with full knowledge of these infirmities: (a) That the note was given for land purchased by defendants from Valentine "upon representations which were false and untrue, and known by said Valentine to be false and untrue, and by reason of which there was a failure of consideration for said note, and that said Valentine could not collect the same"; (b) that Shultz took the note to shield Valentine and aid him in collection, knowing that Valentine could not maintain action against defendants; (c) that Shultz brought this action, not as the real owner *and* holder of the note, but solely to enforce payment upon the obligation, which could not be enforced by Valentine; (d) that he has refused to make Valentine a party to the action, because he is carrying it on for Valentine, *and* not for himself; (e) that he knew that Valentine was solvent and able to pay. (3) That as Shultz claimed the note was given as collateral to secure a debt of Valentine to Shultz, defendant alleges the note belonged to Valentine; but that, if Shultz claims still to have a debt due to him by Valentine, then defendant asks the court to order that Valentine be made a party, and that

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before any judgment may be rendered against defendant the amount of the debt from Valentine to Shultz, and for which the note may be security, be determined, and that until such ascertainment the proceeding be stayed as against defendant.

To this answer Shultz replied, denying the allegations of the first, second, and third affirmative defenses, and also pleaded as follows: That in 1915 Shultz brought an action in the state court to recover interest upon the note involved up to August 10, 1915; that in such action Crewdson appeared and answered as set forth in an exhibit made part of the replication herein; that Shultz replied to this answer as set forth in an exhibit to the replication; that trial was had upon the issues formed by the pleadings, and judgment rendered in favor of Shultz; that on appeal to the Supreme Court of the state the judgment was affirmed; that all the defenses set forth in the defendant's answer in this case were in the case in the state court; that the parties herein were the identical ones involved in the suit in the state court, and that the action is upon the same promissory note. Shultz also avers that he holds the note described as collateral security for five promissory notes made by Valentine to Shultz on August 1, 1913, aggregating $4,825, with interest from date, upon which there had been paid as interest $990, and no more, and that the plaintiff acquired the note sued on in good faith, without notice of infirmity, or of any of the defenses set forth by the defendant in his answer in this case.

The answer (made an exhibit in the replication) filed by Crewdson in the state court was as follows: He denied on information and belief that he and Outcault, for a valuable consideration, made the note in writing as set out in the complaint; admitted that by the terms of the note defendants agreed to pay interest at 6 per cent., payable annually, and that they had failed to make the payments, except $60 paid October 1, 1913; denied that the note was assigned and delivered and pledged to Shultz for value about March 26, 1914, and that Shultz was the owner thereof; and admitted that he had refused to pay interest. He then set forth that Shultz became the holder of a note as collateral security to an obligation owing from Valentine, the payee of the note, and that Shultz has made no effort to collect the original obligation, although Valentine was then able to pay any judgment which might be secured; avers that, when Shultz secured the note, it was on the express understanding with Valentine, and with the makers of the note, that the security would not be resorted to until the plaintiff had exhausted his rights as against Valentine; that therefore Shultz should be estopped from proceeding further until steps were had to secure the payment of the obligation of Valentine. He also set up that Valentine should be made a party, and the rights of all parties determined, in order that suitable judgment might be entered, and that the court should require Shultz first to establish his claim against Valentine; that Shultz, when he came into the possession of the note, knew of the facts and circumstances under which the note was given to Valentine, and that the note was procured by Valentine under "false and fraudulent representations as to the value of the property for which, as part consideration, said note was given," and that defendant had a complete defense to the note and was not liable thereon, and that therefore Shultz was not a bona fide holder for value before maturity; that Shultz and Valentine were intimate, and that Shultz knew of the relations between Valentine and Crewdson and was familiar with the fact that Crewdson has claims against Valentine which are offsets and counterclaims to the obligation in question, and that Shultz knew of these offsets when he received the note; that Shultz and Valentine made an agreement whereby Valentine was to transfer the note to Shultz as collateral security, and for the purpose of having it appear as if Shultz had become a bona fide holder for value, and in order that Crewdson should not be able to interpose the defenses now interposed as against any liability to a claim by Valentine against Crewdson; and that such agreement was made for the purpose of depriving Crewdson of his rights against Valentine, and to assist Valentine in his efforts to defeat Crewdson in the collection of his just claim against Valentine. The replication to the answer filed in the state court admitted that Shultz became the holder of the note as collateral security to an obligation owing from Valen-

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tine, admitted that Shultz was friendly with Valentine, and denied every other allegation made in the answer.

Upon these pleadings the present action came to trial before a jury. Counsel then stipulated that the facts pleaded in plaintiff's affirmative reply were true and correct, whereupon the court granted plaintiff's (Shultz's) motion for a verdict for the full amount prayed for, and upon direction the jury returned a verdict in favor of Shultz against Crewdson for $6,393.75, and judgment was entered accordingly.

Samuel R. Stern, of Spokane, Wash., for appellant.

Hamblen & Gilbert, of Spokane, Wash., for appellee.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

HUNT, Circuit Judge (after stating the facts as above). [1] By the principle of estoppel as laid down by the authorities our opinion is that the former judgment rendered in the action between the same parties who are now at issue in this case, and which is set forth in the reply of the defendant in error herein, is conclusive against Crewdson upon the issue of Shultz being a bona fide holder for value.

In the former action Shultz described the same note as that now sued upon. It is true the first action was brought to recover only interest due up to the time of bringing suit, and that the principal sum was not then due; but the defenses went to the integrity of the note, for Crewdson set up that Shultz was not a holder of the note for value and before maturity; that the note was procured by Valentine under false and fraudulent representations as to the value of the property for which as part consideration the note was given; that the note was taken to shield Valentine and aid him in the collection thereof; that Shultz was not the real owner of the note; that Shultz had refused to make Valentine a party to the action; that Valentine could respond to any judgment; and that the plaintiff should first be required to exhaust his possible rights as against Valentine.

The fact that Shultz brought this action for the principal of the note and such interest as has accrued since the former action was instituted does not improve the position of the maker Crewdson. His grounds of defense to the former suit for interest having been identical in substance with those he has pleaded herein, the conclusions of the state court which tried the issues must be accepted as controlling between the parties. Wilson v. Deen, 121 U. S. 525, 7 Sup. Ct. 1004, 30 L. Ed. 980; Black River Bank v. Edwards, 10 Gray (Mass.) 387; Lumber Co. v. Buchtel, 101 U. S. 638, 25 L. Ed. 1073; Edgell v. Sigerson, 26 Mo. 583; Cleveland v. Creviston, 93 Ind. 31, 47 Am. Rep. 367.

It is argued that, in the present action for the principal, defenses might be interposed which could not have been available in the first suit upon the interest; as, for example, that, after the institution of the former action for interest, litigation was pending between the appellee herein and the payee of the note, Valentine, wherein Shultz sought to recover from Valentine a debt of only $2,500, without setting up any indebtedness upon the note herein involved. Just how the doctrine of res judicata might apply to such a state of supplementary facts is not necessary for decision, for here, of the defenses plead-

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ed, none is sufficient to deprive Shultz of the benefit of having been adjudged a bona fide holder for value, at least to the extent of his lien. Shultz v. Crewdson, 95 Wash. 266, 163 Pac. 734.

[2] This further question then arises: Was it error to award judgment for the full amount of the note which is admitted to be more than the amount of the debt due by Valentine to Shultz, to secure which the note in question was given as collateral security?

Many decisions hold that, where a note is held as collateral security for a debt and the holder is held entitled to recover, he is limited to the amount of the debt which the collateral secures, where there is a valid defense against the transferer of the note. In such case the holder is a bona fide holder, entitled to stand on a better footing, only pro tanto; but if there be no defense to the collateral note the holder may recover the full amount and become a trustee for the balance over what is due to him. Daniel, § 832a, and the cases cited.

On the other hand, there are decisions which permit of full recovery by the holder, notwithstanding equities as between maker and payee. Gowen v. Wentworth, 17 Me. 66; Smith v. Isaacs, 23 La. Ann. 454; Tooke v. Newman, 75 Ill. 215; Gold Glen Milling & Tunneling Co. v. Dennis, 21 Colo. App. 284, 121 Pac. 677.

But as applicable to the present case discussion of general doctrines need not be had, because in Washington a positive statute (section 27 of the Negotiable Instrument Act [Rem. Code 1915, § 3418]), declares that, "where the holder has a lien on the instrument arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien," and because the Supreme Court of the state has construed the statute, and held that one who for value has taken a note as collateral is a holder for value "only" to the extent of the lien arising from the contract. Citizens' Bank & Trust Co. v. Limpright, 93 Wash. 361, 160 Pac. 1046. In that case the court, in reversing a judgment which dismissed a bill for the whole amount of a note taken as collateral, directed a judgment for the amount of the sum remaining due to the holder, together with interest.

Whether the defendant here may have any defense in a direct action against him by Valentine, the payee, for any surplus, is not a vital issue herein. We agree that his averments of fraud are merely conclusions, and wholly insufficient to create an issue. But as the decision of the Supreme Court in Shultz v. Crewdson, supra, was that Valentine was neither a necessary nor a proper party to the action for interest, and as the maker, Crewdson, was not permitted to implead Valentine in the present action, it seems but a just application of the statute that the holder should be limited in his recovery to what is justly due to him upon the note held as collateral, and that any controversy over any further sum should be determined as between Valentine and Crewdson.

Our conclusion is that the construction of the state statute by the Supreme Court of Washington is reasonable and just, and that under it the District Court should have limited the amount of the judgment in favor of Shultz to the amount of debt due to him by Valentine, payee of the note, together with lawful interest.

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The judgment of the District Court will therefore be modified to conform with this opinion, and, when so modified, it will be affirmed, with costs in favor of appellant.

VANE v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3170.

1. CONSPIRACY ⟸43(6)—CRIMINAL CONSPIRACY—INDICTMENT.
An indictment for conspiracy by force and violence to rob a person named of certain mail matter, constituting a part of the United States mails under control of the post office establishment, and in the lawful custody of such person, considered, and *held* sufficiently specific.

2. INDICTMENT AND INFORMATION ⟸86(3)—CRIMINAL CONSPIRACY—PLACE.
In an indictment for conspiracy to commit an offense against the United States, where the conspiracy is alleged to have been formed within the district of indictment, it is not necessary to set forth the place of performance of the object of the conspiracy.

3. CRIMINAL LAW ⟸619—TRIAL—CONSOLIDATION OF INDICTMENTS.
The consolidation for trial of an indictment for conspiracy to commit a crime against the United States and one against the same defendants for commission of such crime *held* proper, under Rev. St. § 1024 (Comp. St. 1916, § 1690).

4. CRIMINAL LAW ⟸1169(7)—HARMLESS ERROR—EVIDENCE.
The admission in evidence in a trial for conspiracy of affidavits made by certain of the defendants, which were competent evidence against them, *held* not prejudicial to the rights of a codefendant tried jointly with them; the evidence not being admitted as against him.

5. CRIMINAL LAW ⟸95—JURISDICTION OF FEDERAL COURT—DEFENDANT ON BAIL FROM STATE COURT.
That a defendant, when indicted, tried, and convicted in a federal court, was under sentence for crime by a state court, and at large on bail pending an appeal, nothing further appearing from the record, did not deprive the federal court of jurisdiction.

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Criminal prosecution by the United States against William Vane and others. From a judgment of conviction, defendant Vane brings error. Affirmed.

See, also, 254 Fed. 32.

R. L. Edmiston, of Spokane, Wash., R. E. McFarland, of Cœur d'Alene, Idaho, and O. J. Bandolin, of Sandpoint, Idaho, for plaintiff in error.

J. L. McClear, U. S. Atty., and J. R. Smead, Asst. U. S. Atty., both of Boise, Idaho.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is a writ of error to review the conviction of Vane, plaintiff in error, upon an indictment for a violation of section 37 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied February 10, 1919.

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1096 [Comp. St. 1916, § 10201]), in conspiring to commit an offense against the United States.

The indictment charged that Vane and certain others, on or about September 6, 1914, in Bonner county, Idaho, and within the jurisdiction of the United States District Court for the District of Idaho, did willfully, unlawfully, and feloniously conspire, combine, and agree by force and violence to—

"rob one Hugo De Witz of certain mail matter which mail matter constituted a part of the United States mails under the control of the post office establishment of the United States, and in the lawful charge and custody of him, the said Hugo De Witz, and which said robbery of the aforesaid mail matter was then and there agreed among them, the said William Vane and Joe Bossio, * * * to be effected by force and violence, and by placing the life of him, the said Hugo De Witz, in jeopardy by the use of certain dangerous weapons, to wit, certain pistols and certain rifles loaded with gunpowder and leaden bullets, with which said dangerous weapons it was then and there agreed by the said William Vane and Joe Bossio * * * to threaten him, the said Hugo De Witz, and to put his life in peril and thereby to take, steal, and carry away from the possession of said Hugo De Witz, and against his will, the aforesaid mail matter."

It is charged that in pursuance of the conspiracy the defendants did "by force and violence" rob the said Hugo De Witz of the said mail matter, and "did threaten him, the said Hugo De Witz, and put his life in peril." There was no demurrer to the indictment, no motion in arrest of judgment, and there is no bill of exceptions in the record. The scope of our examination is therefore limited.

[1] Plaintiff in error contends, however, that the indictment does not state facts constituting an offense against the laws of the United States: (1) In that there is no status of De Witz stated in the indictment; (2) that there is a failure to set forth the character, identity, and destination of the mail matter; (3) that there is no allegation that Vane knew the certain mail matter, alleged to have been the object of the alleged conspiracy to rob, constituted a part of the United States mails; (4) that there is no allegation of knowledge or intent as to the object of the conspiracy; and (5) that there is no place of performance of purpose set forth.

In our opinion it was not necessary to set forth with technical accuracy the relationship of De Witz to the mail. The allegation that the conspiracy was by force and violence to rob him of certain mail, which constituted part of the United States mails under the control of the post office establishment and in his lawful custody, was sufficient to inform him fairly what he had to meet. It would not be a reasonable understanding of words to gather any meaning from the language referred to other than that the mail was part of the United States mail under the control of the postal authorities and by law in the custody of De Witz. The indictment being for conspiracy to commit an offense, it is to be kept in mind that the gist of the crime is the conspiracy, and therefore, as was held by the Supreme Court in Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, a "certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy."

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Nor was it requisite that the indictment should specify the nature of the mail matter or its destination. In a combination to take forcibly a quantity of mail in the keeping of a mail custodian, by holding a loaded gun at his head and threatening to kill him, it would seem very probable that those engaged in the conspiracy would not have in mind taking any specific piece of mail. They could not well know what there was in the mail sacks; they are taking the chance that they will find mail matter containing money or other valuable things. It might be that the intention in this case was to take only such letters as had money in them; but, if the agreement or conspiracy was by violence to steal the mail in the custody of the person named by putting his life in jeopardy, it is immaterial whether the mail matter was in letters, boxes, packages, or other form, and to whom and to what place it might be addressed.

The contention that it was necessary to allege that the defendants knew that the mail was part of the United States mail is not sound, because such knowledge was not an essential element of the particular offense charged. The most material averment was that defendants willfully, unlawfully, and feloniously conspired violently to rob the person in custody of the mail, by stealing and taking the same from his person. In substance, however, persons charged with having willfully and feloniously combined to carry out such an act as the object of the combination are sufficiently charged with knowledge that the conspiracy, the gist of the crime, is to rob as set forth, and are charged with guilty intent in the general purpose of the combination. Felton v. United States, 96 U. S. 699, 24 L. Ed. 875; Burton v. United States, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392; Dunbar v. United States, 156 U. S. 195, 15 Sup. Ct. 325, 39 L. Ed. 390; Tapack v. United States, 220 Fed. 445, 137 C. C. A. 39; Bowers v. United States, 148 Fed. 379, 78 C. C. A. 193.

[2] Lastly, the point that there is no allegation of the place of performance of the purpose of the conspiracy must also fail, for the reason that, if the criminal agreement was formed about the time and within the jurisdiction as alleged, and had for its object the robbing of the mails in the custody of De Witz, it was not at all necessary to set out or prove the place where the robbery was to be executed. It might be that a conspiracy would be formed in a jurisdiction of one of our courts, with the definite purpose of being executed in a foreign land, yet the conspirators could be indicted and tried in the jurisdiction where the unlawful combination was formed.

[3] It is said that there was an improper joinder of defendants and consolidation of charges. It appears that the defendants jointly indicted in this, the conspiracy case, were also jointly indicted for robbery committed about September 8, 1914, against Hugo De Witz, in custody of mail matter of the United States (section 197, Penal Laws of the United States [Comp. St. 1916, § 10367]), and that the court, under the authority of section 1024, Revised Statutes (Comp. St. 1916, § 1690), ordered the two indictments consolidated. We find no error in this course. Furthermore, as defendant went to trial without objection to the order of consolidation, he is in no position now to

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complain of the order. Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429.

[4] It is said that error was committed because upon the trial the court admitted in evidence the affidavits of two of the other defendants, wherein they stated that they, together with Vane and others, planned the robbery of the mail stagecoach, and that in pursuance of such plan and under the directions of Vane the robbery was carried out. There is no contention that these affidavits were offered or admitted in evidence against this plaintiff in error, and inasmuch as they were apparently competent and relevant to the case against the defendants jointly tried, who had made the affidavits, it cannot be held that the admission of the evidence was prejudicial to the rights of the plaintiff in error.

[5] It is argued that the United States District Court in Idaho was without jurisdiction over Vane, because the record herein shows that at the time of the indictment, June 2, 1917, and of the verdict, November 23, 1917, and judgment thereon, November 24, 1917, Vane had been previously convicted of perjury in the superior court of the state of Washington in the county of Pend Oreille, and was under sentence to the penitentiary in that state. The judgment of conviction in the state court is dated April 30, 1917; but it also appears that after conviction in the state court Vane gave notice of appeal to the Supreme Court of the state, and an appeal bond under which he was permitted to go at large until the Supreme Court should render its judgment upon the appeal, and there is no showing of any action by the Supreme Court of the state. While the record fails to show that this matter was ever brought to the attention of the District Court, or that any ruling thereon was had, we are clearly of the opinion that it cannot be held that upon the face of the record the defendant could not be proceeded against in the federal courts in Idaho. It might be that a charge of robbery was filed before a United States commissioner in Idaho, and that defendant was arrested thereunder in Washington, and voluntarily consented to removal from Washington to Idaho; that he gave bond for his appearance before the federal tribunals in Idaho, and was in Idaho awaiting action by the United States grand jury upon the charge against him, and that after indictment by the United States grand jury he voluntarily appeared, pleaded not guilty, and made no objection to jurisdiction because of the conviction in the state court, proceeded with trial, never presented to the federal court any record of conviction in the state court in Washington, or made any question of the power of the court to try him, and was convicted. Under such a state of facts, surely the federal court would have jurisdiction over his person. Courts will wisely recognize that, where one is answerable to two different jurisdictions for offenses against the laws of each, the one will yield to the other for the time being; but the necessity for such a practice is a matter of comity, and not a rule of law, to be applied to a case with such a meager record as we have before us.

We have carefully considered all the points made in the argument and brief of plaintiff in error, and our judgment is that the record fails to show that any substantial rights have been denied him.

The judgment is affirmed.

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VANE v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3166.

1. POST OFFICE ⟸48(8)—ROBBERY OF MAILS—AIDERS AND ABETTORS—INDICTMENT AS PRINCIPALS.
Under Penal Code, § 332 (Comp. St. 1916, § 10506), making one who aids and abets the commission of a crime a principal, an indictment under Penal Code, § 197 (section 10367), directly charging defendant with robbery of the mails, is supported by evidence that he aided and abetted such robbery.

2. ROBBERY ⟸17(2)—INDICTMENT—AVERMENT OF INTENT.
An indictment charging that defendant did willfully, unlawfully, and feloniously commit a robbery is sufficient, and need not allege the specific intent.

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Criminal prosecution by the United States against William Vane and others. From a judgment of conviction, defendant Vane brings error. Affirmed.

R. L. Edmiston, of Spokane, Wash., R. E. McFarland, of Cœur d'Alene, Idaho, and O. J. Bandolin, of Sandpoint, Idaho, for plaintiff in error.

J. L. McClear, U. S. Atty., and J. R. Smead, Asst. U. S. Atty., both of Boise, Idaho.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This case is related to Vane v. United States, 254 Fed. 28, — C. C. A. —, where plaintiff in error was convicted of conspiracy to rob. By this writ of error, brought by William Vane, he seeks a reversal of conviction of robbery under an indictment which charged:

That he and three others did, on or about September 8, 1914, in the county of Barnum, Northern district of Idaho, "willfully, unlawfully, and feloniously" make an assault, and then and there "willfully, unlawfully, and feloniously did rob the said Hugo De Witz of certain mail matter; that is to say, they * * * then and there willfully, unlawfully, and feloniously as aforesaid, and by force and violence, did take, steal, and carry away from the possession of, and against the will of, him, the said Hugo De Witz, the aforesaid mail matter, which said mail matter then and there consisted of letters and parcels constituting a part of the United States mail then and there under the control of the post office establishment of the United States, and then and there in the lawful charge and custody of him, the said Hugo De Witz; and they, * * * in effecting the robbery of such mail matter as aforesaid, did then and there put the life of the said Hugo De Witz in jeopardy by the use of dangerous weapons, to wit, a certain pistol and certain rifles then and there loaded with gunpowder and leaden bullets, with which said weapons the said William Vane * * * did then and there threaten him, the said Hugo De Witz, and did put his life in peril."

There is no bill of exceptions in the record, and it does not appear that there ever was a demurrer to the indictment, or a motion in ar-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied February 10, 1919.

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rest of judgment; but, for use upon the writ of error, a stipulation was made wherein it was agreed that at the trial of Vane and others there was no testimony offered or admitted tending to show that Vane was present at the scene of the alleged robbery, or that Vane took part in any of the overt acts constituting the actual commission of said robbery; that there was testimony tending to show that on the day and at the time of the alleged robbery Vane was at his home in Idaho about 10 miles distant from the place of the robbery, and that there was conflicting testimony tending to show that Vane provided masks and guns to his codefendants prior to the alleged robbery, and planned the robbery, and counseled and induced the other defendants to commit the robbery.

[1] The first assignment of error presents this question: Vane not having been present at the actual robbery, was it error in the court to hold that he could be convicted under section 197 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1126 [Comp. St. 1916, § 10367]), which reads as follows:

"Whoever shall assault any person having lawful charge, control, or custody of any mail matter, with intent to rob, steal, or purloin such mail matter, or any part thereof, or shall rob any such person of such mail or any part thereof, shall for a first offense be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he shall wound the person having custody of the mail, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years."

The position of the plaintiff in error is that upon the face of the indictment, and upon the stipulation of facts, there was a fatal defect in the indictment, and that there was a fatal variance of proof, from which it must follow that plaintiff in error has been deprived of his constitutional rights to be advised of the nature and cause of the accusation against him. But there is a section (332) of the Penal Code which provides that:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." Comp. St. 1916, § 10506.

It being the law that one who aids or induces the commission of an act made an offense under the law of the United States is a principal, distinctions which once existed between classes of offenders, accessories before the fact and principals, are abrogated, and therefore an indictment which charges one with doing the overt act substantially informs him of the nature and cause of the accusation against him. In Rosencranz v. United States, 155 Fed. 38, 83 C. C. A. 634, and Rooney v. United States, 203 Fed. 928, 122 C. C. A. 230, the question was discussed and the authorities cited. The Supreme Court, in Ruthenberg v. United States, 245 U. S. 480, 38 Sup. Ct. 168, 62 L. Ed. 414, has recently held that under section 332, heretofore quoted, an indictment which charged a defendant as an aider and inducer and abettor of the one who did the direct act made a crime states the offense against him as principal, even though the offense be a misdemeanor and though at common law there was no accessory to a mis-

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demeanor. It would naturally follow, we think, that where, under facts alleging that one is an aider and abettor, he is charged as a principal, under facts directly alleging that he is a principal, facts which make him such can be shown, though they prove that he has really only aided and abetted the doing of the main act.

[2] It is urged that there is a failure to set forth facts showing intent to rob, steal, and purloin. The indictment, however, charges robbery of the custodian of the mail, and not an assault with intent to rob him. There is an allegation of an assault, but the charge itself is robbery, and the words that defendants did willfully, unlawfully, and feloniously rob are sufficient. Felton v. United States, 96 U. S. 699, 24 L. Ed. 875; Commonwealth v. Adams, 127 Mass. 15; Allen v. Inhabitants, 3 Wils. 318; Bishop's New Cr. Proc. § 1003.

By the statutes of Idaho (section 7980, Idaho Revised Code) it is provided that after a verdict of guilty, if the judgment be not arrested or a new trial granted, the court must appoint a time for pronouncing a judgment, which in cases of felony must be at least two days after the verdict, if the court intend to remain in session so long, but, if not, then at as remote a time as can reasonably be allowed. Error is assigned because it is said the court passed sentence upon plaintiff in error on the same day that the verdict was received, and within less than two days after return of the verdict against the plaintiff in error. Assuming, but not conceding at all, that the statute quoted governed the practice of the federal court sitting in Idaho, the statute itself is not mandatory, except where the court intends to remain in session for two days or more after rendition of the verdict, and there is nothing in the record to show when the District Court adjourned.

The other principal points made in behalf of the plaintiff in error are sufficiently covered by the opinion in Vane v. United States, supra.

The judgment is affirmed.

KREUZER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918. Rehearing Denied January 20, 1919.)

No. 4582.

1. INDICTMENT AND INFORMATION ⟹130—JOINDER—OFFENSES.
A number of charges of violations of the oleomargarine laws may under Rev. St. § 1024 (Comp. St. 1916, § 1690), be joined in one indictment; the several charges being based on acts connected with the other and for transactions of the same class of crime.

2. CRIMINAL LAW ⟹984—SENTENCE—DIFFERENT COUNTS.
Where sentences on two counts were to be executed concurrently with that imposed on an earlier count, so that but one punishment was imposed, it is only necessary to determine the sufficiency of the earlier count on which sentence was based.

3. CRIMINAL LAW ⟹1178—APPEAL—ABANDONMENT OF ASSIGNMENTS.
An assignment of error complaining of the overruling of objections to testimony, which failed to set out the testimony or its substance as re-

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quired by court rule 11 (188 Fed. ix, 109 C. C. A. ix), will be treated as abandoned; it not being discussed in the brief.

4. CRIMINAL LAW ⊜478(1)—EVIDENCE—OPINION EVIDENCE—EXPERT TESTIMONY.
In prosecution for violating the oleomargarine laws, a witness *held* to have qualified as an expert to testify whether the oleomargarine in tubs was factory packed.

5. CRIMINAL LAW ⊜1129(5)—ASSIGNMENTS OF ERROR—AMENDMENT.
Amended assignment of errors, filed several months after the writ of error had been granted, although by leave of the trial court, cannot be considered.

6. CRIMINAL LAW ⊜1169(1)—HARMLESS ERROR.
In a prosecution for violating the oleomargarine laws, the overruling of objections to testimony by a deputy collector of internal revenue, who took part in the raid, as to what another participant in the raid said about the barricade, etc., *held* not prejudicial error, where he also repeated what he saw and heard the defendant say and do.

7. CRIMINAL LAW ⊜753(2)—TRIAL—SUBMISSION TO JURY.
Where defendant made no motion for directed verdict, the submission of the case to the jury was proper.

8. CRIMINAL LAW ⊜1056(1)—CHARGE—EXCEPTIONS.
Alleged errors in the charge of the court cannot be considered, in the absence of exceptions.

9. CRIMINAL LAW ⊜1172(7)—HARMLESS ERROR—INSTRUCTION.
A charge that the fact defendant did not testify should not be considered against him, but he was entitled to stand on the presumption of innocence, *held* in no way prejudicial, but favorable, to the defendant.

10. CRIMINAL LAW ⊜984, 1209—TRIAL—SENTENCE.
Where defendant was indicted for violating Act Aug. 2, 1886, § 8 (as amended by Act May 9, 1902, § 3), and section 13 (Comp. St. 1916, §§ 6220, 6225), the fact that the court after having sentenced defendant on those counts charging violation of section 8, which relates to tax on oleomargarine, etc., sentenced him under section 13, relating to destruction of stamps on emptied packages, did not nullify the first sentence, constituting a double punishment, though the latter was not imposed until after writ of error and supersedeas was obtained.

In Error to the District Court of the United States for the Eastern District of Missouri; John C. Pollock, Judge.

David J. Kreuzer was convicted of violating the oleomargarine laws, and he brings error. Affirmed.

The plaintiff in error, hereafter called the defendant, was convicted of a violation of several sections of the oleomargarine laws. The indictment contained 10 counts, all parts of the same transaction and connected together. Three of the counts charged were misdemeanors, and the others felonies. A demurrer was filed to the indictment, alleging as grounds:

First. That said indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against him under the laws of the United States.

Second. That said indictment, and each and every count thereof, is invalid on the ground of duplicity.

Third. That said indictment, and each and every count thereof, contains contradictory averments.

Fourth. Because said indictment, and each and every count thereof, is too vague, general, indefinite, and uncertain to afford the accused proper notice to plead and prepare their defense, and sets forth no specific offense under the laws of the United States.

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Fifth. Because said indictment, and each and every count thereof, fails to show that said defendant in any way committed, or undertook to commit, an offense against the laws of the United States.

Sixth. Because there is a misjoinder in the same indictment of charges of misdemeanor and felony.

The demurrer was overruled, and upon a trial to a jury a verdict of guilty on each count was returned. The court on January 30, 1915, sentenced the defendant on the second, third and fourth counts, and deferred sentence on the remaining counts until the March term of the court. A writ of error was allowed on Feb. 2, 1915, and a supersedeas bond approved. At the March term the court sentenced the defendant on the fifth count. No sentences have been imposed on the other counts.

The judgment and sentence on January 30, 1915, was a fine of $5,000 and costs, and imprisonment for two years in the penitentiary on the second count. On the third and fourth counts the sentence was two years' imprisonment on each count, "to run and terminate concurrently with the sentence on the second count." No fine was imposed on these two counts. The judgment and sentence on the fifth counts was a fine of $100 and 30 days' imprisonment in the county jail. After serving the 30 days' imprisonment, he was discharged on his affidavit of poverty, without payment of the fine. By certiorari the record of the last judgment was made a part of the record in this cause.

The assignment of errors filed when the writ of error was granted assigned three errors. These were as follows:

First Assignment of Error.

The court erred in overruling the demurrer of defendant to each and every count of the indictment herein against him.

Second Assignment of Error.

The court erred in overruling the objection made by defendant to the testimony of witness L. P. Mattingly, and allowing him to testify that in his opinion Exhibit 29 had not been packed in a licensed factory, on the ground that the witness was not a qualified expert, and on the ground that it was a question for the jury.

Third Assignment of Error.

The United States has improperly joined in the indictment herein alleged charges which cannot properly be united in one proceeding.

On June 18, 1915, an amended assignment of errors was filed by leave of the District Court, but for reasons hereinafter stated it is not necessary to set it out herein.

On January 12, 1916, by leave of this court, 6 additional assignments of error were filed. These were as follows:

(28) The said District Court erred at the trial in allowing witness Daly to testify for plaintiff that government witness Mattingly's statement about the barricade was correct.

(29) The said District Court erred at the trial in submitting each of the counts to the jury, because there was not sufficient evidence as to each to warrant such submission.

(30) The said District Court erred at the trial by charging the jury that defendant had not testified in his own behalf.

(31) The said District Court erred in not charging the jury that defendant was presumed to be innocent until proven to be guilty beyond reasonable doubt, and the court's remarks on that subject were inadequate, and not up to the measure of the defendant's immunity under the Constitution.

(32) The said District Court erred at the trial in charging the jury that they might under the evidence find the defendant guilty "of all the charges in this indictment."

(33) The said District Court erred in entering judgment and sentence as to each finding, and as to each count whereon such judgment and sentence were entered herein.

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Wm. R. Orthwein and Shephard Barclay, both of St. Louis, Mo. (S. Mayner Wallace, of St. Louis, Mo., on the brief), for plaintiff in error.

Robert W. Childs, Sp. Asst. Atty. Gen. (Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge (after stating the facts as above). [1] It is urged that there was a misjoinder of charges, but the contention is without merit. Section 1024, Rev. St. (Comp. St. 1916, § 1690), permits such joinders, as each of the counts is for acts connected together, and for transactions of the same class of crimes. Logan v. United States, 144 U. S. 263, 295, 12 Sup. Ct. 617, 36 L. Ed. 429; Pointer v. United States, 151 U. S. 396, 403, 14 Sup. Ct. 410, 38 L. Ed. 208; Ingraham v. United States, 155 U. S. 434, 436, 15 Sup. Ct. 148, 39 L. Ed. 213; Dolan v. United States, 133 Fed. 440, 446, 69 C. C. A. 274; McGregor v. United States, 134 Fed. 187, 69 C. C. A. 477; Rooney v. United States, 203 Fed. 928, 122 C. C. A. 230; Norton v. United States, 205 Fed. 593, 123 C. C. A. 609. None of the authorities cited by counsel for the defendant is in point. In McElroy v. United States, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355, it was held that indictments against several defendants for assault cannot be consolidated with an indictment against only some of the defendants for arson and another indictment for arson committed two weeks later. The other authorities cited do not pass upon this question.

[2] As the sentences on the third and fourth counts are to be executed concurrently with that imposed on the second count, and therefore but one punishment has been imposed, it is only necessary to determine the sufficiency of that count. Evans v. United States, 153 U. S. 608, 14 Sup. Ct. 939, 38 L. Ed. 839; Billingsley v. United States, 178 Fed. 653, 662, 101 C. C. A. 465; Norton v. United States, supra, 205 Fed. 602, 123 C. C. A. 609.

Should the demurrer to the second count have been sustained? May v. United States, 199 Fed. 42, 117 C. C. A. 420, rules this contention, and upon the authority of that case we hold it untenable. See, also, Marhoefer v. United States, 241 Fed. 48, 154 C. C. A. 48.

[3] The assignment that the court erred in overruling the objection to the testimony of Mr. Mattingly, because he had not qualified as an expert, fails to set out the testimony admitted or its full substance, as required by rule 11 of this court (188 Fed. ix, 109 C. C. A. ix). Nor is this assignment discussed in the elaborate brief of counsel for the defendant. It may therefore be treated as abandoned.

[4] But, aside from this, he did qualify as an expert. After testifying that he had been working for three years on other oleomargarine cases and had examined the contents of many tubs during that whole period of time, he further testified:

"Generally speaking, I can tell what a tub that is factory packed looks like, though it may be possible for a tub that is not factory packed to be packed almost as perfectly as a factory packed tub."

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This was sufficient to permit him to testify as an expert, and it was for the jury to determine the weight to be given to his testimony. The general rule, as determined by the Supreme Court and this court, is found in Gillespie v. Collier, 224 Fed. 298, 301, 139 C. C. A. 534, 537, where the court quoted and followed what was said by the Supreme Court in Gila Valley R. Co. v. Lyon, 203 U. S. 465, 475, 27 Sup. Ct. 145, 148 (51 L. Ed. 276):

"In the cases of all witnesses, we think the question of the admissibility of their evidence was one within the reasonable discretion of the trial court, and that the discretion was not abused. All the witnesses had had practical experience on railroads, and were familiar with structures and the character of bluffers mentioned in the evidence. There was certainly enough to call upon the court to decide upon the admissibility of their opinions under these circumstances, and we ought not to interfere with the decision of the trial court in this case."

[5] This disposes of the assignments of error filed when the writ of error and supersedeas were granted. The amended assignment of errors filed several months after the writ of error had been granted, although by leave to the District Court, cannot be considered, as that court had no power to grant such leave at that time.

[6] The additional assignments of error filed by leave of this court are properly before us. The first is that the court erred in permitting the witness Daly to testify that "the witness Mattingly's statement about the barricade was correct." But, while the witness did testify to that effect, he repeated what he saw and heard the defendant say and do; the witness being a deputy collector of internal revenue, taking part in the raid with Mr. Mattingly.

The court committed no prejudicial error in overruling the objection. The other assignments are clearly without merit.

[7] As no motion for a directed verdict was made on behalf of the defendant, the court committed no error in submitting the case to the jury. Besides, a careful reading of the testimony satisfies that there was substantial evidence to justify a verdict of guilty, and even if a motion for a directed verdict had been made, the refusal would not be error.

[8, 9] As to the alleged errors in the charge of the court, it is sufficient to say that no exceptions were taken to any part of the charge; but, in view of the fact that the defendant's liberty is at stake, we have carefully read it, and find no prejudicial error. The only part of the charge complained of, which it is proper to refer to, is that part in which the court told the jury:

"The defendant in this case has not testified in his own behalf. That is not to be considered by the jury in any respect whatever. In our courts of justice, the defendant has a right to stand on the presumption of innocence of the offense, and he cannot be convicted unless the government has proven the offense or offenses charged against him, beyond all reasonable doubt, as I have defined the term to you."

This it is claimed, is prejudicial error. To us it seems these remarks were, if anything, favorable to the defendant, as it cautioned the jury against any presumption of guilt, which may arise in their minds from the fact that the defendant did not avail himself of the

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privilege of testifying granted by Act March 16, 1878, c. 37, 20 Stat. 30 (Comp. St. 1916, § 1465). Hanish v. United States, 227 Fed. 584, 142 C. C. A. 216.

[10] By the supplemental proceeding, brought up on the writ of certiorari, the claim is made that the action of the court, sentencing the defendant on the fifth count, at a term after the writ of error and supersedeas had been obtained, which sentence had been executed, nullifies the former sentence, constituting a double punishment. The fifth count charges an entirely different offense from that charged in the second count. The latter charges "mixing artificial coloration with white or uncolored oleomargarine, and thereby making a product resembling butter of a shade of yellow, for sale * * * in an attempt to defraud the United States of the tax imposed by law upon colored oleomargarine," etc.

It charges a violation of section 8 of the Act of August 2, 1886, c. 840, 24 Stat. 210, as amended by Act May 9, 1902, c. 784, § 3, 32 Stat. 194 (section 6220, U. S. Comp. St. 1916). The fifth count charges a violation of section 13 of the Act of August 2, 1886, 24 Stat. 211 (section 6225, U. S. Comp. St. 1916). This contention is therefore without merit.

Finding no error, the judgment is affirmed.

THOMS & BRENNEMAN et al. v. GOODMAN.

In re HAMILTON GAS & ELECTRIC CO.

(Circuit Court of Appeals, Sixth Circuit. August 3, 1918.)

No. 3159.

1. BANKRUPTCY ⟸455—APPEAL—MATTERS REVIEWABLE.
In a bankruptcy proceeding, where stockholders are contesting right to levy assessments against them, in which some were not formally made parties, Circuit Court of Appeals will nevertheless proceed to the merits, where both sides have assumed that the order of assessment was a final appealable order.

2. CORPORATIONS ⟸544(2)—SUBSCRIPTIONS—LIABILITY OF STOCKHOLDERS.
Subscribed, but unpaid, capital stock of a corporation, becomes, upon its insolvency and the suspension of business, a trust fund for all creditors, and, even before insolvency, it so far has that inchoate character as to prevent it from being surrendered or given away by the corporation.

3. COURTS ⟸372(1)—FEDERAL COURTS.
In the absence of any controlling state statute, a federal court is not justified in declining to adopt the general rules of corporate law, approved by the Supreme Court of the United States, unless there is a clear, definite, and settled rule to the contrary in the state.

4. CORPORATIONS ⟸232(1)—LIABILITY OF STOCKHOLDERS—STATUTES.
Ohio Constitution and statutes, to the effect that a stockholder shall be liable for the amount unpaid upon his stock, do not prevent the application of the rule that persons buying necessarily issued additional stock of a corporation at its market value are not liable for the difference between the par value and the purchase price.

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5. CORPORATIONS ⟸232(1)—LIABILITY OF STOCKHOLDERS.

Where an Ohio corporation, on account of impairment of its capital stock, necessarily issues additional stock, stockholders who purchase such stock below par at its market value will not be held liable to creditors or other stockholders for the difference.

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

In the matter of the Hamilton Gas & Electric Company, a corporation, bankrupt. From an order of the District Court, affirming an assessment against stockholders by the referee on petition of S. M. Goodman, trustee, Thoms & Brenneman and others appeal. Reversed and remanded.

In November, 1904, the Hamilton Gas & Electric Company was organized under the laws of Ohio, with an authorized capital stock of $1,000,000, and with an authorized bond issue of the same amount. More accurately speaking, this was a consolidation and reorganization of existing companies; but for all purposes now involved there is no distinction. Seven hundred thousand dollars of bonds and the same amount of stock were issued in payment for the various properties and enterprises which became the property of the corporation and for working capital, and the stock and bonds were considered fully paid by the transfer of these properties and by the cash paid in. For the purposes of this case, the full payment of this $700,000 of stock is unchallenged. The remaining $300,000 of bonds and the same amount of stock were issued at intervals over a period commencing November, 1905, and ending October, 1907, for the purpose of acquiring additional funds needed in the operation of the company, and after it had been in active operation from one to three years. Part of this capital was needed for the reconstruction of a plant destroyed by a tornado, and it is to be assumed, in the lack of present dispute, that it was all necessary to enable it to carry on its business. These 300 bonds, of $1,000 each, and each accompanied by the same amount of stock, were mostly sold for par. The sales were made to the directors or those active in the management of the corporation, many of whom had already advanced considerable sums by way of loan.

In December, 1911, the company became an involuntary bankrupt. Its indebtedness consisted of $1,000,000 of mortgage bonds, about $110,000 of loans and advances by or through the personal relations of directors and an amount of general indebtedness so trifling as to be negligible. The sale of the mortgaged property realized sufficient to pay $495 on each bond. For the deficiency of $505,000, some of the bondholders filed general claims. The assets not mortgaged seem to have been not large enough to make material change in the situation. Thereupon the trustee filed with the referee a petition, asking that he be authorized to make an assessment against the holders of the $300,000 of stock as if it had been subscribed for and remained wholly unpaid. In his petition, and a supplemental petition, he named the holders of this stock, as far as known, and eventually notice was given them, and they made a contest before the referee. Although there was no pleading before the referee in opposition to the petition, the matter seems to have been treated on both sides as if there had been formal appearance and issue. The referee found that, after excluding debts not entitled to share in such an assessment, there remained $86,000 of debts which should be paid in this manner, and which he accordingly assessed, pro rata, against the holders of this stock. Those who had been assessed to the amount of about $50,000 filed a petition for review. The District Judge affirmed the referee in the main, and ordered an assessment to the same general effect. Six of the parties named, and who were thus assessed for about $47,000, bring this appeal.

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Robert Ramsey, of New York City, for appellants.

Slayback & Harr, of Hamilton, Ohio, and Ralph R. Caldwell, of Cincinnati, Ohio, for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and WALTER EVANS, District Judge.

DENISON, Circuit Judge (after stating the facts as above). [1] We pass by any question whether an order, made as this was, when the persons to be assessed were not parties to the record in any formal way, is a final order subject to appeal. It has been so assumed upon both sides, and there is no such obvious lack of jurisdiction as should prevent us from proceeding to the merits. See Marin v. Augedahl, 247 U. S. 142, 38 Sup. Ct. 452, 62 L. Ed. 1038.

[2] The doctrine that the subscribed, but unpaid, capital stock of a corporation, becomes, upon its insolvency and suspension of business, a trust fund for all creditors, and that, even before insolvency, it so far has that inchoate character as to prevent it from being surrendered or given away by the corporation, finds universal acceptance. The underlying reasons for the rule and the persons by whom and the manner in which the resulting rights are to be enforced are not now and here important. No less well settled, as a matter of general corporate law and rule of equity, is the (seeming or possible) exception to the universality of the general rule, by which exception a corporation, the value of whose capital stock has become impaired, and which finds it necessary to sell additional capital stock, may sell the same at the real worth or market value thereof, in which case the purchaser does not incur the liability of a subscriber under the general rule. This was most explicitly declared in Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, and the care with which the question was considered and decided is evidenced by the dissent of two judges, and by the simultaneous consideration and decision of analogous problems, with corresponding result. Clark v. Bever, 139 U. S. 96, 109, 11 Sup. Ct. 468, 35 L. Ed. 88; Fogg v. Blair, 139 U. S. 118, 126, 11 Sup. Ct. 476, 35 L. Ed. 104.[1] When the present case is viewed in the aspect which it must have on the record, there is not merely analogy, but identity, between its facts and the facts of Handley v. Stutz, so far as the latter related to the group of stockholders who bought bonds and stock to-

[1] The same rule has either been expressly adopted, or referred to with apparent approval, quite generally by federal and state courts, where there was no controlling statute. Grant v. East & West Co. (C. C. A. 5, Ala.) 54 Fed. 569, 575, 4 C. C. A. 511; Toledo Co. v. Continental Co. (C. C. A. 6, Ohio) 95 Fed. 497, 515, 36 C. C. A. 155; Ingraham v. Commercial Co. (C. C. A. 8, Mo.) 177 Fed. 341, 343, 101 C. C. A. 317; Granite Co. v. Titus (C. C. A. 5, S. C.) 226 Fed. 557, 570, 141 C. C. A. 313; Clark v. Johnson (C. C. A. 8, Ark.) 245 Fed. 442, 447, 157 C. C. A. 408; Stein v. Howard, 65 Cal. 616, 4 Pac. 662; Dummer v. Smedley, 110 Mich. 466, 476, 68 N. W. 260, 38 L. R. A. 490; Hospes v. Northwestern Co., 48 Minn. 174, 197, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637; Woolfolk v. January, 131 Mo. 620, 634, 33 S. W. 432; Van Cott v. Van Brunt, 82 N. Y. 535; Speer v. Bordeleau, 20 Colo. App. 413, 421, 79 Pac. 332; McDowell v. Lindsay, 213 Pa. 591, 595, 63 Atl. 130; and see note in 8 L. R. A. (N. S.) 263, 265.

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gether (139 U. S. 428, 11 Sup. Ct. 534 [35 L. Ed. 88]), and so far as concerns the form and manner of stock issue—not necessarily as to the justification for the discount. The Hamilton Company was a going concern; the circumstances indicate that its existing stock was worth less than par; it needed additional capital; it is at least probable that bonds could not be sold for par, in such amounts and so quickly as needed; and the case is plainly one where bonds and stock were sold together for a gross sum. It is not alleged that they were worth any more than was received.[2] There is no room for doubt that the petition and the proofs herein fail to make a case, unless Handley v. Stutz ought not to be followed; and the claim that it ought not to be followed rests upon the proposition that the law of Ohio is otherwise and that the Ohio law must control. Whatever might be true as to some of the matters argued (see Clark v. Bever, supra, 139 U. S. at page 117, 11 Sup. Ct. 468, 35 L. Ed. 88), it has been recently held in this court that, upon the underlying question of liability, the Ohio law must be ascertained and applied (Kiskadden v. Steinle [C. C. A. 6] 203 Fed. 375, 378, 121 C. C. A. 559; Courtney v. Croxton, 239 Fed. 247, 249, 152 C. C. A. 235).

[3, 4] Clearly, in the absence of any controlling Ohio statute, we can be justified in declining to adopt the general rules of corporate law approved by the Supreme Court of the United States only in case we find a clear, definite, and settled rule to the contrary in Ohio. The Ohio constitutional and statutory provisions referred to in the Ohio cases hereafter mentioned say only that the stockholder shall be liable for the amount unpaid upon his stock, and it was said, in Clark v. Bever, 139 U. S. 116, 11 Sup. Ct. 475, 35 L. Ed. 88:

"The recognition in the Iowa statute of the right of creditors of corporations to look to unpaid installments of stock subscriptions to obtain satisfaction of their demands did not confer a new right, but is a recognition of a right existing before the statute in virtue of the relations between a corporation and its creditors and stockholders."

Comparison of the Ohio with the Missouri statute, quoted in Fogg v. Blair, supra, 139 U. S. at page 125, 11 Sup. Ct. 476, 35 L. Ed. 104, shows at least as strong a case of statutory liability in Missouri as in Ohio, yet the Missouri statute does not prevent the full application of Handley v. Stutz in that jurisdiction. Ingraham v. Commercial Co. (C. C. A. 8) 177 Fed. 341, 343, 101 C. C. A. 317. Hence we must conclude that the Ohio statute furnishes no effective distinction.

[5] It cannot be said of the Ohio decisions that they establish any such clear and settled rule. Their distinct tendency is the other way. All cases of stock issue resolve themselves into two classes: First, those which are incidental to the organization of the corporation on the launching of its business. All persons who take this stock are the original and voluntary associates. As to this class, it may well be, as has often been held, that the form adopted for their association is not controlling and that they may be treated as subscribers solely through the

[2] The proof is that the bonds, "as marketed," were worth what they brought, but they were "marketed" with the stock accompanying them; and this amounts to saying that they together were worth the price received.

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effect of their acceptance of stock, issued as if on a subscription—provided that the acceptance of stock in good faith exchange for property at an agreed valuation or as incidental to a bond purchase does not by the local law bar further liability. The second class comprises those incidental to the raising of additional capital for a going concern. In many of these cases, the issue of stock is characteristically a compulsory sale of a corporate interest rather than a mere subscription or voluntary joinder in a new enterprise; and while the underlying principles in the two classes applicable to the issue—subscription or sale?—do not furnish entirely satisfactory distinctions, the practical difference is often convincing and controlling. The undoubted fact, known to all, is that the capital stock of a corporation which needs additional working capital is often, if not typically, impaired in value, and that when the capital stock is thus impaired in value it is wholly impossible to sell new stock at par, and the corporation, as a matter of practical necessity, must sell it for what it is worth, or else not sell it at all. The Supreme Court seems to have considered that such possible theoretical injury as might come to creditors through permitting sales of stock at less than par and without liability for the balance, in those cases where the stock could not be sold for par, was a lesser evil than compelling every corporation to wind up its business or reorganize, if it had sustained some losses and needed more invested capital. The decision in Handley v. Stutz rests essentially upon the classification above stated between original associates and those who buy at its real value treasury stock in a going concern. When we come to consider the Ohio decisions, it is clear that those pertaining to an original association, or cases of the first class, cannot be taken—no matter what general language they use—as laying down a rule for cases of the second class, so as to obliterate the distinction which the Supreme Court of the United States has drawn.

The Ohio decisions are said to begin with and rest upon Henry v. Vermillion Co., 17 Ohio, 187. This contains nothing now pertinent, save the rather casual statement that since the charter required stock subscriptions to be paid in cash, an agreement by one subscriber to pay in something other than cash would be invalid as a fraud upon the other stockholders. Noble v. Callender, 20 Ohio St. 199, 208, is to the same effect. When subscribing, the stockholder took a collateral agreement providing that the subscription was to be paid in land. Without any discussion, it was held that this could not be enforced to the prejudice of creditors or costockholders. In Rouse v. Bank, 46 Ohio St. 493, 22 N. E. 293, 5 L. R. A. 378, 15 Am. St. Rep. 644, the court first had occasion to discuss the general principle, upon which depend all the points now involved, that the capital stock of a corporation, upon insolvency, becomes a trust fund for the benefit of creditors; but the extent and character of the liability for—or as if for—unpaid subscriptions were in no way involved. Gates v. Tippecanoe Co., 57 Ohio St. 60, 48 N. E. 285, 63 Am. St. Rep. 705, is the first decision brought to our attention or which we have found in which payment, as upon a subscription, has been enforced against one who received stock purporting to be fully paid. It had to do with a transaction by which a corporation was launched and continued in business

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with a stated paid-up capital of $75,000, of which, in truth and according to property values fixed by the court, only one-half had been paid. Such distinctions as there may be between stock so originally issued at an inflated value and stock afterwards issued upon the basis of actual value at the time of issue were not involved and were not considered. Handley v. Stutz was not mentioned, though it is not to be doubted that some things said in the course of the opinion would apply as well to the latter as to the former class of stock issues. In Trust Co. v. Ford, 75 Ohio St. 322, 332, 79 N. E. 474, 8 L. R. A. (N. S.) 263, there is considerable discussion of the general rule; but it is expressly said that the decision did not reach a case where the stock was sold after commencing business and at its real value.

We find nothing else to support the claim that the Ohio rule is inconsistent with Handley v. Stutz; on the contrary, there are two decisions tending to support the opposite conclusion. In Peter v. Union Co., 56 Ohio St. 181, 46 N. E. 894, there had been capital stock issued at a discount after the corporation had been in business for some time and when it needed additional capital. Upon insolvency, a suit was brought to compel a holder of this discount stock to pay the difference between this purchase price and par. After an exhaustive and fully reported argument of counsel, in which Handley v. Stutz was cited, it was held that the liability did not exist. It is true that the court relied upon, as more or less controlling, the fact that the complaint was made by another stockholder rather than by a creditor, and it is true that this distinction has later been noted by the same court (Trust Co. v. Ford, supra, 75 Ohio St. at page 338, 79 N. E. 474, 8 L. R. A. [N. S.] 263); but, with all deference, we cannot see that this is a distinction in principle. The court expressly holds, in this Peter Case, 56 Ohio St. 197, 46 N. E. 894, that if these unpaid subscriptions are assets of the corporation, the other stockholders are entitled to have them paid in and turned over to the creditors before the statutory double liability of the other stockholders is enforced; and, as it was held in the Gates Case, at almost the same time, that these unpaid subscriptions are corporate assets, the decision in the Peter Case necessarily leads to the conclusion that, under the facts of that case, there was no liability, even for the direct benefit of creditors. The latest reference to the general subject by the Ohio Supreme Court is in Niles v. Olszak, 87 Ohio St. 229, 234, 100 N. E. 820, Ann. Cas. 1913E, 1020. The specific question involved was one of set-off, but the court discussed the controlling principles, and cited, with apparent approval, Clark v. Bever, supra, to the effect that where an additional stock issue was accepted at 20 cents on the dollar, when that was more than it was worth on the market, there was no liability for the remainder as upon a subscription. It clearly did not occur to the court that the Ohio rule was inconsistent with Clark v. Bever. When we remember that the Gates Case and the trustee's claims here are founded on the trust fund theory, and that the United States Supreme Court has consistently maintained and applied that theory, but has decided that it does not reach facts like those now assumed which, upon the present record must be considered to show a case like the Peter and not like the Gates Case, and, when we make this review of the Ohio decisions, we cannot escape concluding that

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the rule of Handley v. Stutz, as to purchasers of stock and bonds, should be applied to Ohio corporations wherever the facts make it appropriate by showing a sale of stock based upon honest dealings and financial necessity. The present petition is based solely on the theory of a subscription for the full amount, upon which nothing has been paid; the facts do not fit that theory, and the proceeding, in its present form, must fail. Whatever liability, if any, there may be must depend upon allegation and proof that the capital stock was depleted through sales of bonds and stock at a price less than could be justified. If the trustee wishes to propound a case with this aspect, and is advised that the right of action therefor is in him, the present petition may be amended, and the question presented. We intimate no opinion as to the force of an order of assessment made against stockholders who have not joined issue, but who reserve their defense for that plenary suit which must eventually be brought. Kiskadden v. Steinle, supra, 203 Fed. at page 382, 121 C. C. A. 559.

Rickerson Co. v. Farrell Co., decided by this court in 75 Fed. 554, 23 C. C. A. 302, is not pertinent to the issue we have been discussing. In that case the stock issued to Fox was in connection with what was practically the launching of the business ("to begin the business for which it had been organized" [75 Fed. 558, 23 C. C. A. 306]), and the opinion distinctly shows that the case was classified under that part of the opinion in Handley v. Stutz which declares a liability as against original subscribers and differentiated from that part of the opinion which refers to a later issue of stock at its market value. Kiskadden v. Steinle, supra, likewise involved only a case of original organization and its accompanying stock issue. Altenberg v. Grant (C. C. A. 6) 85 Fed. 345, 29 C. C. A. 185, was not only of the same class on its facts, but depended on a statute which, as construed, forbade any sale at less than par.

The record suggests numerous questions that will arise, if further efforts are made to enforce a liability, upon the theory that these bonds and stocks were sold for less than their known and fair value. Upon that theory, is the right of action in the trustee, as for the recovery of a corporate asset, or in the creditors who are injured, as for a fraud? Is the actual value of the stock sold, or the good faith exercised in fixing a price, the controlling criterion? Whatever the rule as to ordinary commercial creditors, is there a presumption that one who buys a mortgage bond does so upon the faith of a supposed liability to pay the capital stock, if it has not been paid; and, if there is such presumption, is it merely prima facie, or is it so violent as to be conclusive? Are the customary and natural investigations made by or for one about to buy mortgage bonds in large amount likely to disclose the truth as to its capital stock, so as to raise any presumption of knowledge or of ignorance on that subject? Upon this theory, is the rule of set-off the same as upon the theory of a subscription? Upon the subject of estoppel as against a creditor who knew that the capital stock was issued as fully paid, is one who buys a mortgage bond in any better position than his vendor? Whatever the rule as to the second purchasers of subscribed stock or the original takers of additional stock later sold at a discount, are those who later purchase the latter class of stock,

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supposing it to be full paid, liable if it is not? We think it would be premature to discuss these and other suggested questions, until the facts are more fully developed.

The order appealed from is reversed, and the case remanded for further proceedings in accordance herewith.

VIRGINIA BOOK CO., Inc., v. SITES.

In re MAGEE.

(Circuit Court of Appeals, Fourth Circuit. April 30, 1918.)

No. 1618.

BANKRUPTCY ⟸140(3)—PROPERTY PASSING TO TRUSTEE—GOODS HELD ON CONSIGNMENT.

Under Code Va. 1904, § 2877, providing that all property or stock acquired or used in the business of a trader, doing business in his own name and not displaying by a sign the name of any partner or principal, shall be liable for his debts, the trustee in bankruptcy of such a trader takes title to his stock, including goods held on consignment.

Appeal from the District Court of the United States for the Western District of Virginia, at Roanoke; Henry C. McDowell, Judge.

In the matter of C. H. Magee, bankrupt; D. P. Sites, trustee. From a decree confirming an order of the referee requiring the Virginia Book Company, Incorporated, to surrender property, that company appeals. Affirmed.

E. W. Poindexter, of Roanoke, Va., and S. S. P. Patteson, of Richmond, Va. (Poindexter, Hopwood & Poindexter, of Roanoke, Va., and J. H. Rives, Jr., of Richmond, Va., on the brief), for appellant.

Robert W. Kime, of Roanoke, Va., for appellee.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

KNAPP, Circuit Judge. On September 8, 1916, C. H. Magee, a bookseller and stationer of Salem, Va., filed his petition in voluntary bankruptcy, and adjudication followed the next day. He had been for a year or more the local agent of appellant for the sale on commission of schoolbooks consigned to him under an unrecorded contract by which the legal title of the books remained in the book company. Two days before his petition was filed, and when appellant had reasonable cause to believe that Magee was insolvent, it canceled his agency and repossessed itself of such of its books as he then had on hand, amounting in value to about $450. Upon petition of the trustee in bankruptcy, and after hearing, the referee ordered a return of the books, or their equivalent in money, and this order was confirmed by the District Court. The book company appeals.

The trustee's contention is based upon section 2877 of the Virginia Code, which reads as follows:

"If any person transact business as a trader, with the addition of the words 'Factor,' 'Agent,' 'and Company,' or 'and Co.,' and fail to disclose the

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name of his principal or partner, by a sign in letters easy to be read, placed conspicuously at the house wherein such business is transacted, * * * or if any person transact such business in his own name, without any such addition, all the property, stock, and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of such person. This section shall not apply to a person transacting such business under a license to him as an auctioneer or commission merchant."

There was no compliance with this provision. The sign on Magee's store gave no indication that he was agent for any of the goods offered by him for sale, and he was not licensed to do business as an auctioneer or commission merchant. Moreover, the books received from appellant were intermingled with those procured from other parties and to all appearance constituted part of the bankrupt's stock in trade. In Hoge v. Turner, 96 Va. 624, 632, 32 S. E. 291, 294, it was said:

"The purpose of the Legislature in enacting the statute, as the title to the original act passed March 28, 1839, shows, was to prevent persons carrying on business under false or fictitious names and firms. The object was to prevent fraud, to compel any person transacting business as a trader to disclose the name of the real owner of the business, if any other there be, to prevent any shifting or evasion of ownership and liability for debts in case of controversy, and to preclude the assertion of secret claims of ownership against creditors of him who has conducted the business, possessed the property, and appeared to be its owner."

To the same effect are Edmunds v. Hobbie Piano Co., 97 Va. 588, 34 S. E. 472, and Partlow v. Lickliter, 100 Va. 631, 42 S. E. 671. And this court, in the recent case of American Piano Co. v. Heazel, 240 Fed. 410, 153 C. C. A. 336, although dismissing the petition to superintend and revise, nevertheless took occasion to say:

"In passing, we think * * * it not amiss to say that we have examined this case upon its merits, and that if the same were here by the proper method we would, with reluctance, feel it our duty to affirm the judgment of the court below."

Granting, as appellant contends, that in each of these cases the opposing creditor had or claimed a lien upon the property in dispute, there is nothing in any of the opinions to suggest that they were decided upon that ground. Every implication is to the contrary. Nor does it appear that the courts of Mississippi, which has an almost identical statute, have made any distinction in giving it effect between lien creditors and general creditors. However that may be, the question here considered has not been an open one in this court since its decision in Chesapeake Shoe Co. v. Seldner, 122 Fed. 593, 58 C. C. A. 261. Without repeating the discussion, it is enough to say that it was there held, under this Virginia statute, that the trustee in bankruptcy of a trader doing business in his own name takes title to all the stock in his store, including goods held by him on consignment, to which he did not have title as between himself and the consignor. Among other things, it was said:

"To all intents and purposes, so far as his creditors' rights are concerned, this statute vests in the trader the title to the consigned goods. It precludes the assertion of secret claims of ownership by the consignor. In other words, it avoids the title of the consignor and gives title to the trader."

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The only difference between that case and the case at bar is that in the former the consigned property was in the possession of the consignee when bankruptcy proceedings were commenced against him, while in this case the consignor, with reasonable cause to believe that the consignee was insolvent, and presumably for that reason, repossessed itself of the property just before the consignee filed his petition. But we are clearly of opinion that the mere change of possession, under the circumstances here disclosed, cannot serve to sustain the distinction contended for by the appellant. To hold otherwise would be to defeat in large degree the declared purpose of the statute and open the door to its easy evasion. If the bankrupt's failure to comply with this statute operated to vest in him quoad his creditors the title to the books in question, as was decided in Chesapeake Shoe Co. v. Seldner, supra, it seems evident that the consignor could not as against creditors reinvest itself with title by taking possession of the property when the bankruptcy of the consignee was impending and the necessary effect of its act was to give it a preference. In other words, since the statute made these books, notwithstanding the concealed reservation of title, the property of the bankrupt quoad his creditors, the book company had no more right to them as against creditors than it had to any other property belonging to his estate. It results that the transaction under review was a voidable preference, and the trustee is therefore entitled to recover the books or their value. We have examined the various cases cited by appellant, but they all relate to recording acts or other state laws which present a different question.

Accepting, as we are bound to do, the construction which the Virginia Supreme Court of Appeals appears to have given to this trader's statute, and taking into account the applicable provisions of the Bankruptcy Act, we deem it not doubtful that the decree appealed from should be affirmed.

WILLIAMS et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. October 30, 1918.)

No. 3179.

INTOXICATING LIQUORS ⟸254—INTERSTATE SHIPMENTS—SUIT FOR FORFEITURE—COSTS.

Where a claimant unsuccessfully defends a suit under Criminal Code, § 240 (Comp. St. 1916, § 10410), for forfeiture of liquors shipped without proper labels, the court may, where the facts justify it, adjudge the costs and expenses against him.

In Error to the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Suit by the United States against 530 Packages of Spirituous and Intoxicating Liquor; Wiley Williams and George Davis, claimants. Judgment for the United States, and claimants bring error. Affirmed.

This suit was commenced by a libel in rem for the seizure and forfeiture of some 530 packages of spirituous and intoxicating liquors, described as con-

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tained in two certain freight cars located on the Ocilla, Pine Bloom & Valdosta Railroad at Mobley's Siding, in the county of Irwin, state of Georgia, as shipped by one Wiley Williams and one George Davis, in violation of the provisions of section 240 of the Criminal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1137 [Comp. St. 1916, § 10410]).

The libel contains four counts, the first two of which charged that the shipment of said liquors in interstate commerce was from the city of Fitzgerald, in the state of Georgia, to the city of Jacksonville, in the state of Florida, and the third and fourth counts charged that the shipment was from Lellaton, in the county of Coffee, in the state of Georgia, to the city of Jacksonville, in the state of Florida.

Upon filing the libel a warrant of seizure was duly issued, and on the following day an order was issued for the removal of the said carloads of liquors from said Mobley's Siding to the city of Macon. Three days after said order of removal, said Wiley Williams and George Davis, the plaintiffs in error, intervened, claiming to be the owners of said property, and alleging that the property libeled was expensive to keep, and that pending the adjudication the delay would work damage and injury to the claimants, and thereupon prayed that the property should be delivered to the claimants, and that the court should appoint the proper persons to appraise said property, and thereupon that claimants should have the privilege of bonding the same. This intervening claim was followed by an amendment denying all the allegations of the libel with regard to the shipment of the property, and especially alleging as follows:

"Interveners further show to the court that on the 27th day of April, 1916, they delivered said two cars of intoxicating liquors to the Ocilla Southern Railroad Company, to be by it and its connecting carriers, transported, one car to Lax, Ga., and one car to Metz Siding, Ga., which shipments were entire intrastate. Thereafter some trouble, confusion, and excitement arose over the fact that said two cars of intoxicating liquors were located at said Lax and said Metz Siding, and various parties living in the vicinity of said rural stations evidenced a desire to take charge of the whole or a portion of said two cars of intoxicating liquors. Thereupon the Ocilla, Pine Bloom & Valdosta Railroad Company, on whose line said two cars were situated, moved said cars to Lellaton, Coffee county, Ga., in order that the same might be protected and preserved. After said two cars of intoxicating liquors had been moved to Lellaton, interveners conferred with Reason Henderson, the president of said Ocilla, Pine Bloom & Valdosta Railroad Company, and informed the said Reason Henderson that if they could legally do so it was their purpose and desire to reship said two cars of intoxicating liquors to the city of Jacksonville, Fla., at the same time advising the said Henderson that before said cars could be shipped to the state of Florida it would be necessary for them to prepare said packages of liquor for interstate shipment, and requested the said Reason Henderson to consult with the counsel for the railroad company, and ascertain from such counsel whether it was legal and lawful to ship two cars of liquors out of the state of Georgia into the state of Florida, provided that the laws with reference to interstate shipments of intoxicating liquors were complied with."

No proceedings to bond the property appear thereafter to have been taken.

The case was brought to trial before a jury, which rendered a general verdict for the United States. Thereupon the court entered a decree of forfeiture of the property and rendered judgment as follows:

"And it is further ordered and decreed that the said 530 packages of spirituous and intoxicating liquors be, and the same are hereby, condemned and forfeited to the United States of America, and that each and every package of said spirituous and intoxicating liquors be, by the marshal of this court, forthwith delivered to the Secretary of the Treasury of the United States, or his authorized agent, taking his receipt therefor. Said liquors to be disposed of as the said Secretary of the Treasury shall direct. And it is further ordered, adjudged, and decreed that the United States of America do have and recover from the said claimants, to wit, Wiley Williams and George Davis, all costs of court, including freight charges incurred in trans-

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porting said spirituous and intoxicating liquors from the point or points where seized by the marshal to Macon, Ga., and all expenses for guarding and storing said spirituous and intoxicating liquors while in the possession of the marshal, and all other costs and expenses of every kind and character, not hereinbefore paid by said claimants, incurred by this litigation between said claimants and the United States of America, with right of execution therefor, leave being now reserved to the United States of America to enter thereafter such supplemental judgment as may be necessary for proper fixing the exact amount of recovery; and, in case said costs and expenses, or any part thereof, are not paid by said claimants, and in the event the Secretary of the Treasury shall accept said liquors, such costs or expenses, or any unpaid part thereof, be and the same are hereby adjudged, decreed, and directed to be paid by the United States.

"This the 9th day of March, 1917."

On May 23, 1917, the following supplemental judgment was entered:

"The jury having returned a verdict in favor of the United States in the above case, and a judgment having been entered thereon on the 9th day of March, 1917, with the right reserved therein to take a supplemental judgment for all costs of court as soon as the exact amount of same could be determined, and the exact amount of said costs having been this day ascertained, it is therefore ordered, adjudged, and decreed that the United States do have and recover from the claimants in said cause, to wit, Wiley Williams and George Davis, in the sum of $1,867.53, costs of court, said amount being itemized as follows:

Clerk's costs:	
Attorney's docket fee	$ 20.00
Other costs (clerk's)	44.90
Marshal's costs:	
Guard hire from June 16 to 26, 1916, inclusive, day guard, at $2.50 per day	27.50
Guard hire from June 16, 1916, to March 22, 1917, night guard, at $2.50 per night, 280 nights at $2.50	700.00
Rent of storage room from June 17, 1916, to March 22, 1917, at $1 per day (279)	279.00
Freight on two carloads liquor from Mobley's Siding, Berrien county, to Macon, Ga., upon order of court	569.68
Fees of marshal serving orders, and expenses of travel to serve same, and expenses of deputies guarding said liquor in transit	57.30
Hack fares from marshal's office to place of storage, from June 17, 1916, to March 22, 1917	4.75
Two heavy locks, at $1.25 each	2.50
Carpenter putting locks on, staples, etc.	1.50
Other costs:	
Witness' fees	160.40
Total	$1,867.53

Thereupon said Wiley Williams and George Davis sued out this writ of error, assigning errors as follows:

"(1) Because the court erred in the judgment of March 9, 1917, in condemning the claimants to pay the costs in said action.

"(2) Because the court erred in said judgment of March 9, 1917, in condemning the claimants to pay the costs of seizing, guarding, removing, and storing the liquors therein mentioned, for the reason that in and by said judgment the court decreed the liquors therein mentioned to have been forfeited to the United States as of the date of the original seizure, and all expenses incident to the same accruing subsequent to that date should have been adjudged to have been paid by the United States.

"(3) Because the court erred in said judgment of March 9, 1917, in condemning the claimants to pay the expenses incident to the seizure, removing, storing, and guarding said liquors subsequent to the seizure thereof, for the reason that the court should have adjudged that said liquor be sold and said costs and expenses paid out of the fund realized from said sale.

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"(4) Because the court erred in said judgment of May 5, 1917, in condemning the claimants to pay costs of court, amounting to $1,867.53.

"(5) Because the court erred in said judgment of May 5, 1917, in condemning the claimants to pay the items included in said judgment under the head of 'Marshal's Costs,' for the reason, said property having been adjudged to be forfeited to the United States as of the date of the original seizure, the United States should have been condemned to have paid the expenses incident to preserving and keeping said property subsequent to said date, and for the further reason that the court should have, in and by said judgment, directed that the liquors therein mentioned should be sold, and the costs and expenses incident to preserving and keeping the same paid out of the fund realized from said sale."

Alexander Akerman and Charles Akerman, both of Macon, Ga., for plaintiffs in error.

E. M. Donalson, U. S. Atty., of Macon, Ga.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). Whether the court erred in adjudging costs and expenses attendant upon the seizure in this case against the intervening claimants depends upon the facts in the case, as shown by the transcript before us, and as this shows no bill of exceptions, nor any agreed statement of facts, and as the verdict of the jury was against the interveners and in favor of the United States on all the issues involved, it follows that the only facts we can consider are those shown by the pleadings. Looking to the pleadings, we find that the plaintiffs in error were the original violators of the law, rendering the seizure proper and necessary, and through their intervention the proceedings were delayed nearly 10 months, thereby largely increasing all the costs and expenses incurred for the preservation of the property pending the final judgment of the court, and we conclude that the plaintiffs in error were properly held responsible for all the costs and expenses incurred from the beginning of the suit. See Clara O. Burns, Adm'x, et al. v. Julius W. Rosenstein et al., 135 U. S. 449, 10 Sup. Ct. 817, 34 L. Ed. 193.

This view of the case is decidedly strengthened by the admission of the interveners in the amendment to their claim to the effect that they originally shipped the liquors for distribution in the state of Georgia as an intrastate shipment, which would have been in violation of the laws of the state of Georgia, wherein said liquors were contraband and liable to seizure and forfeiture See Laws Ga. 1915 (Extra Sess.) p. 88. Taking this view of the case, none of the errors assigned is well taken.

The judgment of the District Court should be affirmed; and it is so ordered.

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WILLIAMS v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. October 24, 1918.)

No. 3221.

WITNESSES ⇐337(5)—EVIDENCE OF FORMER CONVICTION.

A defendant in a criminal case, who elects to take the witness stand, is subject to all the rules and tests applicable to other witnesses, and renders admissible records of former convictions for felony.

In Error to the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Criminal prosecution by the United States against Charles T. Williams. Judgment of conviction, and defendant brings error. Affirmed.

John R. Cooper, of Macon, Ga., for plaintiff in error.

E. M. Donalson, U. S. Atty., of Macon, Ga. (Wallace Miller, Asst. U. S. Atty., of Macon, Ga., on the brief), for the United States.

Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

SHEPPARD, District Judge. The plaintiff in error was tried and convicted for the offense denounced by section 3258 of the Revised Statutes (Comp. St. 1916, § 5994). It was the usual indictment of four counts in such cases, and plaintiff in error was convicted on all counts, and assigns as error here the admission in evidence over his objection of the records of two previous convictions of plaintiff in the same court for the same offense. There are two other assignments mentioned in the brief, but not argued, to the effect that the court erred in not permitting the accused to make an uninterrupted statement of his defense to the jury, and the refusal of the court to admit in evidence a letter from one Jule Ingram to Walter Simmons, exculpatory of the latter of any connection with the alleged illicit distillery.

The record shows that during the progress of the trial the defendant elected to take the witness stand in his own behalf, and so became subject to all the rules and tests applicable to any other witness, and was confronted with the record of his previous convictions, the punishment for which may be two years in a penitentiary, and by section 335, Federal Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. 1916, § 10509]), is made a felony. What is said, and the authorities cited in support of our conclusion, in Robert Lee Gordon v. United States, 254 Fed. 53, —— C. C. A. ——, decided at this term, disposes fully of this assignment, as well as the objection that the accused was not allowed to make a statement to the jury. There was no error in excluding from the jury what purported to be a copy of the "Ingram letter." Its contents were clearly hearsay, and it appears to have been previously excluded on objection of defendant below. It was wholly irrelevant to any issue in the case. The evi-

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dence on the whole, if believed by the jury, was sufficient to support the verdict.

We find no error, and the judgment is affirmed. It will be so ordered.

GORDON v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. October 24, 1918.)

No. 3214.

1. CRIMINAL LAW ⟸369(1)—EVIDENCE—OTHER OFFENSES.
Evidence of other offenses, and independent crimes and convictions, are incompetent to establish the guilt of an accused.

2. CRIMINAL LAW ⟸376—EVIDENCE—BAD CHARACTER.
Unless the accused has introduced evidence of his good character, the prosecution cannot introduce evidence of his bad character and habits as part of its case.

3. WITNESSES ⟸337(5)—IMPEACHMENT OF ACCUSED—OTHER OFFENSES.
Where accused took the stand in his own behalf, he could be impeached, like any other witness, by proof of his prior conviction of an offense, which Penal Code, § 335, made a felony; the evidence being restricted to that purpose.

In Error to the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Robert Lee Gordon was convicted of violating Rev. St. § 3258 (Comp. St. 1916, § 5994), by having in his custody and control a distilling apparatus, etc., and he brings error. Affirmed.

Chas. Akerman, of Macon, Ga., for plaintiff in error.

E. M. Donalson, U. S. Atty., of Macon, Ga.

Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

SHEPPARD, District Judge. The plaintiff in error, Robert Lee Gordon, was tried and convicted in the Southern district of Georgia on the usual indictment of four counts for a violation of section 3258 of the Revised Statutes (Comp. St. 1916, § 5994), namely, having in his custody and control and set up a distilling apparatus in violation of statute, and with operating, etc., a distillery for which no bond had been given to the United States in conformity to law. During the progress of the trial the defendant volunteered as a witness in his own behalf, and on cross-examination by the United States Attorney was confronted by the record of a previous conviction for the same offense in the same court two years before, to which objection was made, and exception taken to the order of the judge overruling the objection. This exception constitutes the only assignment on this writ of error.

[1, 2] The plaintiff in error complains that the admission of this evidence went to impeach the character of the defendant and was strongly prejudicial to his defense in the trial. That evidence of other independent crimes and convictions to establish the guilt of an

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accused are incompetent is well settled. Dyar v. United States, 186 Fed. 614, 108 C. C. A. 478, and cases cited. And it also is true that, unless the accused has introduced evidence of good character, the prosecution cannot introduce evidence of his bad character and habits as part of its case. Thompson v. Bowie, 4 Wall. 463, 18 L. Ed. 423; Williams v. United States, 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509.

[3] When, however, the defendant in a criminal trial in a United States court takes the stand as a witness in his own behalf, he does so at his own election, and, by the federal practice, as a witness he becomes subject to all the rules and tests applicable to any other witness, and to test his credibility he may be interrogated as to all matters affecting his credibility. He may be impeached, like any other witness, by proving that he has been convicted of a felony; the punishment provided in the statute for the offense of which the plaintiff had previously been convicted made it a felony. Section 335, Federal Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. 1916, § 10509]). It is well for the judge to instruct the jury as to the limitations of such evidence, that it is not to be considered as proof that the accused is guilty of the offense of which he is charged, but only to affect his credibility as a witness. The record shows that the trial judge safeguarded the rights of the defendant with a proper instruction as to the effect of the previous conviction.

There was no error in the admission in evidence of the record of defendant's previous conviction for the purpose it was offered, circumscribed as it was with an appropriate instruction to the jury. 5 Ency. of Supreme Court Reports, 128; Reagan v. United States, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709; Caminetti v. United States, 242 U. S. 493, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168.

The judgment, therefore, must be affirmed; and it is so ordered.

AMERICAN SURETY CO. OF NEW YORK v. BELLINGHAM NAT. BANK et al.

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3183.

1. MUNICIPAL CORPORATIONS ⟸347(2)—CONSTRUCTION CONTRACTS—SURETY—PRIOR ASSIGNMENTS.

Under the settled law of Washington, a bank which has advanced money to a contractor, which was expended in paying for labor and materials used in making a city improvement, and has taken an assignment of city warrants therefor, has an equity superior to that of a surety on the contractor's bond.

2. COURTS ⟸365—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

A rule established for years by the highest court of a state, affecting the rights of parties arising out of contracts for municipal improvements and sureties on statutory bonds given by the contractor, if fixed and definite, and uniform in application, should be followed by the federal courts.

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Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Suit in equity by the American Surety Company of New York against the Bellingham National Bank, the City of Bellingham, and others. Decree for defendants, and complainant appeals. Affirmed.

Hastings & Stedman, of Seattle, Wash., Kellogg & Thompson, of Bellingham, Wash., and Livingston B. Stedman, of Seattle, Wash., for appellant.

Sather & Livesey and George Livesey, all of Bellingham, Wash., for appellees.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The appellant brought a suit to enjoin the city of Bellingham, Wash., from paying to the Bellingham National Bank certain warrants of the city. The city had made two contracts with Moran Bros. for street improvements, one of date July 29, 1916, for the improvement of Maryland street, the other of date September 22, 1916, for the improvement of Iowa street. On both contracts the appellant became surety on the bonds of the contractors; the first bond being dated July 27, 1916, and the second September 20, 1916. The bank advanced to the contractors money to prosecute both contracts, and took assignments of warrants from them; one assignment on September 11, 1916, for advances on the Maryland street contract, and one on October 20, 1916, for advances on the Iowa street contract. At the time of the completion of the contracts no payment had been made by the city on either contract. The bank had advanced considerable sums on each contract, all of which were used in payment for labor, supplies, and material, in the improvements. Claims in considerable amounts for sums which had not been paid by the contractors were filed against the bonds; all the items thereof being valid claims against the bonds under the law of Washington. The contractors were insolvent. It was the contention of the appellant that its right of lien was superior to that of the bank, and the bank contended that, having paid various claims for labor, material, and supplies actually used in the construction of the improvements, its equity was superior to that of the appellant. The contract price of the improvements was not sufficient to pay all the sums so advanced by the bank and the claims presented against the bonds.

[1] The court below held that the equities were with the bank, distinguished the case from Prairie State Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, on the ground that in the latter case the assignment of warrants was prohibited, and distinguished it from Title Guaranty & Surety Co. v. Dutcher (D. C.) 203 Fed. 167, on the ground that in that case no account was kept of the particular work on which the borrowed money was disbursed, and distinguished it from the decision of this court in First Nat. Bank v. City Trust, Safe Deposit & Surety Co., 114 Fed. 529, 52 C. C. A. 313, on

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the ground that in that case no equities obtained in favor of the bank, evidently meaning that there was nothing to show that the money loaned by the bank to the contractor in that case was actually devoted to the payment of labor or material for which lienable claims would have arisen against the contractor's bond. Without entering into discussion of the points of difference between the present case and the decisions so cited, we are disposed to hold that the decision here appealed from should be sustained on the ground that in the state of Washington it is now, and has for many years been, the settled law that, where a contractor has assigned to a bank the sums to become due on a city contract as collateral for advances, payments due to the contractor in case of his default are to be applied first to repay such advances. It is sufficient to cite Northwestern Nat. Bank v. Guardian C. & G. Co., 93 Wash. 635, 161 Pac. 473, and Title G. & S. Co. v. First Nat. Bank, 94 Wash. 55, 162 Pac. 23. In the first of those cases the court said:

"We find no merit in the claim that the bonding company has a superior equity in this fund over that of the bank. It has no equity in the fund as against the bank, which paid its money on the strength of assignments of the fund at a time when the contractors had full right to collect and dispose of the fund as they saw fit. Moreover, it is an admitted fact in this case that the money advanced by the bank was actually used by the contractors in the performance of the contract, thus diminishing the bonding company's liability by just the amount advanced. The equities are obviously with the bank."

[2] Such a local rule, affecting rights of parties arising out of municipal contracts for street improvements and sureties on bonds filed in pursuance of statutory provisions, if fixed and definite and uniform in its application, should be followed by a federal court in a case where, as here, no question of general or commercial law or of rights under the federal Constitution or the laws of Congress is involved. In Columbia Digger Co. v. Sparks, 227 Fed. 780, 142 C. C. A. 304, we followed the decision of the Supreme Court of Washington in holding that sureties on a statutory bond of a contractor for a public improvement have the right to have the proceeds of the contract applied in payment for labor and material furnished under said contract in preference to the right of an assignee to receive the same as payee of a pre-existing debt. We said:

"That doctrine has become the settled rule in Washington, and the sureties on the contract in question had the right to rely upon it as the law of that state, and we may assume that they did so when they became sureties upon the contract. A federal court ought not to upset the rule thus established by the Supreme Court of a state for the guidance of its own citizens, unless that rule is against the very decided weight of authority"

—citing Detroit v. Osborne, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260, in which it was said:

"There should be, in all matters of a local nature, but one law within the state; and that law is not what this court might determine, but what the Supreme Court of the state has determined"

—and citing, also, Equitable Life Assur. Society v. Brown, 213 U. S. 25, 44, 29 Sup. Ct. 404, 410 (53 L. Ed. 682), in which it was said:

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"The decisions of the highest court of New York are therefore binding upon this court as to the meaning and effect of the charter of the defendant, and as it is a New York company and the contract is a New York contract, executed and to be carried out therein, its meaning and construction, as held by the highest court of the state, will be of most persuasive influence, even if not of binding force."

See, also, Claiborne County v. Brooks, 111 U. S. 400, 410, 4 Sup. Ct. 489, 28 L. Ed. 470; Snare v. Friedman, 169 Fed. 11, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367; Keystone Wood Co. v. Susquehanna Boom Co., 240 Fed. 296, 153 C. C. A. 222.

The judgment against the appellant for $133.25 on the claim of Morse Hardware Company, having been entered inadvertently, as it is admitted, the decree below should be modified accordingly. As so modified, the decree is affirmed.

UNITED STATES v. MINOR et al.

(Circuit Court of Appeals, Fourth Circuit. October 1, 1918.)

No. 1621.

1. DESCENT AND DISTRIBUTION ⟸138 — LANDS OF DECEASED JUDGMENT DEBTOR—JURISDICTION OF EQUITY.
   The federal District Court has jurisdiction of a bill in equity by the United States to subject to payment of a judgment North Carolina land which had descended to heirs of the judgment debtor; there being no personal assets, and it being necessary to bring in the heirs, etc., for, since Laws 1846–47, c. 1, lands descended to heirs of the judgment debtor cannot be sold on execution, etc., and Revisal N. C. 1905, § 68, conferred jurisdiction on the superior court to grant relief, etc.
2. CREDITORS' SUIT ⟸1—JURISDICTION.
   Courts of equity have jurisdiction to entertain suits in the nature of creditors' bills for the purpose of administering estates, marshaling assets, and adjusting equities.

Appeal from the District Court of the United States for the Western District of North Carolina, at Greensboro; James E. Boyd, Judge.

Bill by the United States against J. B. Minor, administrator of C. O. Ward, deceased, and others. From a decree dismissing the bill (243 Fed. 953), complainant appeals. Reversed.

William C. Hammer, U. S. Atty., of Ashboro, N. C., for appellant.
George S. Bradshaw, of Greensboro, N. C., for appellee.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

CONNOR, District Judge. This cause was before the court at the May term, 1916. 235 Fed. 101, 148 C. C. A. 595. The facts material to the decision of this appeal are set forth in the opinion of Judge Woods. The court, in that appeal, having held that the cause of action on the judgments recovered by plaintiff, was not barred by the statute of limitation, the district attorney presented to the court a decree directing that the lands described in the bill, which descended to

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defendants, heirs at law of the judgment debtor, C. O. Ward, deceased, and conveyed by them to defendant M. J. Wrenn, be sold for the payment of the judgments. The District Judge, for the reasons set out in his opinion, in the record, declined to sign the decree, and dismissed the bill. From this decree, the district attorney appealed. The District Judge, giving full force to the decision of this court, was of the opinion that the collection of the judgments should be enforced by an execution, or writ of fieri facias. Recognizing the fact that the defendants, heirs at law, and the purchasers of the land were entitled to a day in court, before the lands were subjected to sale, he suggests that this could have been accomplished by motion in the original cause, with a citation to them to show cause why the writ should not issue—that the bill in equity could not be entertained.

[1, 2] The learned judge overlooked the fact that by the laws of the state of North Carolina lands descending to the heirs of a judgment debtor cannot be sold under execution issuing on the judgment. The act of the Legislature of 1784 (chapter 1) gave to the judgment creditor of a person deceased, the right to have a writ of scire facias issue to the heirs at law, directing them to show cause why an execution should not issue. Upon the return of the writ, the heirs could, upon proper averment, have an issue tried to ascertain whether there were any personal assets in the hands of the administrator. If this issue was found against the heirs, execution issued against the lands. This statute was repealed by the act of 1846 (Laws 1846–47, c. 1), and provision made for subjecting the lands of the deceased debtor by means of a petition by the administrator, filed in the court of pleas and quarter sessions. Richmond Cedar Works v. Stringfellow (D. C.) 236 Fed. 264. Jurisdiction was thereafter conferred upon the superior court to grant relief. Rev. 1905, c. 1, § 68.

Lands descended cannot be sold under execution. To do so would disturb the statutory system prescribing the method of administration of estates of deceased persons. In this case it may have been more orderly for the administrator to have proceeded under the statute. It has been held by the Supreme Court of this state that, if he fails to do so, the creditor may institute the proceeding. Courts of equity have jurisdiction to entertain suits in the nature of creditors' bills for the purpose of administering estates, marshaling assets, and adjusting equities. Adams' Equity, 257.

In view of the fact that it was necessary to "bring in" the heir and the purchaser, we can see no valid reason why the court of equity is not the proper tribunal for enforcing the remedy which the United States had to collect the judgments. It may, by its decree, adjust any rights which the purchaser may have against the heirs and apportion their liability to him. It is conceded that the administrator has no personal assets, and that there are no other debts outstanding or liens against the land—no other persons than the plaintiff and defendants have any rights or interests to be conserved.

The case is one which illustrates the truth of the maxim that "hard cases are the quicksands of the law." The facts appeal strongly to the consideration of the department upon which the duty of enforcing

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claims of the government is imposed. The court can only adjudge the right and enforce the remedy as the law directs.

The decree dismissing the bill must be reversed, to the end that further proceedings be had in accordance with the decision of this court.

Reversed.

UNITED STATES v. ASH SHEEP CO.

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3229.

INDIANS ⇐19—UNAUTHORIZED PASTURING OF STOCK ON INDIAN LANDS—"CATTLE."

Rev. St. § 2117 (Comp. St. 1916, § 4107), providing a penalty of $1 a head for grazing "any stock of horses, mules or cattle" on land of any Indian or Indian tribe, applies to sheep.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cattle.]

In Error to the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

Action by the United States against the Ash Sheep Company. Judgment for the United States, and defendant brings error. Affirmed.

C. B. Nolan and William Scallon, both of Helena, Mont., for plaintiff in error.

Burton K. Wheeler, U. S. Atty., and James H. Baldwin, Asst. U. S. Atty., both of Butte, Mont., and Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. By writ of error the Ash Sheep Company seeks a reversal of a judgment entered against it for $5,000 in favor of the United States in an action brought in the district of Montana by the United States to recover the penalties provided by section 2117, Rev. St. (Comp. St. 1916, § 4107).

The origin of the case and its history are given in the opinion we expressed in United States v. Ash Sheep Co., 250 Fed. 592, —— C. C. A. ——. It is therefore only now necessary to recite that, after we reversed the judgment of the lower court and remanded the case for further proceedings, there was a trial to the District Court upon an agreed statement of facts, whereby it was admitted that in July, 1913, the Sheep Company, without the consent of the Crow Tribe of Indians, or of the United States, drove, ranged, and fed 5,000 head of sheep on the lands specified in the complaint; that at that time the land in question had no settlements or entries thereon under the laws of the United States, which provided for settlement and entry being made upon the land; and that in the civil suit brought by the United States to enjoin the Sheep Company from trespassing on the land, the suit being that referred to in the answer of the Sheep Company filed in this action (Ash Sheep Co. v. United States, 250 Fed. 591,

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— C. C. A. —), the United States sought to recover as damages the penalties it is herein seeking to recover.

The foregoing statement and the assignments of error disclose that the present case raises the same questions, and only those, which were directly involved in, and were considered and decided by this court upon, the former writ of error; and counsel for the Sheep Company state in their brief that the writ of error herein is prosecuted for the purpose of saving the right to seek a review of our former opinion by the Supreme Court.

As no reason occurs to us for reversing the views we announced in our earlier opinion, we abide by it, and affirm the judgment of the District Court.

Affirmed.

YEATES v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. October 28, 1918.)

No. 3287.

1. CRIMINAL LAW ⟸118—PLACE OF PROSECUTION—ALLEGATION OF INDICTMENT.
   Allegation, in indictment for violation of White Slave Act June 25, 1910 (Comp. St. 1916, §§ 8812–8819), of the place from which transportation was made, fixes jurisdiction.
2. CRIMINAL LAW ⟸29—DIFFERENT OFFENSES IN SAME TRANSACTION—STATE AND FEDERAL.
   There may be a conviction of violation of White Slave Act June 25, 1910 (Comp. St. 1916, §§ 8812–8819), though the offense proved may contain the elements of a graver offense, cognizable by the state laws.
3. CRIMINAL LAW ⟸1156(3)—APPEAL—DENIAL OF NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION.
   Disposition of a motion for new trial, based on alleged newly discovered evidence, is within the discretion of the trial judge, reviewable only for manifest abuse.

In Error to the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

James S. Yeates was convicted of violation of the White Slave Act, and brings error. Affirmed.

John R. Cooper, of Macon, Ga., for plaintiff in error.

E. M. Donalson, of Macon, Ga., for the United States.

Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

BATTS, Circuit Judge. [1] The indictment charges violation of White Slave Act June 25, 1910, c. 395, 36 Stat. 825 (Comp. St. 1916, §§ 8812–8819). The allegation that the transportation was from a place in the Southwestern division of the Southern district of Georgia fixes jurisdiction therein.

[2] The evidence indicates that defendant's unlawful purpose may have been consummated by rape. That the offense proved may con-

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tain the elements of a graver crime, cognizable by the state laws, does not affect the prosecution.

The Supreme Court has recognized no qualifications to the comprehensive literal terms of the White Slave Act. Questions as to its constitutionality are foreclosed.

[3] The disposition of a motion for a new trial, based upon alleged newly discovered evidence, is within the discretion of the trial judge, subject to review for manifest abuse. There is in this case an absence of anything to indicate that the motion was not disposed of properly.

The judgment is affirmed.

ANDUAGA et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 21, 1918.)

No. 3284.

BAIL ⊂=64—CRIMINAL PROSECUTIONS—SUFFICIENCY OF BOND.

A bail bond is not rendered invalid because of a mere verbal inaccuracy, caused by accidental transposition of words, which does not work injury to any person in interest.

In Error to the District Court of the United States for the Western District of Texas, San Antonio Division; Duval West, Judge.

Action by the United States against Enrique Anduaga and A. B. Copeland. Judgment for the United States, and defendants bring error. Affirmed.

Ed. Halton, of San Antonio, Tex., for plaintiffs in error.

Hugh R. Robertson, U. S. Atty., of San Antonio, Tex.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. Article 1014, R. S. (Comp. St. 1916, § 1674), provides that a United States commissioner may take bail in any state "agreeably to the usual mode of process against offenders in such state." A provision of Code of Criminal Procedure of Texas 1911, art. 321, is to the effect that—

"A bail bond shall be sufficient if it contains the following requisites: * * * "3. If the defendant is charged with an offense that is a felony, that it state that he is charged with a felony."

The bond upon which the judgment appealed from was based was in accordance with the law, unless the following is insufficient as a compliance with the quoted subdivision:

"Answer the United States in a complaint filed against him, the said a felony in said court, charging him with."

It is apparent that any deficiency is the result of a mere transposition of words, probably caused by filling blanks in a printed form. The words as used constitute a sufficient recital of the fact that the defendant was charged with a felony. A mere clerical inaccuracy, re-

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sulting in no harm to any person at interest, ought not to be permitted to defeat the purpose of the law and the intentions of the parties to the bond.

The judgment is affirmed.

MONITOR STOVE & RANGE CO. v. L. J. MUELLER FURNACE CO.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1918. Rehearing Denied November 9, 1918.)

No. 2550.

1. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The Short patent, No. 933,128, for a hot-air heater, claim 1, which specified the combination with a floor, of a heater having a drum, means for heating said drum, a second drum, etc., and a third drum, etc., *held* not infringed.

2. PATENTS ⟸323—CONSTRUCTION—INFRINGEMENT.
The Doyle and Wollenhaupt patent, No. 1,133,242, for a furnace, claims 1, 2, and 3, which emphasized two concentric circumferential casings surrounding said heater, etc., *held* not infringed.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Bill by the Monitor Stove & Range Company against the L. J. Mueller Furnace Company. From a decree dismissing the bill, complainant appeals. Affirmed.

Suit to enjoin infringement of patent No. 933,128, to Robert L. Short, for hot-air heater, and patent No. 1,133,242, to William J. Doyle and J. J. Wollenhaupt, for a furnace. Bill dismissed.

William R. Wood, of New York City, for appellant.

Arthur L. Morsell, of Milwaukee, Wis., for appellee.

Before BAKER, MACK, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. [1] Appellant, as assignee of patentees' rights, charged appellee with infringing claim 1 of the Short patent, No. 933,128, and claims 1, 2, and 3 of the Doyle and Wollenhaupt patent, No. 1,133,242. The District Judge found the claims of both patents here involved to be invalid and dismissed the bill.

The Short patent, to quote from the specifications—

"relates to air-heating systems, and it has particular reference to a heater which is depressed below the floor level; the upper surface of the heater being supported upon the floor and consisting of an open grate structure similar to that employed in the hot-air register. * * * The heater is intended especially for use with gas. It has advantage of economy in the use of fuel, of greater heating capacity, and of use in such positions that the heater occupies practically no space in the rooms where used."

The patentee further states in his specifications:

"In the ordinary hot-air systems where a large furnace is employed, with hot-air pipes leading to registers throughout the building; there is necessarily a great loss of heat incident to the transmission of the hot air from the furnace to the various registers and in the incidental heating of the said con-

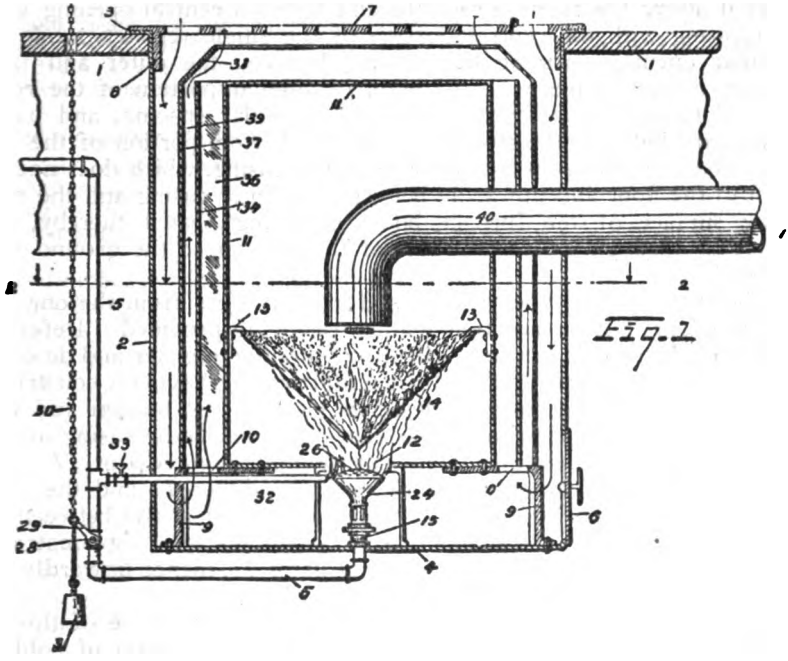
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ducting pipes. Furthermore, in the use of such furnaces, when but little heat is required, there is always considerable loss due to the employment of a large furnace. In my heater this loss is almost entirely avoided, for the reason that there are no conducting pipes to be heated, and, the heater being located immediately beneath the floor of the room to be heated, there can be no loss due to any of the above-mentioned causes. My system of heating, therefore, has the advantage of locating the heat at the various points needed, the heating devices so located being under the absolute control from the room to be heated, whereby a great convenience in control of the heating devices is secured."

While the foregoing description clearly pictures the structure the patentee had in mind, and the drawing accompanying the specifications, herewith reproduced,



emphasizes the limitations of the invention as disclosed by the specifications, it is claimed by appellant that simply a preferred form of structure is thus set forth in the specifications and the drawing; that in reality the combination covered the triple casing pipeless furnace which has grown much in favor during the past few years. Much testimony was received and appellant favors us with an elaborate argument in support of the advantages of a triple casing pipeless furnace over the double casing type. Appellee, on the other hand, contends that the turning point in this litigation does not involve any such question in the least.

The differences between a pipeless furnace and the furnace with pipes running to the various rooms are quite familiar. In furnaces with pipes carrying the hot air to the different rooms, we have a fur-

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nace body proper surrounded with a single casing forming an air space, which air space incloses the radiating surface of the heating body. Cold air is admitted into the bottom of this compartment surrounding the furnace body, and this air receives heat from the radiating surface and passes through the upper part of the compartment to a series of hot-air conduits which lead to the registers of the rooms to be heated.

In the pipeless furnace system, the furnace body is surrounded by a plurality of casings, each spaced from the other. Instead of taking the cold air from the bottom, this style of furnace employs a single large register for the entire house, positioned at a convenient place on the ground floor; the furnace being immediately under and communicating directly with the single register. The inner casing is contracted above the furnace radiator and forms a central opening communicating with the central portion of the single register, while the annular opening forming the spacing between the outer and inner casings communicates with the outer or annular portion of the register. Cold air enters through this outer annular spacing, and passes downward between the two casings to the bottom portion of the furnace, then passes inwardly under the inner casing, which does not extend to the floor and upwardly between the inner casing and the radiating surface of the furnace body, becoming heated thereby, and emerging through the central part of the register to the ground floor of the house.

The triple casing type of pipeless furnace differs from the one just described in that an additional inner casing is provided. Referring to Figure 1, the cold air enters the margin of the register and descends between the outer casing *2* and the middle casing having a constricted upper end *38*. The cold air descends clear to the bottom and then passes inwardly under the bottom edges of this middle casing and of the inner casing *34*, immediately surrounding the radiator *11*. The greater volume of air passes between the radiator *11* and the inner casing *34*, but a portion of the descending cold air passes between the inner casing *34* and the middle casing and is deflected by constricted portion *38* over the upper end of the radiator *11*, thence upwardly and outwardly through the central portion of the radiator.

The advantage of the triple casing lies in the presence of this air chamber, which serves to insulate the outermost column of cold air from the innermost column of hot air.

Appellant urges that Short contributed to the pipeless furnace art, among other things, the idea of a triple casing, thereby making provision for this extra air chamber. Appellee contends that such was not Short's patent disclosure, and, if his discovery be limited to the use of an extra air chamber in a pipeless furnace, it was, in view of the prior art, no invention, and the claim is invalid.

Claim No. 1 reads as follows:

"1. The combination, with a floor, of a heater having a drum, means for heating said drum, a second drum surrounding the first-mentioned drum, and spaced therefrom, a third drum surrounding both drums and constricted at its upper end, and means for causing the cold air to pass downwardly outside the third drum, whereby the heated air passes upwardly between said drum and is directed away from the floor."

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Opposing counsel do not agree upon what constitutes the last element in the combination, namely:

"Means for causing the cold air to pass downwardly outside the third drum, whereby the heated air passes upwardly between the said drums and is directed away from the floor."

In giving the proper construction to this claim we cannot overlook the fact that appellant entered a crowded department of the heating art. The file wrapper is likewise instructive and illuminating.

After numerous claims had been rejected, the claim in question was presented, reading as follows:

"A combination with a floor, of a heater having a drum, means for heating said drum, a second drum surrounding the first-mentioned drum and spaced therefrom, a third drum surrounding both drums and constricted at its upper end, and means for supporting said drum from the floor of the room to be heated, and means for causing the cold air to pass downward outside the third drum, whereby the heated air passes upwardly between said drums and is directed away from the floor."

The examiner stated in respect to this claim as thus drawn:

"Claim 1 is found to twice introduce the same matter, namely, means for supporting said drums from the floor of the room to be heated, and means for causing the cold air to pass downwardly outside the third drum, the casing tube being thus twice involved."

Thereupon applicant amended his claim by striking out the words "means for supporting the said drum from the floor of the room to be heated." This amendment was in response to the objection set forth in the letter quoted above. It follows, therefore, that both the Patent Office and the applicant construed the otherwise ambiguous element, "means for causing cold air to pass downwardly outside the third drum, whereby the heated air passes upwardly between the said drum," as synonymous with the element, "means for supporting the said drum from the floor of the room to be heated." No escape from this conclusion is apparent. Likewise, we find no other rational explanation of this last element in the combination as finally allowed. Such a definition is consistent with the asserted claims of the patentee in his specifications heretofore quoted. Wherein did patentee expect to economize in fuel through the employment of a small furnace, if this were not his intention? Again, how did the patentee hope to obtain selected and preferred locations for his heater if his invention did not call for a heater for each room?

Moreover, the prior art was full of patents, an examination of which discloses pipeless furnaces of the general character used by appellee and appellant in their commercial structures, and wherein reference was made to an insulating chamber or medium. For example, in the patent to Evans, No. 496,193, patentee in his specification says:

"In the drawing *a* is the exterior shell of the furnace within which all the internal flues, passages, channels and accessories are contained. *b* is a similar internal casing located within the exterior shell *a*. *This casing* b *may be made double, or in other words, jacketed so as to afford a passage c' for air to pass in order to prevent cold air from impinging upon the hotter interior member of the double casing.*"

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In the patent to W. R. Kloeb, No. 765,143, patentee sought protection of an improvement in furnaces. In his specifications he stated:

"This wall, meaning wall *b*, as well as the wall *c* next within, may be of metal covered with asbestos, or other suitable nonconducting and noncombustible material, or a corrugated asbestos board or the like can be employed for this use or in conjunction with a sheet metal interior. * * * Any suitable arrangement may be adopted at this point to maintain the separation of the cold and hot air currents and to sustain the circulation of air herein provided for."

In view of these and other patents, it would be at best but an exercise of mechanical skill to provide a third air chamber to separate the cold-air chamber from the hot-air chamber. In other words, if the sole asserted novelty of Short's discovery consisted of the use of triple casing in place of the double casing so as to more effectually separate the cold-air from the hot-air passages, no invention was disclosed and the claim would be invalid.

If the Patent Office was justified in its allowance of claim 1, it was due to the last element in this claim in combination with the others, which combination produced a heater that possessed the virtues claimed for it by the patentee in his specifications. Such a heater was small, economical of operation, easily operated from the room to be heated. Its operation did not require heating of the entire house but merely a single room.

The particular form of the third drum represented by element 5 might also well have been considered by the Patent Office in giving recognition to this claim.

Clearly, if the last element mentioned in the patent refers to the outer casing *2*, and supports the drum from the floor of the room to be heated, and such is the construction we give to it, then no infringement is shown.

Doyle and Wollenhaupt Patent.

[2] The three claims here in issue are:

"1. A furnace of the character described combining a heater having passages projected therefrom, two concentric circumferential casings surrounding said heater providing two chambers communicating at their base, the outer casing having a rigid heater passage terminal plate circumferentially continuous therewith and the inner casing having an offset portion united to the margins of said plate providing an areaway for said heater passages.

"2. A furnace of the character described combining a heater having passages projected from its various compartments, two concentric casings surrounding said heater, providing two chambers communicating at their base, said casings at their upper portions forming conductor passages for the chambers respectively, one to admit cold air into the outer chamber and the second for discharging the heated air from the inner chamber, the outer casing having a heater face plate circumferentially continuous therewith as a terminal for said heater passages and the inner casing having an offset portion united to the margins of the face plate providing an areaway for said heater passages.

"3. A furnace of the character described combining a heater having passages projected therefrom, a casing surrounding said heater having a rigid passage terminal portion continuous with the circumference of said casing, a second casing within said first casing divisional of two chambers communicative at their base, said second casing having an offset portion connecting with said rigid portion of said first casing providing an areaway for said heater passages."

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A prior patent to Strong, No. 1,002,776, is cited both on the construction and the validity of these three claims. In the Strong patent, patentee was endeavoring to provide an improved furnace casing which might be shipped in knocked-down condition and easily and quickly set up. The patent here under consideration was merely an improvement on the Short patent in which the outer casing has a "rigid heater passage terminal plate circumferentially continuous therewith as a terminal for said heater passages and supports the doors thereof." The application for patent was denied by the examiner and the board of appeals, but was finally allowed by the Commissioner of Patents. Adopting the argument of applicant's attorney, distinguishing this patent from the Strong patent, the Commissioner of Patents says:

"Applicants state that in such a furnace it is of prime importance to have the air in the outer or cold chamber considerably colder than the air in the inner or heating chamber. Unless this is true, the heated air in the interior will not rise.

"Applicants therefore have departed from the prior art, represented by Strong by removing what they call their heater face plate *8* outwardly, so that the plate *8* is a continuation circumferentially of the outer casing instead of the inner casing as shown in Strong.

"They contend that they obtained several advantages over this construction, first, by removing the plate further from the heater it will not become so hot and therefore conduct the heat to the inner casing, as would Strong's plate *5*; * * * second, the plate *8* is located outwardly by the offset *27*, so as to correspond circumferentially with the exterior casing, the parts can be much easier assembled as no difficulty would be experienced in getting to the bolts or rivets holding the parts together; and, third, the applicants' plate *8* being continuous with their outer casing *26* obviates the inward depression of the Strong device and locates their device so that they can be fully opened.

"The claims all distinguish from the references very much in the same manner, namely, by including the 'rigid passage terminal circumferentially continuous' with the outer casing, and an inner casing having 'an offset portion united to the margins of said plate' or equivalent limitations.

"In view of the alleged advantages, I cannot see that this change is devoid of patentable novelty, and the claims therefore should be allowed."

Having thus secured their patent upon the emphasis placed on the element:

"Two concentric circumferential casings surrounding said heater providing two chambers communicating at their base, the outer casing having a rigid heater passage terminal plate circumferentially continuous therewith"

—patentee is in no position to assert the rigid heater passage terminal plate need not be circumferentially continuous with the outer casing.

Appellee's structure, not having its terminal plate so located, does not infringe.

Other defenses raised by appellee, including an attack upon the validity of these claims, we need not consider.

The decree is affirmed.

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STROMBERG MOTOR DEVICES CO. v. ZENITH CARBURETOR CO. ZENITH CARBURETOR CO. v. STROMBERG MOTOR DEVICES CO.

(Circuit Court of Appeals, Seventh Circuit. September 14, 1918. Rehearing Denied November 19, 1918.)

Nos. 2234, 2247.

1. PATENTS ⇐168(2)—REJECTION OF CLAIMS—ACQUIESCENCE.
The owner of a patent has no standing to sue upon a canceled claim or seek a construction of an allowed claim which would in effect revive a canceled claim, but the acquiescence of the patentee in the rejection of one claim cannot be given a retroactive effect upon the negotiation leading up to the allowance of the other claims, so as to narrow those claims to less than they were entitled to at the time of their allowance.

2. PATENTS ⇐239—IMPROVEMENT PATENTS—INFRINGEMENT.
Where a later patentee, who obviated another objection to an old device, added to his independent solution a device already patented, but which did not solve the objection solved by the later patentee, such patentee infringed the earlier patent.

3. PATENTS ⇐328—CONSTRUCTION—VALIDITY AND INFRINGEMENT.
The Ahara patent, No. 684,662, claims 1, 2, 4, 5, and 7, for a carburetor for explosive engines which was novel in providing a U-shaped auxiliary well, *held* valid, and infringed by defendant's Exhibits 1 and 10 as well as Exhibit 2.

4. PATENTS ⇐165—PROTECTION TO PATENTEE.
A patentee is entitled to all the benefits of his invention, whether he apprehends and states them or not, and must be given full protection in his claims, whether he has explained the theory of the operation of his device correctly or not, being entitled, against an infringer, to a range of equivalency commensurate with his actual contribution to the art.

5. PATENTS ⇐177—CLAIMS—COMBINATION CLAIMS.
A combination claim must of course be treated as an integer, for its novelty may consist wholly in bringing together old elements.

6. PATENTS ⇐328—CONSTRUCTION—INFRINGEMENT.
The Richard patent No. 791,501, claims 8, 10, and 11, for an explosion engine consisting of a carbureting chamber, a U-shaped receptacle connected with the storage reservoir, etc., *held*, in view of the prior art, not infringed by defendant's carburetors.

7. PATENTS ⇐328—CONSTRUCTION—INFRINGEMENT.
The Sturtevant reissue patent No. 12,611, for a double carburetor for explosive engines, claim 1, *held* not infringed.

8. PATENTS ⇐328—CONSTRUCTION—INFRINGEMENT.
The Anderson patent, No. 1,063,148, claim 1, for a carburetor, a carbureting chamber, a fuel jet, an auxiliary reservoir, etc., *held* not infringed, if conceded valid.

9. PATENTS ⇐157(1)—CONSTRUCTION—ELEMENTS OF COMBINATION.
An element of a combination, described in the same words in each of two claims of a patent, must be taken to refer to the same thing in both claims.

Appeal and Cross-Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Stromberg Motor Devices Company against the Zenith Carburetor Company. From a decree in part for complainant (220 Fed. 154), complainant appeals, and defendant cross-appeals. Remanded, with directions. See, also, 254 Fed. 91.

Charles A. Brown, of Chicago, Ill., and William H. Kenyon, of New York City, for Stromberg Motor Devices Co.

Clarence P. Byrnes, of Pittsburgh, Pa., and William M. Swan, of Detroit, Mich., for Zenith Carburetor Co.

Before BAKER, MACK, and EVANS, Circuit Judges.

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BAKER, Circuit Judge. Stromberg Company sued Zenith Company for alleged infringement of four patents on carburetors for internal-combustion engines.

Claims 1, 2, 4, 5, and 7 of patent No. 684,662, October 15, 1901, to Ahara, and claims 8, 10, and 11 of patent No. 791,501, June 6, 1905, to Richard, were held valid and infringed by Zenith carburetors identified as Exhibits 1 and 10, but not infringed by Exhibit 2.

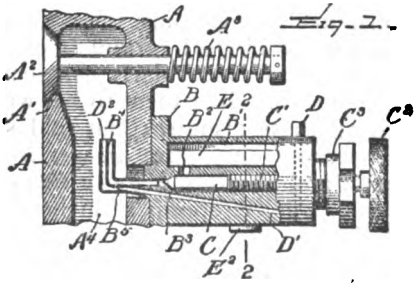
Claim 1 of patent No. 1,063,148, May 27, 1913, to Anderson, and claim 1 of reissue patent No. 12,611, February 19, 1907, to Sturtevant, were held valid, but not infringed by any Zenith device.

Each company assigns error on those parts of the decree that are adverse to its contentions.

I. Ahara.

[1-3] "Feeder for explosive engines," namely, a carburetor, is the subject-matter of the patent. No improvement of explosive engines in kind or degree was contemplated or involved. "This invention," Ahara said, "relates particularly to a structure adapted to vary the amount of fuel mixed with air fed to such an engine"; that is, an explosive engine. He pictured and described in detail the adaptability of his carburetor to vary the amount of fuel to correlate properly with the air conditions, both as to quantity and heat, in a one-cylinder work engine in which the desired uniformity of speed is obtained within fairly close limits by the automatic action of a governor in holding the intake valve shut and the exhaust valve open during one or more of the four-cycle periods of operation. But he also declared that "changes in details of construction to adapt the device to other types of explosive engines are obvious and within ordinary mechanical skill." Of course his saying so does not make it so. But in connection with the general statement of the nature and object of the invention it demonstrates that Ahara's inventive concept covered a carburetor, not an improved one-cylinder work engine, and that he intended to claim, though unnecessarily, all uses to which his carburetor could be put.

In giving the operation of his carburetor when applied to a one cylinder hit-and-miss engine, he illustrated and described three styles of construction; but, as they all operate in the same way, it will suffice if we follow through one type.



"Referring to Fig. 1, the letter A indicates the casing forming a part of an engine, which is provided with an aperture A^1, controlled by a valve A^2 at the inlet-port for the cylinder of an explosive-engine, and communicates with the main air-inlet passage A^4 of the engine. This valve A^2 is ordinarily closed by any desired means—for instance, a spring A^3—and is opened by the suction of the engine-piston in moving away from the valve, so as to draw inward the explosive mixture composed of fuel and air, while in the return movement of the piston the valve is closed and the mixture placed under compression, as is well known in this art. In Fig. 1 I have shown at B a casing comprising the feeding device, which is formed at its upper por-

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tion with a fuel-reservoir B^1, having a discharge opening B^2 below the fuel-level therein and valve-controlled port B^3, from which port a feed-tube B^4 extends upward into the space or passage adjacent to the inlet-opening A^1. Any preferred construction of valve may be used in this connection; but I have shown in the present instance a needle-valve C, adjusted by means of a threaded portion C^1, and provided at its outer edge with a handle C^2, while the stem of said valve passes through a packing-sleeve C^3, secured to the casing B in any desired manner. In the form of the invention shown in Fig. 1 there is provided a collecting passage or chamber D, having one end communicating with the atmosphere above the fuel-level of the reservoir, and the other end extending downward to the lower portions of the casing B, and thence upward upon an inclined plane, as shown at D^1, where it communicates with a feed-tube D^2, extending parallel to and in contact with the fuel-tube B^4, which tube is provided with an opening B^5, communicating with the feed-tube D^2. It will thus be seen that when the valve is set to permit the continuous flow of any desired quantity of fuel at each suction-stroke of the engine this amount would pass into the fuel-tube B^4, and be drawn upward with the proper amount of air to effect the explosive mixture for use in the engine, while if the feed of fuel be omitted or cut out the fuel continues to flow into the tube B^4, and not being drawn upward by suction into the cylinder, flows through the aperture B^5 downward into the inclined portion D^1 of the passage D. Sufficient fuel will collect in this passage, depending upon the time interval between the suction-strokes of the engine, so that when the next charge of fuel is drawn into the engine an excess of fuel in proportion to the air is secured sufficient to compensate for the cooling of the cylinder and the air which may be therein, and thus produces an explosive action equal in character with the regular action of the engine.

"The fuel in the reservoir B^1 is maintained at a predetermined level by any desired means."

Claims 1 and 2 are enough to consider in determining all the essential points of dispute:

"1. A feeder for explosive-engines comprising a fuel-reservoir having a feed-outlet below the fuel-level therein to effect a continuous feed, a passage communicating with the atmosphere and with said outlet from said reservoir to receive fuel therefrom, and means adapted to control the communication between said reservoir and said passage, substantially as specified."

"2. A feeder for explosive-engines comprising a casing having a reservoir at its upper portion; a passage below said reservoir communicating with the atmosphere, a fuel-passage extending from below the fuel-level of said reservoir to said first-named passage, and means for regulating the capacity of a normally open port to control the flow of fuel through said fuel-passage, substantially as specified."

Crossley's British patent No. 24,584, December 21, 1893, is the main reliance for overthrowing Ahara. Counsel and experts contend interminably concerning the nature and capacity of the Crossley device, the meaning of certain suggested, but unillustrated, substitutions of parts, and particularly whether the alternative constructions, as each side conceives them to be, would work. We have fully considered all these disputes; but find it unnecessary to state them in detail, because our entire answer is given by considering the Crossley patent, and by placing above the various parts of the provisional and of the complete specification headings that in our judgment indicate the classifications Crossley had in mind.

From the provisional specification:

General Statement.

"Our invention is for the purpose of measuring the quantity of oil required for each working stroke of such oil engines as in governing take a charge or

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none in the well-known way. It consists of a chamber into which the oil is delivered of a certain definite capacity, this chamber being the proper size to hold the maximum quantity of oil required for one working stroke, and being emptied by the suction of the engine piston at each charging stroke."

Large Engine.

"There are some conditions under which the quantity of oil per working or charging stroke requires modification to give the best results, as, for instance, an engine working at maximum load, and thus giving working strokes as frequently as possible, requires a definite amount of oil to give the best result. Should, however, the load decrease so as to cause the governor to miss out one or more working strokes in succession, a slight increase in the amount of oil delivered into the engine to form the next working stroke gives a better result than without such increase.

"We obtain this increased amount in the following manner: A pump is arranged to deliver at the necessary intervals the best quantity for each working stroke when working at maximum load; this quantity being delivered into the measuring chamber, and, owing to the special form given to the measure, is drawn into the vaporiser by the piston of the engine during each suction stroke. The total capacity of the measuring chamber, however, is somewhat larger than the volume of this full-power oil charge, so that, when a working stroke has been cut out by the governor, the pump, which still continues delivering its definite quantity, delivers a second charge—or more charges—into the measuring chamber, which, owing to its greater capacity, retains a slightly increased amount for delivery to the engine the next time a working stroke is required, the excess overflowing and returning to the oil receptacle."

Small Engine.

"In a modification of our invention, more especially applicable to smaller engines, in which it may not be necessary to give more than one measured oil charge, the measuring chamber may be made of a suitable size to give the definite amount of oil required, the pump, however, being made to throw a larger volume, and the surplus which thus overflows at each delivery of the pump may be carried to supply a lamp or for any other desired purpose, or may simply pass back to the oil tank."

Non-Return Valve for Both Engines.

"Between the measuring chamber and the vaporiser in most instances it is desirable to place a light non-return valve, which opens during the suction stroke of the engine, allows the oil to be sucked in past it more or less mixed with and followed by a current of air, which thus sweeps the contents of the chamber out, and ensures it being carried through into the vaporiser and thence into the engine."

Preferred Form of Measurer for Both Engines.

"By preference the form given to the measurer is that of a U with very short legs, and the supply from the pump is delivered into the lower part of it from beneath."

Small Engine.

"When the measurer is used for giving one fixed charge only whether the engine be running at light or full load, it may be filled from a vessel placed above it instead of by a pump. A regulated quantity is thus allowed to flow into the U—the surplus passing, as in the case of the pump, either to feed the lamp or to a receptacle below. A bird-cage fountain arrangement may take the place of the overhead vessel so as to dispense with a constant flow to the measurer or any overflow therefrom. A float designed so as to give a constant level may be used instead of the bird-cage fountain."

That ends the provisional specification.

From the complete specification:

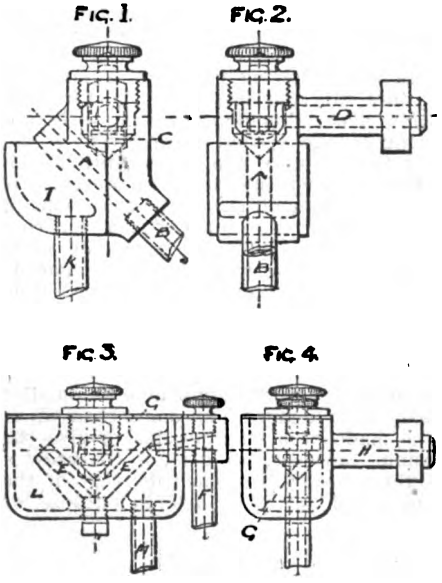
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General Statement.

Same as in the provisional specification.

Large Engine.

After explaining as before the desirability of an increase of fuel after a nonsuction stroke, Crossley gives the details of construction by reference to drawings, which are part of the complete specification only, as follows:



"To enable our invention to be better understood, we append a sheet of drawings in which Fig. 1 is an end elevation, Fig. 2 is a side elevation, Fig. 3 is an end elevation of a modified form, Fig. 4 is a side elevation of the same.

"In Figs. 1 and 2, 'A' represents the chamber or oil measurer, in this instance consisting of a straight drilled hole, 'B' is the pipe from the oil-pump delivery, and 'C' is the automatic valve hereinafter referred to, 'D' is a passage into the vaporiser. In Figs. 3 and 4, 'E' is the chamber or oil measurer, 'F' is the pipe for the pump delivery, 'G' is the automatic valve, and 'H' is the passage to the vaporiser.

"In connection with the measure shown in Figs. 1 and 2 a pump is arranged to deliver at the necessary intervals the best quantity of oil for each working stroke, when working at maximum load: this quantity being delivered into the measuring chamber 'A,' and, owing to the special form of this chamber, drawn into the vaporiser by the piston of the engine during each vapor charging stroke through the passage 'D' and the automatic valve 'C.' The total capacity of the measuring chamber 'A,' however, is somewhat larger than the volume of this full-power oil charge, so that when a working stroke has been cut out by the governor the pump, which still continues delivering its definite quantity, delivers the second charge—or more charges—into the measuring chamber 'A,' which, owing to its greater capacity, retains a slightly increased amount for delivery to the engine the next time a working stroke is required, the excess overflowing into the cup shaped receiver 'I,' and returning to the oil receptacle through the overflow pipe 'K'."

Small Engine.

Crossley brings forward from the provisional specification the first portion that relates to the small engine, but wholly omits the second portion, which contains the suggestions of substitutions for the pump.

Nonreturn Valve for Both Engines.

"Between the measuring chamber and the vaporiser, in most instances, it is desirable to place the light nonreturn valve 'C,' which opens during the suction stroke of the engine, and allows the oil to be sucked in past it more or less mixed with and followed by a current of air, which thus sweeps the contents of the chamber out through 'H' or 'D,' and insures it being carried through into the vaporiser and thence into the engine."

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Preferred Form of Measurer for Both Engines.

"By preference in some instances we form the measuring chamber 'E' as shown in Figs. 3 and 4, the form given being that of a U or V with very short legs. The oil may be delivered into the lower part of it from beneath at the junction of the two short legs."

Large Engine.

"Or, as shown in the drawings, may be delivered into the mouth of one of the legs through 'F.' By thus forming the measurer 'E' the oil flows with a certain amount of momentum into the mouth of one of the legs of the measuring chamber 'E,' this momentum given to the oil causes it to spill over out of the mouth of the other leg, so that though an excess amount of oil may be pumped into the measurer 'E' the oil does not quite fill the measurer 'E,' but the quantity contained in it is sufficient for normal working strokes. If the governor cut out working strokes, a second pump delivery of oil takes place into the measurer 'E.' This measurer, however, being more or less filled with oil, the new charge does not cause so much disturbance in it, and after its delivery the measurer is fuller than it was before, thus giving the slightly increased amount of oil desirable to give a working stroke following an idle stroke or strokes. Working in this manner, there is still a surplus of oil to flow over into the overflow cup 'L,' and pass away by the pipe 'M' to supply a lamp or for any other purpose."

That ends the complete specification.

It is only the large Crossley engine that has any provision of means for increasing the amount of fuel after a nonsuction stroke. Therefore the large Crossley engine is the only structure in this British patent that has any pertinency to the Ahara invention. In the large Crossley engine a pump and a measuring cup capable of holding a little more than one pump-stroke of liquid fuel are the means. None other is described, or even suggested. Referring to Ahara's drawing and description, we find that the means of varying the amount of fuel to correlate with quantity and heat conditions of air in the engine are a constant-level reservoir B^1; a gravity feed leading through the opening B^2, past controllable port B^3, and ending at B^4 within the intake or manifold of the engine with which the carburetor is associated; a valve C to control port B^3; an auxiliary well, namely, the U-shaped tube D D^1D^2, the upright portion D communicating with the atmosphere above the fuel-level of the reservoir, the lower portion D^1 lying beneath the gravity fuel-feed, and the upright portion D^2 terminating within the intake or manifold of the engine at a point above the fuel-level of the reservoir; and an aperture B^5 permitting the fuel to flow from the gravity feed into the auxiliary well. Upon this disclosure of means Ahara laid his broad claims in suit. Claims 1 and 2, which we have recited, generically cover vital combinations that work in accordance with the Ahara principle. With respect to the other claims in suit, not copied herein, our judgment is the same. Not only is it impossible to derive the Ahara device and claims from the Crossley patent on account of clear differences in means, but Ahara also achieved an improved and enlarged result. In a running engine of the hit-and-miss type periods of nonsuction, and in the multicylindered type, wherein suction is continuous but varied in amount by a manually operated throttle valve, periods of low suction are to be met and provided for. If feeding a running engine with an auxiliary supply of fuel, available immediately after a period of nonsuction or low suction,

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be taken as the genus, Crossley's and Ahara's desires for results were akin; but in species their achievements were distant cousins. Crossley's measuring cup was sized to hold the proper supply of oil for one explosion of a hit-and-miss engine running at a predetermined speed, and to hold an additional amount that was relatively slight. One pump-stroke furnished the normal quantity. If by the lessening of the load the predetermined speed of the engine should increase so that the governor would cut out a working stroke, the pump would discharge another pump-stroke of oil into the measuring cup; but the addition to the amount already in the cup would be less than one pump-stroke of oil, because Crossley mentions an excess overflowing the cup and returning to the receptacle with which the pump is connected. Now suppose that the governor, due to a greater fall in load, should cut out a succession of working strokes of the engine. It is obvious that after the first cut-out there would be no increase of fuel to correlate with the increased change of quantity and heat conditions of air in the engine. On the other hand, if the cup were enlarged to satisfy conditions after a succession of cut-outs, it would supply a hostile excess after one cut-out, because the cup is completely emptied by each suction stroke, and any excess of fuel tends to choke the engine. It is apparent, too, that Crossley's carburetor, whose measuring cup is emptied by each suction stroke, would not do very well on a multicylindered, hand-throttle-controlled, automobile engine, wherein the continuous suction must have wide variations in tensity. At best it would provide only that narrow range of speed which would come from holding the throttle to measure the air to correspond with the strictly measured oil, because revolution of the crank-shaft, not suction within the manifold, controls the delivery capacity of the pump. Turn now to Ahara. It is evident that suction at B^4 may be so tense as to limit greatly, if not to stop entirely, the flow into the auxiliary well through the aperture B^5. The result in degree is a matter of proportioning the parts, left to the ordinary judgment and mechanical skill of carburetor makers. If the Ahara carburetor is attached to a hit-and-miss engine, the duration of nonsuction periods is important. If one cut-out occurs, there is time for some fuel to collect in the auxiliary well; if a succession of cut-outs, more time for more fuel. If the nonsuction period is long, as in a dead engine (and this applies to both hit-and-miss and hand-throttle-controlled engines), there is time for the auxiliary well to fill up to the fuel-level of the reservoir. With a running hand-throttle-controlled engine, both the duration and the tensity of low-suction periods are important. Suction may be so high that little fuel or none flows into the auxiliary well. At varying time and tensity degrees of lower suction, correlatively varying amounts of fuel accumulate in the auxiliary well. In starting, suddenly going from no suction to suction, and in picking-up, suddenly going from low suction to high, an excess of fuel in proportion to air is needed; needed on account of the relatively lower temperature in the engine (which is a heat engine) and the lag of the fuel behind the air, due to greater density of fuel than that of air. So in these important operations of starting and of picking-up the Ahara auxiliary well stands ready to meet and satisfy the varying heat and air condi-

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tions of the engine. And only in the limited sense that the size of the well and of the openings in connection with it must be proportioned to the demands upon it (as must other parts of the carburetor, and indeed, of the entire engine and automobile) is it true that the Ahara auxiliary well is a "measurer." Crossley was strictly that.

Crossley's and our statement of his patent eliminates his feeder for the small engine, in which there is never an increment of fuel. But in finally dismissing Crossley it may be permissible to note, in connection with the alternative constructions of the feeder for the small engine, (1) that both the large engine and the small will work when the measuring cup is fed by a pump; (2) that in the small engine, wherein the cup is completely filled in advance of each suction stroke, a constant-level reservoir may be substituted for the pump if the fuel-lever in the reservoir is kept at the level of the brim of the cup; (3) that in the large engine, though a constant-level reservoir may be substituted if the fuel-level in the reservoir is kept at the level of a line on the cup that marks one pump-stroke of fuel, we do not perceive how the constant-level can raise itself to supply the increment that distinguishes the operation of the large engine. At least Crossley did not show how; and we are not concerned with the nunc pro tunc products of the creative imagination of counsel and experts.

Only one other prior art reference need be noticed. Banki's patent, No. 595,552, December 14, 1897, was for a gasoline motor. It detailed and claimed improvements in methods of ignition and air control that are irrelevant. One suggestion relating to the carburetor is relied on. A constant-level reservoir feeding a single aspirating jet, typified in Ahara minus the auxiliary well, was used. The tip of the upright nozzle flared like a V. From above, down through the casing of the carburetor, came a screw whose conical point extended within the flaring nozzle. The screw was adjustable to control the amount of gasoline that could be sucked from the nozzle. The suggestion relied on is that the screw "may be provided with a central longitudinal boring through which air may be sucked in during the period of suction, whereby a complete dispersion of the gasoline will result." That is, if the needle of a needle-valve within an aspirating nozzle is hollow, the air coming through the hollow needle will aid in the atomization of the gasoline. No words of Banki's indicate that he ever dreamed of an auxiliary well like Ahara's as part of a carburetor. From Banki's drawings one may read that, when the engine is at rest, the gasoline from the constant-level reservoir would stand near the top of the nozzle; that one-fourth of the conical point of the needle would dip into the gasoline; that the gasoline would rise and stand within the hollow to that extent; and that, when the engine is started, the gasoline in the point of the needle would be sucked out so that the air through the hollow needle might perform its service in aiding atomization. This is claimed to be a clear and definite anticipation of Ahara's auxiliary well. Not only is Ahara's combination of means a stranger to Banki, there being, for example, no passage like Ahara's B^5 leading through the wall of the gravity feed into the hollow needle (the supposed auxiliary well), but the presence of gasoline in the tip of the conical point of the needle was an insignificant accident with Banki

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in accomplishing his desired purpose of atomization. To count on the reading of Banki's drawings merely emphasizes the dearth of the prior art. If Zenith Company can construct a usable carburetor of such dimensions that a part of the conical point of the hollow needle of a needle-valve within the aspirating nozzle will serve as an auxiliary well in starting and in picking-up, we feel sure no one will object. What is objected to is the use of Ahara's disclosed mode of operation and claimed combination of means.

Finally stress is laid on the file wrapper as a bar to giving the claims their natural import and the scope they are entitled to as against the prior art. We have carefully considered the entire contents of this voluminous document. It may be summarized thus: Solicitor and examiner had repeated passes at supposed faults of omission, of redundancy, of phraseology, of terminology, in the description and in the claims. Claims were repeatedly rejected on reference to Crossley, Banki, and other patents. After a considerable time the drawings and description took the form they now have in the patent, and eight claims were submitted. Claims 4 to 8, inclusive, became word for word claims 3 to 7, inclusive, of the patent. Claims 2 and 3, after acceptance of an insignificant change in wording suggested by the examiner, became claims 1 and 2 of the patent. But when the eight claims in final form were presented, they were all rejected, the examiner still clinging to the idea that, because Crossley had disclosed means for providing an increment of fuel and Banki and others had shown that constant-level reservoirs, needle-valves, and other elements were old in the carburetor art, no invention was required to produce the mode of operation and the mechanical combinations of the Ahara carburetor. Thereupon an oral debate between solicitor and examiner took place. What occurred is not recorded in the file wrapper. It may possibly be surmised from a reading of the following written argument filed by the solicitor:

"In view of the oral interview with the examiner, it is believed that the objection as to the passage D being an air passage is removed and the term now used will be satisfactory to him. It is noted that in each of the references the air passage cited to anticipate the claim is the main inlet passage for the cylinder, while the present invention is not an explosive engine, and consequently cannot cover in the claims this passage, but a feeder for the engine, which is an attachment independent therefrom, and discharges its charge of fuel into the air or suction inlet of the engine. With this understanding, it is believed that the claims clearly define over the references cited, which do not show the fuel reservoir having an outlet adapted to feed by gravity into the passage communicating with the atmosphere, whereby the amount of fuel which collects increases during the time that the feed is cut out until the fuel in this passage reaches the level of the reservoir. This operation is not present in the prior art, and the British patent to Crossley does not disclose the same, but merely the broad principle of permitting an overflow from the pump when the feed is cut off. In the reference the fuel which flows into the downwardly extending pipe is not adapted to be drawn into the engine at the next succeeding stroke, and the only fuel capable of this action is the small amount between the inlet connection and the end of the pipe from the pump. It is believed, however, that the present amendment places claims in condition for allowance, and an action of that character is urgently requested."

Thereupon the examiner allowed claims 2 to 8, inclusive, but rejected claim 1 on reference to Crossley and Banki. At this point the solicitor was called upon to decide whether he would accept the allowed

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claims, and waive claim 1 as submitted, or amend claim 1 in a further attempt to convince the examiner. He amended claim 1 to read as follows:

"1. A feeder for explosive engines comprising a fuel reservoir having a feed outlet below the fuel-level therein to effect a continuous feed, a passage communicating with the atmosphere and extending below said outlet from said reservoir to receive a gravity feed of fuel therefrom, substantially as specified."

And he accompanied the amendment with the following argument:

"Claim 1 was the only claim rejected by the last official action, and it is believed that the amendment thereto which defines the collecting passage extending below the outlet from the reservoir so as to receive the gravity feed of fuel therefrom is a feature novel in the art, and will be deemed allowable by the examiner. In view of the arguments previously submitted and of the last liberal action of the examiner, it is believed that no further argument is necessary as to the manifest advantages secured by the gravity feed over the structures disclosed in the references of record."

But the examiner rejected claim 1 as finally amended. It then became obligatory upon the solicitor to decide whether he would appeal or close the application by taking out the patent with the previously allowed claims as sufficient protection of the disclosed invention. In a document canceling claim 1 and renumbering the allowed claims, the solicitor said:

"It is believed that the foregoing amendment, which cancels former claim 1, removes all objection to the case and places the same in condition for allowance. It will be conceded that applicant should not be confined in his present first claim specifically to a valve, as his combination is novel when embodying any means for controlling the food supply to the collecting passage, whereby the automatic gravity feed is successfully accomplished and the fluctuations and expense of a pumping action are entirely avoided."

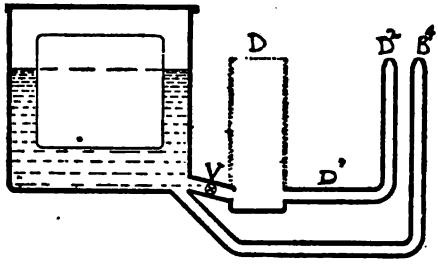
Beyond question the owner of the Ahara patent has no standing to sue upon canceled claim 1 or to seek a construction of an allowed claim that would have the effect of reviving the canceled claim. But that, in our judgment, is the extent of the estoppel. The solicitor's subsequent election not to appeal from the rejection of claim 1 can be given no retroactive effect upon the negotiations leading up to the allowance of the claims in the patent so as to narrow those claims to less than they were entitled to at the time of their allowance. In those negotiations the solicitor always and consistently declared that claim 1 of the patent, for example, produced a new result, through a new mode of operation, by means of a new mechanical combination, and never for a moment conceded that the inventive concept in that claim amounted to nothing but adding to abandoned claim 1 (not then in existence or abandoned) means for controlling the communication between the reservoir and the auxiliary well. On his side the examiner receded from his original position, and allowed the claims in the patent without stating or demanding any limitation or condition not inherent in the claims themselves, or furnishing any contemporaneous glossary for their interpretation. In electing not to appeal from the rejection of claim 1 the solicitor did not agree that the examiner's action was correct; much less that an infringer should take abandoned claim 1, and not the prior art itself, as the measure of invention involved in the patent.

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Zenith Company's carburetors employ a principle that was disclosed in Baverey's patent, No. 907,953, December 29, 1908. If the old single-jet carburetor is adjusted to supply the proper mixture of air and gasoline to an engine running 500 revolutions a minute, the mixture is too rich in gasoline when the engine is up to a substantially higher speed, say 1,500 revolutions a minute; if adjusted to 1,500 revolutions, then the mixture is too lean at 500 revolutions. One Krebs was the first to overcome this difficulty. He provided a supplemental air inlet, governed by a spring-held valve, so that with increasing engine-suction there would be a proportional increase of air. Baverey's method was not to supply an additional air inlet, but to supplement the suction fuel-jet with another jet that could feed a unit of fuel in a unit of time irrespective of the engine-suction or nearly so. Manifestly the tendency of the supplemental jet would be to give leaner mixtures at higher speeds; and, if the two jets were properly correlated, the contrary tendencies would balance, and a uniform mixture would be supplied at all speeds.

This Baverey principle was of course unknown to Ahara, who improved the single suction-jet carburetor by providing his U-shaped auxiliary well for use in starting and in picking-up. But it is elementary that if Baverey, coming later, should add to his independent solution of another objection to the old carburetor the Ahara auxiliary well for starting and picking-up, he would infringe the Ahara patent.

From one of Zenith Company's briefs we reproduce a diagrammatic representation of its carburetor:



B^4 is the suction jet; D^2, the supplemental jet. Air-leg D, of the auxiliary well D D^1 D^2, is indicated by the dotted lines. This was for the purpose of showing, first, that the Baverey principle could be used without the presence of the air-leg D: and, second, that its presence was merely incidental, and therefore not to be counted in determining infringement. If a hand-valve V be used as the means to control the communication between the reservoir and the jet D^2, and if it be turned on at starting, and turned down at low speed and turned off at stopping, the Baverey principle may be employed without having the air-leg D in the carburetor. But the necessity of such frequent manipulation would probably render the carburetor unsalable. And the air-leg is actually employed not merely to do away with the inconveniences that would result from the use of a hand-valve without the air-leg; it is present and is used as an element in the combination of the U-shaped auxiliary well D D^1 D^2 with the reservoir and means for controlling the communication between the reservoir and the auxiliary well. When there is a period of no suction, it is evident that the gasoline will rise in the air-leg D and stand at the level of the constant-level of the reservoir, and be ready to supply the demand for an excess of fuel in starting.

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When there is a period of very high suction, the parts may be and are so proportioned that the air-leg is empty. When there is a period of low suction, depending on the time and the degree, there may be and is a filling up of the air-leg with gasoline ready to respond to the sudden demand for an excess of fuel in picking-up. So the Zenith uses the Ahara combination in the Ahara way to produce the Ahara results.

In the actual Zenith carburetors, instead of the supposititious hand-valve, several nuts with different sized bores through them are furnished to be inserted interchangeably at the point V as the means for regulating the flow from the reservoir to the auxiliary well. Both the Baverey patent and the Zenith catalogues properly recognize the interchangeable nuts as the equivalent of Ahara's needle-valve; and they are certainly "means adapted to control the communication." Inasmuch as Zenith has the equivalent of the Ahara control in the Ahara combination, we regard it as irrelevant that Zenith has a separate control of that part of the fuel stream which feeds the suction jet.

Within the air-leg D Zenith Company has placed a secondary U-shaped auxiliary well to improve the starting operation and separate it somewhat from the operation of picking-up. It is unnecessary to detail this part of the mechanism, for with respect to infringement the only distinction between the primary and the secondary auxiliary well is that the latter receives its fuel supply through an opening in its bottom from the primary well instead of directly from the fuel stream as does the primary well. But when the engine is at rest the gasoline rises in the secondary well to the level of the constant-level of the reservoir; and we find in the Ahara claims no limitation that the communication shall be direct and immediate.

Between Exhibits 1 and 10, which the trial court found to be infringements, and Exhibit 2, which was held not to infringe, the only difference is in the amount of "subatmosphere" in the auxiliary well. This expression has been used by witnesses and counsel to indicate that the atmospheric pressure within all the Zenith auxiliary wells and the Ahara well is less than at the ratio of fifteen pounds to the square inch. But Ahara does not mention subatmosphere. In his drawings the opening to the atmosphere seems to be the full circular area of the air-leg D. In the Zenith wells the openings to the atmosphere are more or less constricted. That, however, was Zenith Company's choice of construction, which cannot be recognized as an escape from Ahara.

The decree should be enlarged to include infringement by Exhibit 2; but as the Ahara patent will doubtlessly expire before a final decree can be entered in the District Court, the relief should be limited to an accounting.

II. Richard.

[4-6] This patent is for an "explosion engine." Some of the improvements are in the carburetor art; and to them the claims in suit are addressed.

Claim 11, the broadest, reads as follows:

"11. In an explosion engine, the combination of a storage-reservoir; a carbureting-chamber connected to the engine-cylinder; a mixing-chamber in the upper portion of said carbureting-chamber; a U-shaped receptacle connected

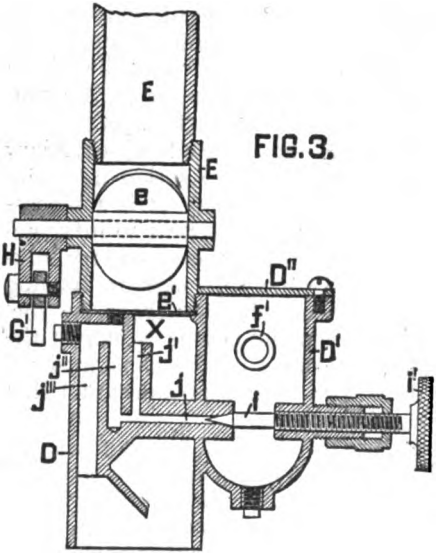
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to said storage-reservoir, one of the arms of which opens into said mixing chamber; and suitable air-ports for the other arm of said receptacle and said mixing-chamber."

Claim 10 is the same as claim 11, with the addition of "a valve above said carbureting-chamber"; and claim 8 is the same as claim 10, with the addition of "means for controlling said air-ports."

These claims must be read, first, according to Richard's own lexicography; and second, against the background of the prior art, to determine the nature and scope of the alleged invention, and what, if anything, Zenith owes to Richard.

Richard's figure 3 is this:



In explanation Richard said:

"The atomizer or carburetor proper consists of a main chamber D and a feed-chamber D' therefor. * * * A passage *j* connects the chambers D D'. * * * The liquid hydrocarbon is delivered through the passage *j* into an oil-receptacle within the chamber D. This receptacle is shaped somewhat like a letter U, as it consists of a pair of arms or passages *j' j''*, connected at the bottom and open at the top. The arm or passage *j'* of the oil-receptacle opens into mixing-chamber X. The passage *j''* opens into or is connected to the air-passage *j'''*. Across the top of the chamber X is a screen *e'*. The screen *e'* is retained in position by the valve-casing E, which is threaded into the top of the chamber D. The delivery-pipe E' suitably connects the chamber D to the engine-cylinder. Air is drawn through the atomizing or carbureting chamber by the suction of the engine. A valve *e* is provided for controlling the same. * * * A slanted partition plate or deflector in the bottom of the chamber D is provided to direct a considerable portion of the air passing through the carbureting-chamber into the passage *j'''*.

"In operation air is drawn through the atomizing or vaporizing chamber by the suction of the engine, and a portion of the air passing through the passage *j'''* into the passages *j''* and *j'* becomes saturated with and carries or dashes the liquid hydrocarbon into the mixing-chamber X and against the screen *e'*, where it is met by the in-rushing air, which is thereby suitably mixed therewith and drawn past the valve *e* into the engine-cylinder. The adjustment of the valve *e* regulates the amount of air drawn through the atomizer or carburetor."

Laying this disclosure upon the claims in suit, we find that the "storage-reservoir" is D'; the "carbureting-chamber" is the entire space within the casing D from the air inlet at the bottom to the top where it is screwed upon the casing E; the "mixing-chamber in the upper portion of the carbureting-chamber" is the walled off space X, within which the jet *j'* terminates; the "U-shaped receptacle" is made up of the jet *j'*, the air-leg *j''*, and the passage at the bottom between them, and is located wholly within the carbureting-chamber D; the

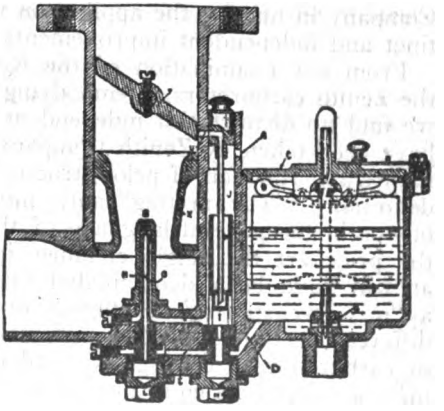
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"suitable air-ports" are, first, *j'''* to supply the air-leg *j''*; and, second, the remainder of the intake to supply the mixing chamber X; the "valve above the carbureting-chamber" is the throttle-valve of the engine, and the "means for controlling said air-ports" is the "slanted partition plate or deflector in the bottom of the chamber D."

Richard's idea of the mode of operation seems to be this: If I take the Ahara U-shaped auxiliary well and locate it wholly within the air intake of the engine; if I partition the intake so that the inrushing current of air will be divided into two streams, one to go to the right through the mixing-chamber X and affect the jet *j'* by aspiration, and the other to rush up the passage *j'''*, down the air-leg *j''* and into the jet *j'*; and especially if I increase the rush of the air current into the passage *j'''* by means of a deflecting plate—I obtain not merely aspiration, but I also cause the gasoline to be "carried or dashed into the mixing-chamber X and against the screen *e'*, where it is met by the inrushing air" from the other part of the stream, and thus I produce a better mixture than any known before.

We do not inquire whether Richard was right in his theory. A patentee is entitled to all the benefits of his invention whether he apprehends and states them or not. He must be given full protection in his claims whether he has explained the theory of the operation of his device correctly, erroneously, or not at all. Against an infringer he must be allowed a range of equivalency that is commensurate with his actual contribution to the art. He is not to be limited to particular formation or location of parts, unless the limitations are embodied in the claims themselves or are necessarily imposed by the prior art. We have given Richard's theory only as an aid in framing the definitions of the elements of the claims from Richard's own terminology in connection with the prior art and the alleged infringing structure.

A drawing of the Zenith carburetor is herewith reproduced:



Richard's claims in suit are not limited in terms to the formation and location of parts as detailed in his drawings and description. Taking the terms in their broadest sense, and apart from Richard's dictionary and the prior art, we find in the Zenith carburetors a "storage-reservoir" F; the entire space within the casing from the air intake at the lower-left side of the drawing up to the throttle-valve T may be taken as a "carbureting-chamber"; the space from the bottom of the constricting member X up to the throttle valve T may be called a "mixing-chamber in the upper portion of the carbureting-chamber"; a "U-shaped receptacle" may be found in the air-leg J, the jet H, and the communicat-

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ing passage at the bottom between them; a second "U-shaped receptacle" may be found in the air-leg P, the jet U, and the communicating passage at the bottom between them; the air intake at the lower left and the opening A into air-leg J at the upper right are used by Zenith as "suitable air-ports"; the throttle-valve T is present as a "valve above the carbureting-chamber"; and the relative sizes of the air intake of the engine and of the opening A may be considered to be "means for controlling said air-ports."

But on looking to the prior art we find that it was old to recognize the carburetion occurred in the space between the air intake and the throttle-valve. It was established practice, as an aid to efficient aspiration, to constrict the air passage shortly below the tip of the jet and then to taper it up to full diameter below the throttle-valve. Such a construction was called a Venturi tube. But whether a tube of uniform diameter or a Venturi tube was used, the space from below the jet up to the throttle-valve, without being specifically named, was in fact the only "carbureting-chamber" present in the old structure. And the same space, again without being named, was in fact the only "mixing-chamber" present. So without regard to what Richard might say or claim, Zenith Company was free to use an aspirating jet in a Venturi tube. Now the Ahara patent, as we have found, covered his invention of the auxiliary well to whatever extent it could be used with hit-and-miss engines, with throttle-controlled engines, with straight air intakes, with Venturi tubes, and with engines and carburetors not yet devised. Zenith Company, with Ahara's consent, might have applied Ahara's auxiliary well to the old aspirating jet within the old Venturi tube. Whether Zenith Company procured Ahara's consent is of no concern to Richard; that is, Richard cannot be permitted to reach back into the prior art and take any part of Ahara's monopoly of the application of the Ahara auxiliary well to an aspirating jet within a Venturi tube. On the other hand, the Zenith Company in making the application was not at liberty to use any distinct and independent improvements within the Richard patent.

From our examination of the Richard patent, the prior art, and the Zenith carburetors as embodying features that antedated Richard, we find no distinct and independent improvements of Richard's that have been taken by Zenith Company. Richard could not change the nature and function of prior structures by applying to them new word definitions. "Carbureting" and "mixing" may well be taken as synonyms in the general language of the art of aspirating gasoline. In the prior art the single chamber in which aspiration occurs might at will have been denominated either a "carbureting-chamber" or a "mixing-chamber." Applying two names to one structure or to different parts thereof does not make two structures. For a maker of carburetors to infringe Richard he would have to use the walled-off space X, or its equivalent, for a "mixing-chamber" as distinguished from a "carbureting-chamber"—a chamber characterized not only by its physically separate formation and location, but also by its function of "mixing" by means of one branch of the air current within the intake being used to "carry and dash" the gasoline therein, and there to encounter the other branch of the air current. We agree

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that "the screen e'," which distinguishes claim 6 from claim 11, cannot be read into the claims in suit; but neither can the remaining characterizing structural and functional features of the "mixing-chamber" be read out.

A combination claim must of course be treated as an integer. Its novelty may consist wholly in bringing together old elements. But, as we have already seen, the prior art denies novelty in Richard's combination, if generic definitions be applied to the old elements. Novelty must therefore be predicated upon new characterizing features given to one or more of the old elements. We have found such novelty in Richard's "mixing-chamber" only by putting it in a class different from the old Venturi tube. Similarly the "U-shaped receptacle" cannot be merely Ahara's auxiliary well, which has its air-leg open to the outside atmosphere. Novelty in this feature can be based only on the placing of the entire auxiliary well within the air intake. "Suitable air-ports" must be something different from Ahara's, if the individuality of this element is to characterize Richard's combination as novel. Likewise the "means for controlling said air-ports" must be something distinctive from the relative sizes of the Ahara air intake and of the Ahara opening to the air-leg—it must be the slanted deflector or equivalent means for splitting the air current within the intake into two streams. Of course novelty cannot be found in the storage-reservoir, or the carbureting-chamber, or the throttle-valve of the engine. Infringement would be avoided if Zenith failed to employ any one element of Richard's combination. We find that Zenith has used nothing to which Richard can properly lay claim.

The decree should be modified by striking out the finding that Zenith Exhibits 1 and 10 infringe the Richard patent.

III. Sturtevant.

[7] A "double carburetor for explosive engines" is the subject-matter.

Sturtevant stated his problem as follows:

> "In the operation of gas-engines which are fed with an explosive mixture of carbureted air some difficulty has been experienced in throttling the engine down to its minimum speed and power without stopping it, this trouble being due to the fact that too fine an adjustment of the throttling devices for controlling the delivery of the explosive mixture to the engine is necessary to be practical, and the control of the engine, therefore, is not at all times absolute or satisfactory."

It is evident that Sturtevant had before his mental vision a throttle-controlled engine provided with the usual single carburetor, namely a device for impregnating with gasoline the air sucked into the engine, consisting of the air intake, the fuel reservoir, and therefrom the fuel tube terminating in the fuel jet within the air intake. He pictured this single carburetor in association with a throttle-valve having the capacity of closing completely the air intake, and thus shutting off the entire supply both of air and of gasoline from the engine. In throttling down an engine so equipped the operator might move the throttle-lever to the closed position, or so near that the minimum of fuel to keep the engine running would not be supplied

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and so the engine would stop. To guard against such stoppage the operator might learn, by observation and experiment, the point at which to hold the throttle-lever to provide the required minimum, and then either mark the place on the lever-arc or affix a mechanical stop so that the throttle-valve could not be completely closed. Such was the evil Sturtevant intended to remedy by wholly different means and mode of operation.

Sturtevant explained his means thus:

"Briefly stated, the invention consists in forming the carburetor double—this is to say, having two carbureting-chambers of different fuel capacities, which deliver to the engine-cylinders together under normal running conditions and supply the maximum amount of fuel, but one of which (the main carburetor) may be throttled down or cut out entirely when it is desirable to reduce speed, under which conditions the other or auxiliary carburetor, which is the smaller and which is always open, will supply a minimum amount of fuel sufficient to keep the engine at low speed and prevent its stopping. Furthermore, in starting the engine the smaller carburetor is of the proper capacity to supply the exact charge of fuel to give a proper starting charge at low starting speed and insure the initial starting of the engine, after which the throttled carburetor may be thrown into action and the engine brought up to its full speed."

And this is his mode of operation:

"In operation, assuming that the engine be at rest and the throttle-valve of the main carburetor closed, the engine will be manually turned to give the initial suction or intake stroke to the piston. The suction being through the auxiliary carburetor, fuel in sufficient quantity and of the proper richness will be supplied thereby to start the engine and keep it running at low speed, and the main carburetor can then be thrown into service by opening the throttle-valve and the engine brought to its full speed and power with both carburetors in service and a maximum supply of fuel being delivered to the engine-cylinders. When it is desired to slow down, this may be gradually or quickly done by throttling down the main carburetor until it is entirely cut out, and yet complete stoppage of the engine cannot occur owing to careless throttling down, for the reason that the auxiliary carburetor is still in service and independent of the control of the main carburetor and affords a constant minimum supply of fuel."

Sturtevant's structure is clear. His main carburetor is a complete carburetor in itself. It is associated with a throttle-valve that completely closes its air intake. His auxiliary carburetor is a complete carburetor in itself. To be so, it necessarily has its own separate air intake, its own separate fuel tube, and its own separate fuel jet. It supplies its own separate explosive mixture to the engine independently of any control of the controllable main carburetor. Its air intake is always open, has no association with any throttle. It feeds its explosive mixture, not into the mixing-chamber of the main carburetor at or below the throttle-valve, but through an independent by-pass into the manifold between the throttle-valve and the engine cylinders. Whenever the engine is running, the auxiliary carburetor is in operation and gives the requisite minimum of fuel. Whenever the main carburetor is opened to any degree, the two carburetors co-operate to furnish any desired increment of fuel up to the maximum, which is the sum of the full capacities of the two.

On his disclosure of means and mode of operation Sturtevant started out by claiming "fuel-supplying apparatus for explosive engines, comprising a main carburetor and an auxiliary carburetor."

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But the patent office rejected the claim on reference to Schumm's patent, No. 482,201, Sept. 6, 1892, which is for a double carburetor. Thereupon Sturtevant canceled, but eventually was allowed the claim in suit:

"1. Fuel-supplying apparatus for gas-engines, comprising the combination with a main carburetor having a fuel-outlet, and a throttle-valve controlling said fuel-outlet, whereby the amount of fuel supplied from said main carburetor may be varied or completely shut off; of an auxiliary carburetor co-operating with said main carburetor, said auxiliary carburetor having an open fuel-outlet, whereby a desired minimum fuel-supply for the engine is afforded."

It is needless to detail Schumm and other references, for we find in the claim itself all the limitations that Zenith Company deduces from the prior art.

Sturtevant's main carburetor must be associated with a throttle-valve by which "the amount of fuel supplied from said main carburetor may be varied or completely cut off." Looking to the specification of means and the mode of operation to ascertain what Sturtevant had in mind when using the above-quoted limiting clause, we find that he meant a throttle-valve having the capacity of completely closing the intake, thereby completely cutting off the fuel; and that he never contemplated a structure in which the throttle-valve should always be partially open, and in which the fuel-jet should be so large that the minimum of inrushing air would not aspirate the gasoline. Sturtevant's auxiliary carburetor must "co-operate" with his main carburetor. Schumm denies to Sturtevant any monopoly of general co-operation. Therefore what the word in the claim calls for is the specific co-operation that Sturtevant has described. His auxiliary carburetor must be a "carburetor" in the same sense as the main carburetor is a carburetor; that is, a complete carburetor in itself. It must have "an open fuel-outlet whereby a desired minimum fuel-supply for the engine is afforded." That is, it must have means for discharging its own explosive mixture into the engine beyond the control of the throttle-valve and when the engine is running this explosive mixture must always be supplied and be ready to "co-operate" with the mixture from the main carburetor whenever and to whatever degree the closed throttle-valve may be opened. Such, in our judgment, is the scope of the claim.

Turning back to the drawing of the Zenith carburetor, we note that Zenith's alleged auxiliary carburetor consists of the fuel reservoir, the fuel passages leading into the well P, the well P, the fuel jet therefrom terminating at U, and the air intake at the lower left side of the drawing; and that said auxiliary carburetor co-operates with the Zenith main carburetor, which is identified by reference to the fuel-jet S within the Venturi tube.

If the throttle-valve T is closed, there is found in the Zenith structure the equivalent of Sturtevant's main carburetor with its prescribed limitations; but there is no auxiliary carburetor having an opening to discharge its explosive mixture into the engine, for the outlet U is smothered by the throttle-valve.

If the throttle-valve T is permanently held partially open, then, whatever may be said about the presence of Sturtevant's auxiliary

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carburetor, no main carburetor is found in its required association with a throttle-valve having the capacity of being completely closed.

Either horn disposes of infringement. But, more vitally, the outlet U is never a discharge for an explosive mixture; it merely feeds raw gasoline. And, still more vitally, when the air current through the main carburetor is pointed to as the means for converting the raw gasoline from the outlet U into an explosive mixture, a demonstration is thereby afforded that Zenith contains no auxiliary "carburetor" at all.

We approve the finding of noninfringement of the Sturtevant patent.

IV. ANDERSON.

[8] Claim 1 is the only claim in issue:

"1. In a carburetor, a carbureting-chamber, a fuel-jet therein, a constant-level supply-chamber feeding said fuel-jet and exposed to atmospheric pressure, an auxiliary reservoir fed from said constant-level supply-chamber, an auxiliary fuel-jet discharging into said carbureting-chamber and fed from said auxiliary reservoir, an atmosphere inlet for said auxiliary reservoir, and means for maintaining a subatmospheric pressure in said auxiliary reservoir during operation of said carburetor."

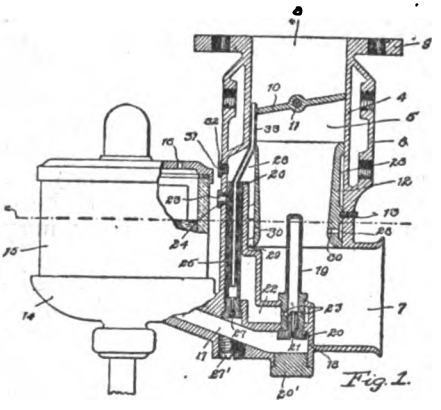


Fig. 1.

From the fuel reservoir 15, through the passage 17, gasoline is fed through the orifice 21 into the main jet within the Venturi tube, and also is fed through the orifice 27 into the auxiliary reservoir 25, and thence into the supplemental jet 33. The auxiliary reservoir 25 is open to the atmosphere through the restricted opening 31; and it is also open to the chamber 28, in which are openings 29 and 30 into the Venturi tube.

This construction, when the engine is running, produces in the auxiliary reservoir 25 a partial vacuum of varying degrees, which is the "subatmospheric pressure" spoken of in the claim. How it is produced, the mode of operation, the working principle, is thus explained by Anderson:

"It is to be noted that the surface of the fuel in the reservoir 25 is exposed to the pressure in the chamber 28, which, in turn, is subject to the pressure and the variations in pressure in the Venturi tube or carbureting-chamber. It is thus clear that, as the suction in the Venturi tube increases, the pressure in the chamber 28 will be lowered, and the rate at which the fuel passes through the restricted opening 27 into the reservoir 25 will vary accordingly. It has been found by experiment, however, that this variation, while highly desirable and productive of the best sort of a mixture, is too marked for practical purposes, unless properly moderated, and I have secured this moderation by means of the restricted passageway 31 to the atmosphere. The passageway is restricted to such an extent that it cannot satisfy the suction created in the chamber 28, and it therefore follows that the pressure on the surface of the fuel in the reservoir 25 is lessened, as the engine speed increases,

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so that, as before pointed out, the flow through the passageway 27 is varied accordingly."

Anderson's mode of operation is unmistakable. He creates a partial vacuum in the chamber 28 by means of engine-suction through the openings 29 and 30 into the Venturi tube; the partial vacuum varies in tensity with the varying tensity of the engine-suction; he finds that high suction produces too much "subatmosphere"; and so he "moderates" his "subatmosphere," partially destroys the vacuum tensity, by admitting outside air into chamber 28 through the restricted opening 31.

Whatever of inventive creation was involved in producing the Anderson combination of means to obtain the Anderson result in the Anderson way is entitled to protection not only by specific claims but also by the most generic that could be drawn to fit Anderson's inventive concept. But infringement of the broadest as well as of the narrowest claims can be predicated only on a structure that embodies substantially the Anderson combination of means to obtain substantially the Anderson result in substantially the Anderson way.

As a basis for charging infringement of claim 1 by the starting feed of the Zenith carburetor, Exhibit 2, Stromberg Company identifies the generic terminology of claim 1 with the specific disclosure of means in the following manner:

1. "A carbureting-chamber" is the space from the air-inlet 7 to the explosive-mixture discharge 8.
2. "A fuel-jet therein" is the jet 19.
3. "A constant-level supply-chamber feeding said fuel-jet and exposed to atmospheric pressure" is the constant-level chamber 15.
4. "An auxiliary reservoir fed from said constant-level supply-chamber" is reservoir 25.
5. "An auxiliary fuel-jet discharging into said carbureting-chamber and fed from said auxiliary reservoir" is the jet 33.
6. "An atmosphere inlet for said auxiliary reservoir" is the opening 31.
7. "And means for maintaining a subatmospheric pressure in said auxiliary reservoir during the operation of said carburetor" is the bored nut 32. Several nuts of different sized bores are furnished so that the diameter of the opening 31 may be varied in relation to the openings 29 and 30 into the Venturi tube and the discharge outlet of jet 33. This interchangeability of the bored nut 32 is for the purpose of assisting in the proper initial adjustment of the carburetor to different engines.

Turning back to the drawing of the Zenith carburetor, we find that Zenith has the equivalent, specifically and generically, of Anderson's first element, in the carbureting space from the air intake at the lower left side of the drawing up to the explosive-mixture discharge at the top of the drawing; of his second element, in the double-jet S; of his third element, in the fuel reservoir F; of his fourth element, in the auxiliary reservoir or well P; of his fifth element, in the fuel-jet U; of his sixth element, in the atmosphere inlet A; and of what Stromberg Company has chosen to identify as his seventh element, in the ability and practice of Zenith Company to regulate the size of

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the atmosphere inlet for the purpose of aiding in the proper initial adjustment of the carburetor to a given engine.

But Zenith carburetors 1 and 10 and Baverey's patent No. 907,953, December 29, 1908, which was cited against Anderson in the patent office, were in the prior art. Zenith carburetors 1 and 10 contained item for item the elements we have pointed to in the Zenith drawing. So naturally no attempt was made to subordinate them to the Anderson patent. Before Anderson's time Zenith had modified the carburetor as shown in the drawing by closing the top of the well P and admitting air thereto through restricted openings into the well J. And no charge of infringing the Anderson patent could be laid upon that modification. Since Anderson's time the only change in Zenith is found in Exhibit 2. In this, instead of air being admitted to the closed well P through restricted openings into the well J, it is admitted through restricted tubes from the outer air. And on this slight change in construction, and the additional result that is supposed to be obtained thereby, the question of infringement turns.

By means of Ahara's air inlet D and Zenith's restricted air inlet A subatmosphere was created in their respective auxiliary wells. There has always been subatmosphere in the Zenith wells, both P and J. In the structure of the Zenith drawing there may not be much, if any, difference in subatmospheric pressure in the two wells. When Zenith closed the top of the well P and admitted air thereto through restricted openings into the well J, there was undoubtedly a nearer approach to vacuum in the well P than in the well J. And in the Zenith carburetor, Exhibit 2, there is a greater degree of subatmosphere in the inner well than in the outer. But we are unable to determine from the record whether there was any greater or any less degree of subatmosphere in the inner well when air was taken from the outer well than when taken from outside the carburetor. As means of admitting air into the inner well, the restricted openings to the outer well are the equivalents of the restricted openings to the outer air, unless there is a difference in results, for mechanically it is immaterial whether the air is admitted mediately or immediately from the outer air. No infringement can be laid upon Zenith's Exhibit 2, if all that Zenith got was substantially the old result in substantially the old way. But because the proofs do not enable us to find definitely that Zenith obtained merely the old result, we proceed to determine whether Stromberg Company is correct in saying that the seventh element is any means, of the general nature of the nut 32, adapted to regulate the admission of air into the inner well from the outer air.

In support of its right to point to the restricted passages in Zenith's Exhibit 2 from the inner well to the outer air as the equivalent of the seventh element, Stromberg Company asserts that the presence of subatmosphere in the prior Zenith carburetors was incidental, insignificant, detrimental, and contrary to the desired operation; and upon this assertion predicates a claim that Anderson was entitled to monopolize any desirable and intentional use of subatmosphere in carburetors, even though the mechanical elements were found similarly combined in prior structures. It is true that subatmosphere in the Zenith outer

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well J, which supplies the supplemental jet H, runs counters to the Baverey principle of supplying the supplemental jet with a unit of fuel in a unit of time and makes it impossible of complete realization. Indeed, the use of any auxiliary well, as we have heretofore seen, is unnecessary to the employment of that feature of the Zenith carburetors. But in every Zenith starting well (the inner well P) subatmosphere has been desirable and in accord with the intended purpose in starting, because in response to subatmosphere the action of the starting jet is augmented and prolonged, and thereby the interval of time that passes before the suction in the Venturi tube is sufficient to lift the gasoline from the main jet is bridged. And if the intent of a maker may be judged by the beneficial results produced by his mechanism, the use of subatmosphere in the prior Zenith starting well was intentional. So there is no basis in fact for the contention that Anderson's patent is to be scanned from the viewpoint that he was the first to devise means for the beneficial and intentional employment of subatmosphere in carburetors.

In our judgment Anderson himself furnishes three demonstrations that Stromberg Company is in error in asserting that Anderson's seventh element in claim 1 refers generically to any means for regulating the admission of outer air to the inner well which have a mode of operation and produce results analogous to the mode of operation and results of Anderson's interchangeable nut 32, which determines the size of the opening 31.

1. In his specification, herein above quoted, Anderson shows that his characteristic subatmosphere is created by the action of the openings 29 and 30 into the Venturi tube in connection with the suction through the Venturi tube; that at high speeds too much subatmosphere is thereby created; and that he destroys the excess by admitting outer air through the opening 31. In other words, if Anderson had not found by experiment, as he says he did, that his means for creating subatmosphere operated excessively at high speeds, he never would have put into his carburetor the opening 31, which is present merely as a moderator of the active means, just as a governor moderates, but does not create, the applied power of an engine. Zenith Company has no carburetor in which the passageway from the outer air to the inner well has any such mode of operation or produces any such result. But Stromberg Company insists that we cannot accept Anderson's definition of his seventh element, because to do so would make that element the same in claim 1 as in claim 2, wherein that element is additionally defined as "comprising a duct for the passage of air only, communicating with said carbureting-chamber and with the auxiliary reservoir above the level of the liquid therein." Taking definitions of terms from Anderson, we believe structures can be imagined which would infringe claim 1 without embodying the quoted limitation in claim 2, and so both claims would be purposeful. But we do not stop to picture supposititious structures, because if we are mistaken in our belief, and if claim 1 must fall unless we accept Stromberg Company's definition and reject Anderson's, then fall it must.

2. On his specification of means and mode of operation, Anderson

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submitted claims, several of which were rejected on reference to Baverey. Their general character may be gathered from the following:

"In a carburetor the combination of a suction-controlled fuel feed-jet, a constant-level supply-chamber therefor, an additional jet, and means for supply to said additional jet arranged to deliver varying quantities of fuel according to the pressure produced by the engine."

The objection to this claim is that, if the arrangement for varying the discharge from the additional jet to correlate with the pressure produced by the engine, which is the arrangement for creating subatmosphere, is not confined to Anderson's stated means and method of creating subatmosphere, but is aimed to cover the inlet from the outer air into Zenith's prior auxiliary well, then the claim is void in the light of Baverey's disclosure.

Anderson acquiesced in the rejection. In submitting the present claims, he distinguished from Baverey, as he in fact had already clearly done in his specification of means and mode of operation, by pointing out that his "operation is brought about by maintaining a subatmospheric pressure in the auxiliary reservoir even though the said reservoir is connected with the atmosphere." That is, Anderson's characteristic subatmosphere is obtained, not by means of, but in spite of, the Baverey-Zenith inlet. And thereby Anderson became estopped from contending that the Zenith characteristic subatmosphere was immaterial in the prior art, and that he was entitled to a general dominancy of subatmosphere in carburetors—a contention we have heretofore examined and found to be wanting in merit.

[8] 3. Anderson's claim 4 is word for word the same as claim 1, except that the sixth element, "an atmosphere inlet for said auxiliary reservoir" in claim 1, becomes "a restricted atmosphere inlet for said auxiliary reservoir" in claim 4.

Of course the other elements, including the seventh, must be given exactly the same value and scope in both claims.

Respecting the differentiation of the sixth element, claim 1 calls for an inlet regardless of restriction—for example, Anderson's inlet with the interchangeable nut 32 omitted; while claim 4 demands a restriction of the inlet—for example, such a "restricted inlet" as is provided by the bored and interchangeable nut 32.

Now, if this suit were based on claim 4, it would be apparent at once that the nut 32, or its equivalent in general character, could not be taken as the seventh element after having been properly identified as the sixth element. And though only the opening and not the nut itself as a restricting means is in the sixth element of claim 1, nevertheless the seventh element, being in the same words and based on the same statements of means and mode of operation, must be taken to refer to the same thing in both claims. And inasmuch as the nut 32, or its equivalent in general character, cannot be the seventh element of claim 4, it cannot be the seventh element of claim 1.

Granting validity to Anderson's claim 1, we find that it is not infringed.

The cause is remanded, with the direction to amend the decree conformably to this opinion. Costs in this court are to be equally divided.

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STROMBERG MOTOR DEVICES CO. v. ZENITH CARBURETOR CO.

(Circuit Court of Appeals, Seventh Circuit. September 14, 1918.)

No. 2154.

PATENTS ⟸301(1)—PRELIMINARY INJUNCTION—ISSUANCE.

The denial of a motion for preliminary injunction in an infringement suit presented on affidavits was obviously not an abuse of discretion, where, after hearing on the merits, it was found there was no infringement.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Stromberg Motor Devices Company against the Zenith Carburetor Company. From an order denying a preliminary injunction, complainant appeals. Affirmed.

Charles A. Brown, of Chicago, Ill., and William H. Kenyon, of New York City, for appellant.

Clarence P. Byrnes, of Pittsburgh, Pa., and William M. Swan, of Detroit, Mich., for appellee.

Before BAKER, MACK, and EVANS, Circuit Judges.

BAKER, Circuit Judge. This is an appeal from an order denying a preliminary injunction upon claims 8, 10, and 11 of the Richard patent, No. 791,501, June 6, 1905.

Shortly after the denial of the motion the District Court heard the case on the merits, and held the claims valid and infringed by two Zenith structures and not infringed by a third.

An appeal was taken from that decree, and was lodged in this court shortly after the present appeal, and by agreement of the parties the two cases were heard at the same time.

Inasmuch as we have found that no Zenith structure infringes the Richard claims (see Stromberg Motor Devices Co. v. Zenith Carburetor Co., 254 Fed. 68, —— C. C. A. ——, herewith decided), it is quite obvious that the questions of infringement, presented by affidavits, were not so clearly in favor of the Stromberg Company that the District Court abused its discretion in denying the motion for a preliminary injunction.

The order is affirmed.

JONES et al. v. SYKES METAL LATH & ROOFING CO.

(Circuit Court of Appeals, Sixth Circuit. June 4, 1918.)

No. 3032.

1. PATENTS ⟸51(1)—INVENTION—PRIOR ART—REDUCTION TO PRACTICE.

It is a sufficient reduction to practice of the idea of rolls for cutting expanded metal, relative to anticipation of patented rolls, that they were worked only by hand, being intended as part of a machine which should cut and expand, and the expanding part not being ready; there being no necessary connection between the two parts.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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2. PATENTS ⟸51(1)—PRIOR ART.
A machine in prior use, though not patented or described in printed publication nor known to patentee, was a part of the prior art.

3. PATENTS ⟸53—INVENTION—PRIOR USE—ABANDONMENT.
Relative to anticipation of patented machine, mere change in form of prior commercial machine, it at all times being within the limits of the claim of the patent, would not interrupt continuity of use and constitute abandonment.

4. PATENTS ⟸328—INVENTION—INTEGRAL AND SECTIONAL STRUCTURES—EXPANDED METAL CUTTING ROLLS.
The Curtis patent, No. 671,915, for rolls for cutting expanded metal, claim 2, in substance a square-edged cutting roll notched on one edge only, *held*, in view of prior segmental cutter, not to involve invention, but merely making integrally, and so stronger and simpler, what had been before made in two parts and then put together.

5. PATENTS ⟸328—LIMITED CLAIM—INVENTION—INFRINGEMENT—EXPANDED METAL CUTTING ROLLS.
The Curtis patent, No. 671,915, for rolls for cutting expanded metal, claim 1, *held* limited to preferred form, to involve invention, and to be infringed.

6. PATENTS ⟸165—CLAIMS—LIMITATIONS.
A limitation found in one claim, whereby alone it substantially differs from another, cannot be read into the other.

7. PATENTS ⟸165—CONSTRUCTION OF CLAIM—PATENTEE'S DICTIONARY.
A patentee may supply his own dictionary; so a claim being for roll with notches staggered as specified, and the word "staggered" being found, in the specification, only in the sentence stating the preferred form, the claim will be limited to such form.

8. PATENTS ⟸319(1)—INFRINGEMENT—DAMAGES.
Damages for infringement of patent may be measured by reasonable royalty, if there is no better means of establishing profits or damages.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Killits, Judge.

Suit by Breckenridge Jones, trustee, and others against the Sykes Metal Lath & Roofing Company. Bill dismissed, and complainants appeal. Affirmed in part, and in part reversed and remanded.

This is the usual infringement suit based on patent No. 671,915, issued April 9, 1901, to Curtis, appellants' ultimate assignor, for "rolls for cutting expanded metal." The application was filed October 13, 1900. The purpose of the machine was to cut in a metal sheet parallel series of slits so that when a lateral pull was exerted the slitted sheet would expand into an open mesh of approximately diamond-shaped form. The result was not at all new, nor was the mechanism broadly new. It was understood that the continuous longitudinal slit must be interrupted at regular intervals by an uncut portion, called a bond, and that in two adjacent slits these bonds must be so spaced that each bond in one slit would be opposite the center of a severed portion in the other slit. The slits had been made by beveled-edged rotary cutters, and the bonds were caused by making a notch in the rotary cutting edge, just as if a notch is made in the cutting edge of one blade of a pair of shears, whereby the fabric upon which the blades close will be cut on both sides of the notch and remain uncut at that point. A further step in the efficiency of such machines had been made by discarding beveled-edged cutters and using square-edged rolls. Several of these were assembled upon the upper of two horizontal shafts and were thereon properly spaced apart by intermediate smaller discs. Upon the lower shaft were placed corresponding rolls and discs, but each roll upon the lower shaft was opposite an intermediate disc upon the upper, and the two shafts were at such a distance

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apart that the lower edge of the cutting rolls upon the upper shaft slightly passed by the upper edge of the similar rolls on the lower shaft and entered slightly into the open spaces surrounding the spacing discs on the lower shaft. As the upper and lower cutting rolls were adjusted laterally just to clear each other, it followed that they would cut a continuous slit in the sheet of metal passed between the rolls—again acting like a pair of shears, save that the motion was rotary. Notches cut across the periphery of these rolls would obviously leave bonds in the material; but, as both edges of the square-faced rolls were cutting edges, such transverse notches would leave the bonds in adjacent slits opposite to each other and the product would not expand. An expansible sheet could be produced with those rolls only by running the sheet through twice, cutting the first slits twice as far apart as was desired, and, on the second run, shifting the sheet longitudinally so as to bring the bonds in the later slits midway between those of the earlier. This was the state of the art, as shown by prior patents and by commercial practice, when Curtis made his improvement. He used the intermeshing square-edged rolls upon upper and lower shaft as just described; but, instead of cutting his notches clear across the periphery of the roll, he notched only one edge, thus producing bonds in only one of the slits cut by the edges of the roll. Then he notched one of the meeting edges which cut the next slit, and arranged these notches so that the bonds would not be opposite each other, but each bond would be opposite the center of the next opening. He could do this in either of two ways: The first way was to notch the right-hand edges of the upper and lower rolls and so each slit would be produced by the rolling engagement of the passing edges of the two rolls, one of which was notched and the other was plain. The other way was to leave the lower rolls entirely plain but notch both edges of the upper roll, arranging the notches upon the opposite edges of the same roll, not across from each other, but in the alternate or staggered position. This would also accomplish the cutting by the meeting of a plain edge and a notched edge. Based upon this construction, he claimed:

1. The slitting-rolls for cutting expanded metal provided with spaced and countering cutting rings having right-angle corners being interrupted at intervals by notches formed in the side faces of the rings, and the notches being relatively staggered, substantially as specified.

2. The slitting-rolls for cutting expanded metal, provided with spaced and countering rings having sharp corners for cutting the metal, such corners being interrupted by notching out the side faces of the rings for a portion of the thickness of the rings, substantially as specified.

The court below held the patent invalid.

Dyrenforth, Lee, Chritton & Wiles and Russell Wiles, all of Chicago, Ill., and Bates & Macklin, of Cleveland, Ohio, for appellants.

Whittemore, Hulbert & Whittemore and James Whittemore, all of Detroit, Mich., for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and SESSIONS, District Judge.

DENISON, Circuit Judge (after stating the facts as above). Infringement of both claims is alleged; and, if they receive the construction which we think they must have, infringement is conceded.

[1] Several earlier uses are set up in order to anticipate or otherwise invalidate the second and broader claim. We agree with the District Judge that the claim is invalid; but we think this conclusion is most safely based upon the earlier so-called segmental cutter. Curtis made his constructive reduction to practice by filing his application in October, 1900. He claims to have conceived the invention in June of that year; but the evidence of any definite early conception of the invention embodied in these claims is vague, and there was no dis-

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closure until in the course of preparing the application. The defendant's predecessor experimented in the summer of 1899 with a machine of this general class, and in December of that year let a contract for the building of a commercial machine. This commercial machine was completed in the spring of 1900 and operated by hand sufficiently to demonstrate its effectiveness. This is proved with all the certainty necessary to establish a claim of anticipation. The rolls were not operated by power at that time, because they were intended to be only a part of the complete machine which should cut and expand, and the expanding part was not ready; but there was no necessary connection between the two parts, and we consider what was done to be a sufficient reduction to practice of the idea involved. It was the same as that later developed by Curtis, with two exceptions: (a) The notches were placed upon the corresponding (say left-hand) edges of each cutting roll, upper and lower, instead of upon both edges of the upper rolls only, as in Curtis' preferred form; (b) instead of cutting notches in the edges of the body of the roll, defendant's predecessor made the roll of less diameter than the adjacent spacing disc, and then built it out with a series of so-called segments until it was of the larger diameter required for the cutting roll. Each segment contained a portion of the cutting edge having one notch (two half notches) therein, and was bolted fast to the body of the roll. When they were all in place, they constitute a continuous roll-cutting edge interrupted by notches. This awkward arrangement was adopted because it was thought the cutting edge must be of harder steel than was advisable for the body of the roll, and because it was thought that separable parts would facilitate sharpening and repairs. It was anticipated that notches would break down and wear out, and in this way one part could be replaced without affecting the rest of the roll. When the entire machine was later completed, it was employed for some time to produce the commercial result. It was finally discarded and replaced by the Curtis construction, because the making in this segmental way and the necessary replacements and repairs proved to be too expensive.

[2, 3] This segmental cutter, although it had never been patented or described in any printed publication and was not known to Curtis, yet was a part of the prior art, with reference to which the character of his variation therefrom must be judged. If some one else had completely invented and used this segmental cutter, and if what Curtis did involved no invention over what had thus been done, certainly Curtis was not entitled to a patent as the first inventor of the thing which he produced. One cannot be an inventor, if there is no invention. See Package Co. v. Johnson Co. (C. C. A. 6) 246 Fed. 598, 601, 159 C. C. A. 568; Lemley v. Dobson (C. C. A. 6) 243 Fed. 391, 395, 156 C. C. A. 171; and see Buser v. Novelty Co. (C. C. A. 6) 151 Fed. 478, 492, et seq., 81 C. C. A. 16. This is not a case where a prior use, exact or suggestive, had been abandoned, and so perhaps should go into oblivion instead of into the prior art; the segmental cutter was in complete and active existence, when Curtis made his conception, and in commercial use when he filed his application. If the segmental cutter is not generally different from Curtis' form, then it follows that

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the substance of claim 2—a square-edged cutting roll notched on one edge only—has been in continuous use by defendant and its predecessor ever since a date earlier than Curtis' invention, for change in form within the limits of the claim would not interrupt the continuity of the use.

[4] We find thus presented the controlling question whether Curtis' integral square-edged cutting roll with notches on the edge involved invention as compared with defendant's sectional square-edged roll with notches on the edge. The precise question may be clearer by transposing to the more familiar circular saw. Let it be supposed that saws composed of an integral disc with teeth cut into the edge were common; that defendant had devised a peculiar kind of teeth, and had attached these by removable means to the edge of the disc, thereby producing a saw with these peculiar teeth, each tooth separately removable; and that Curtis then put these same peculiar teeth into the edge of an integral saw by cutting them therein. We are confident that this would not, and that what Curtis did with these cutter rolls did not, involve invention. We have a clear instance of that merely making integrally what had before been made in two parts and then put together, rather than an instance of that uniting into one part which dispenses with a function or gets a new result. See Gould v. Cincinnati Co. (C. C. A. 6) 194 Fed. 680, 685, 115 C. C. A. 74. Curtis' cutter roll was stronger and simpler than defendant's, but only as an integral structure is always stronger and simpler than a sectional one. The defendant had passed through and beyond the Curtis form. Curtis simply dropped off what he thought a useless and troublesome refinement, and adopted the remainder, the substance of defendant's structure. This is especially illustrated by the fact that a sectional view of this segmental cutter and adjacent spacing disc, taken on any selected diameter, cannot be distinguished from a sectional view of the Curtis roll and spacing disc taken on the same diameter, save by the presence of the attaching bolt and the seam between the permanent body and the removable edge.

So far as concerns claim 2, the decree of the court below dismissing the bill must be affirmed.

[5] Claim 1 presents a different problem. We think it must be interpreted as of specific intent, directed to and limited to Curtis' preferred form, whereby he put all his interrupting notches upon the upper rolls, leaving the lower rolls plain, and arranged these notches on the opposite edges of the same roll in staggered relation to each other. Defendant has adopted and used this precise form. It seeks to escape liability by alleging that, if given this specific construction, the claim involves no patentable distinction from claim 2, and is invalid for the same reason, but that it ought not to be so limited, but should be constructed so broadly that it is equivalent to, and is defeated by the same facts which defeat, claim 2.

Putting these notches upon both edges of the same disc, and not opposite each other but staggered, was entirely new and had obvious advantages over the plan of notching one edge of both upper and lower rolls. In the latter case, the ultimate alternate relation of slit

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and bond must be secured by a rather nice relative rotary adjustment of upper and lower rolls on their respective shafts and also by regulating the driving means for each shaft so that the notches will leave the bonds at the right spots. Either wear in connecting gears or inaccuracy in replacing rolls after they have been removed for grinding would produce bad results. With the Curtis preferred form, the proper relation of slit and bond in the two adjacent rows was necessarily and automatically preserved. When the rolls were placed on the shaft, originally or after removal, it was immaterial what circumferential position the notches happened to have, so long as the notches in the series of rolls on that one shaft were aligned with each other. It is true these results and these advantages are not testified to by any expert; but they are obvious, and there is no testimony tending to dispute their apparent value. We cannot say that this specific improvement involved no invention.

[6, 7] Since a device which does not bring the bonds and the slits into alternate position will not make a useful product, it is said that the thought expressed by "the notches being relatively staggered" must be read into the second claim as well, and that the notches are "relatively staggered" even in the form of machine which notches only one side of the roll but uses notched rolls on both upper and lower shafts, because these are so adjusted that the notches strike the metal in a staggered relation to each other. Viewed in this way, the claims are equivalent and of a breadth which makes them both invalid. We cannot accept this point of view, for the sufficient reason that a limitation found in one claim and by which alone it substantially differs from another cannot be read into that other, but the expressed distinction must be preserved. There is the further reason that, although by resort to all the possible meanings of the phrase in question, we can conceive that in the upper and lower notched roll construction, the notches are "relatively staggered," yet this was plainly not what Curtis meant when he selected the words; and a patentee is at liberty to supply his own dictionary; the terms of a claim should be taken in the sense given in the lexicon of the specification. Baker, C. J., in Kennicott Co. v. Holt Co. (C. C. A. 7) 230 Fed. 157, 160, 144 C. C. A. 455. He shows, in Fig. 5, one form having the notches alternately arranged on the opposite edges of the same roll, and, in Fig. 6, a form having the notches upon the same edge, and upon one edge only, of upper and lower rolls. He says:

"I prefer to form these notches upon both sides of all the rings as shown in Fig. 5, arranging the notches in staggered fashion. * * * I do not notch the (lower) rings 30 as that is unnecessary if the (upper) rings 20 are notched upon both sides as shown at Fig. 5; but, instead of that construction, the upper rings may be notched upon one side only and the lower rings should, in that case, also be notched upon one side. * * * Either construction works well."

The word "stagger" is not found in any form in the specification, except in the sentence just quoted; and this reference to the authoritative lexicon makes it entirely clear that the first claim was intended to cover this preferred form, and the second claim was intended to be broad enough to cover either form. Defendant's argument upon this

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subject, based upon the contents of the file wrapper, is not convincing. As the application was filed, the second claim was in the same form as when issued; but the first claim was still broader and reached generally this arrangement of cutting rings, provided only that they had "notches on their side faces." This would cover notches extending transversely entirely across the periphery and was old, as appeared by the reference cited by the Patent Office. Curtis then amended by substituting claim 1 as issued, and pointed out that there was invention in making notches in the edge only instead of all the way across, because by this change he succeeded in producing bonds which were necessarily opposite each other. The patent then issued.

[8] It results from these considerations that there must be the usual interlocutory decree based on claim 1; but for accounting only—the patent has expired. We appreciate the difficulties attending an accounting, but they are not sufficient to justify the refusal of that remedy, particularly in view of the present rule that damages may be measured by reasonable royalty, if there is no better means of establishing profits or damages.

The judgment is reversed, with costs of this court, and the case remanded for further proceedings.

JONES et al. v. GENERAL FIREPROOFING CO.*

(Circuit Court of Appeals, Sixth Circuit. June 4, 1918.)

No. 3051.

1. PATENTS ⟸328—INVENTION—SHEET METAL EXPANDING MACHINES.
The Curtis patent, No. 670,606, on machines for expanding sheet metal, claim 13, *held* invalid, as not involving invention, but the thought that automatic opening mechanism could be made to operate in a transverse plane; it not being patentable merely to do by automatic machinery what has commonly been done by hand.

2. PATENTS ⟸101—CLAIMS—PART OF DEVICE.
Claims of a patent, intended to reach the operation of half of the device considered by itself, may be valid.

3. PATENTS ⟸328—VALIDITY—SHEET METAL EXPANDING MACHINES.
The Curtis patent, No. 796,402, on machines for expanding sheet metal, claim 3, *held* to be for the diagonal edge over which the sheet should be drawn into another plane as it progressed longitudinally, a new element in the association, and to be valid.

4. PATENTS ⟸165—CONSTRUCTION—LIMITING WORDS.
Limiting words in the claim of a patent, relied on in Patent Office to differentiate it from a prior patent, while to be given their full meaning, if clear and definite, when developing ambiguity should not be read any more broadly than is reasonably necessary to serve such purpose of differentiation.

5. PATENTS ⟸328—INFRINGEMENT—SHEET METAL EXPANDING MACHINES—DRAWING.
The Curtis patent, No. 796,402, on machines for expanding sheet metal, claim 3, *held* infringed by defendant's machine, as "drawing" the sheet; claims 5 and 9 also *held* valid and infringed.

6. PATENTS ⟸328—VALIDITY—SHEET METAL EXPANDING MACHINES.
The Curtis patent, No. 796,402, on machines for expanding sheet metal, claims 1, 8, and 10, *held* invalid, as too broad.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*For opinion on motion for rehearing and to reopen, see 254 Fed. 970, — C. C. A. —.

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Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Killits, Judge.

Suit by Breckenridge Jones, trustee, and others, against the General Fireproofing Company. Bill dismissed, and complainants appeal. Reversed and remanded.

Dyrenforth, Lee, Chritton & Wiles and Russell Wiles, all of Chicago, Ill., and Bates & Macklin, of Cleveland, Ohio, for appellants.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio (Charles Neave, of New York City, and Fred L. Chappell, of Kalamazoo, Mich., of counsel), for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and SESSIONS, District Judge.

DENISON, Circuit Judge. [1] For lack of infringement, the court below dismissed the bill of the appellants charging infringement of two patents issued to Curtis, one No. 670,606, of March 26, 1901, and the other No. 796,402, of August 1, 1905, upon machines for expanding sheet metal. Both patents relate to a device which receives as its raw material to be acted upon a slitted sheet of metal prepared as described in our opinion to-day filed in No. 3032, Jones v. Sykes Co., 254 Fed. 91. The final product of the machines of the patents in suit was intended to be used as metal lath. It was not new in itself. It is fully enough described in the opinion of the Supreme Court in Expanded Co. v. Bradford, 214 U. S. 366, 376, 29 Sup. Ct. 652, 53 L. Ed. 1034, as being the product of the methods which the patentee in that case undertook to supersede by his patent there involved. It had also been known that after a sheet was fully cut, as, for example, by the Curtis machine of the patent involved in the Sykes Case, and after the sheet was thus ready for expanding by a pulling or stretching force, such force would be much more effective if exerted at a lateral angle to the plane of the sheet than if exerted in the same plane. This was obvious, since, if the force were exerted in the same plane, the sheet could yield and expand only by a distortion and twisting at and near the bonding points, while, if an equivalent force were exerted at, e. g., a right angle to the plane of the sheet, the necessary yielding and expansion would call only for a bending of the strands without material twisting, and would produce an approximately diamond-shaped mesh (quasi hexagonal) with the strands lying edgewise in the new plane instead of flat in the old. This had been accomplished by taking the finished sheet after it had come from the slitting machine, seizing the opposite edges by suitable holders, and then carrying them apart from each other in a transverse plane. This had been an essentially manual operation, although aided by hand-operated mechanism. Curtis was the first to construct any machine which would receive at one end a ready slitted sheet, carry the same longitudinally along through the machine, and deliver at the other end the transversely expanded product ready for use—all without intermediate handling or attention. The novel characteristic of his machine was to expand transversely and progressively as an incident to the longitudinal feed and travel of this slitted sheet.

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In his first machine (670,606), he did this by employing traveling grips which seized the edges of the sheet as it passed longitudinally off the end of the horizontal feed table, and which grips traveled in angling paths forward from, and transversely up and down from, the feed table, thereby gradually expanding the sheet in this transverse plane until the full intended width was reached. His thirteenth claim, the one said to be infringed, reads as follows:

"The machine for opening or expanding sheet metal the slits in which have been previously cut, wherein are combined means for feeding the slitted sheets and means acting to open them by opening the strands between the slits in a direction substantially at right angles to the plane of the sheet, substantially as specified."

The other claims of the patent covered, with various breadth of expression, the specific means which Curtis showed and described, and claim 13 must be considered as reaching any suitable feeding means combined with any suitable opening means which automatically bend the strands at right angles to the plane of the sheet as it leaves the end of the feed table. Thus construed, the claim did not express a patentable invention. The history of the transaction makes this clear. Caldwell had devised a machine which gripped the slitted sheet by its edges as it left the horizontal feed table and opened it in its own plane. Curtis, as a mechanical expert, was asked by the owner of the Caldwell invention to see if he could improve it. He knew that the sheet ought to be opened in a transverse plane, and knew that it was common practice to do this manually, and he modified and adopted the Caldwell mechanism so that the grips moved away from each other up and down instead of sidewise. He was entitled to a patent upon the devices by which he caused this to be done and to a fair measure of equivalency; but we see no invention involved in the mere thought sought to be monopolized by this thirteenth claim, that automatic opening mechanism could be made to operate in the transverse plane. To find invention in such thought would be to say that it is broadly patentable merely to do by automatic machinery what has commonly been done by hand, and the general rule is to the contrary. Marchand v. Emken, 132 U. S. 195, 199, 200, 10 Sup. Ct. 65, 33 L. Ed. 332.

The prosecution, under the second patent in suit, is based upon claims 1, 3, 5, 8, 9, and 10. Claim 3 reads thus:

"In a machine for expanding previously slitted sheets, the combination with a support over which the slitted sheet is moved, of means for continuously feeding the sheet lengthwise along said support and means for drawing it away from the plane of the support as it passes off the same, substantially as specified."

[2] In this patent, Curtis took a completely slitted sheet and conveyed it longitudinally along a feed table. This feed table was broken away on a diagonal line commencing at one of the forward corners and extending back at the desired angle to the other side. The result was that, as the sheet fed forward, first one corner would pass off the supporting means, and then a gradually increasing triangular section would do so, until, eventually, the whole sheet would be passing over and beyond this diagonal edge. Means were then provided for

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carrying the free edge of the sheet downwardly at an angle to the plane of the feed table, and, accordingly, the sheet was expanded by pulling it over the diagonal edge. It is true that Curtis showed a double-acting device, so that, in order to apply thereto the foregoing description, his sheet should be thought of as divided into two by a longitudinal center line, the first opening corner of each half sheet being at the central division point between them, and one half being pulled downwardly and the other half pulled upwardly over diagonal edges extending from the two outer corners of the feeding means inward to the center. However, there are claims devoted to this double construction, and the claims in suit clearly have no reference thereto, but are intended to reach the operation of one-half the device considered by itself; and there is no inherent reason why claims drawn on that theory may not be valid.

[3] Our conclusion is that this is a proper case for the application for the principle to which we referred in Davis v. New Departure Co., 217 Fed. 775, 133 C. C. A. 505. From the broad point of view involved in claim 3, the new thing provided by Curtis was the diagonal edge over which the sheet should be drawn into another plane as it progressed longitudinally. This we consider a new element in this association, and it imparts both validity and character to the claim. Curtis did not merely provide a new association of old elements; *the* thought that the feed table or supporting means could be cut away on a diagonal line so that this diagonal edge would serve as the resisting means over which the sheet might be pulled into expanded form was the novel thought, and the other recited elements of the claim only provide its necessary working environment. There is therefore no occasion to confine the claim to the particular operative mechanism shown and described, but infringement will be found *if* a defendant has adopted substantially this novel element of the claim, even though it is put into association with other elements of distinctly different form from those shown in the patent, provided that they furnish the necessary field for the novel element to operate and to function as contemplated by the patent, and do not omit, in specie and by equivalent, any specified part.

We do not overlook the fact that this diagonal edge is not, in *so* many words, specified in claim 3; but we conclude that it is imperatively implied. The claim calls for "a support over which the slitted sheet is moved," and since such a sheet could not be moved lengthwise of the support and drawn away from the plane of the support into expansion as it passes off the same, unless it passes off in a diagonal line, we must conclude that the "support" of the claim is the support thus described. If there were doubt about the necessary presence of this element in claim 3, there could be none as to claim 5.

There is the common controversy whether the patented device has been largely used. If the patent is of the relatively generic scope claimed for it, then it has been embodied in machines which have been extensively adopted; if it is of the precise and limited scope insisted on by defendant, it has had no commercial use. In such a case, *to*

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argue against validity because the specific form has not been marketed is to beg the question.

[4-6] Having determined that the claim is valid and has the scope which we have attributed to it, the question of infringement remains. We conclude that this question depends upon the force to be given to the word "drawing," found in the claim. Defendant's machine does not draw the sheet over the diagonal edge in the same manner nor to the same degree that the Curtis device does. The allusion to the drawing function was relied upon during its progress through the Patent Office, to avoid a reference, and it therefore must have the limiting effect which the circumstance requires; but of course it does not follow that the "drawing" must be of the same kind and extent as shown by Curtis.[1] The file wrapper discloses that Pitkin had an earlier patent upon a device which (for the purpose of construing claim 3) we may assume discloses a longitudinal feed table or support broken away in a diagonal line; but Pitkin fed through this device an unslitted sheet, and above the angling edge he placed a corresponding row of star wheels, which operated to slit, punch, stretch, and expand that line of the metal sheet progressing thereunder. The strand thus cut and punched was forced down and away from the plane of the support, and thereupon another strand was treated in the same manner. The result was that the sheet, as a whole, was carried somewhat away from the plane of the support; but Pitkin did not disclose the idea of drawing or pulling the sheet over this edge and thereby accomplishing the expanding. When Pitkin was cited, Curtis met the rejection by pointing out this drawing function. If words so inserted or relied upon as indicating difference, and which thereby become words of limitation, are clear and definite, they must have their full meaning, even though it later appear that the patentee thereby measurably lessened the monopoly to which he was really entitled; but, if these limiting words develop ambiguity, they should not be read any more broadly than is reasonably necessary to serve that purpose of differentiation for which they were adopted. See Clipper Co. v. E. W. Co. (C. C. A. 6) 237 Fed. 602, 608, 150 C. C. A. 484, and cases cited. When we come to consider defendant's form of turning the sheet over the edge, it is evident that the limitation to "drawing" is ambiguous, and we therefore must inquire whether defendant's operation draws the sheet over the edge in the sense in which Curtis said that he did and that Pitkin did not.

Defendant's machine is very different in appearance from Curtis', and its operation is obscure. It has been necessary to study it in detail and observe the function of each part, but we are finally satisfied that it responds to the terms of the claim. It clearly accomplishes the general result; it feeds in longitudinally a completely slitted sheet and delivers the sheet at the other end fully expanded and in a plane right-angled to the plane of feed. It accomplishes this by turning the sheet over a diagonal edge in the feed table. This turning is done by a series of cams or wedges each of which meets and

[1] We give defendant the benefit of all doubts, by assuming that the effect is the same as if the limiting words had been inserted by amendment.

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directs away in a right-angled plane one of the diagonal strands, and, as it does so, it pulls open the space between this strand and the next one and bends the intermediate connectors into the new plane. The result is certainly not the effect of a pushing force, applied from beyond or above the plane of feed, as in Pitkin. It certainly is the result of a pulling strain, applied in the plane of the expanded sheet, as in Curtis. A detailed discussion of the operation involved would serve no good purpose. It is enough to say that, taking Curtis and Pitkin as the prototypes of differentiated classes, we feel confident that defendant's device must be classified with Curtis; and, consequently, infringement must be found.

We see no vital distinction in the fact that Curtis' machine shows a pull transmitted from the further margin through the entire expanded portion, while defendant's bending and turning force comes directly from the next strand, and is exerted strand by strand. Theoretically, Curtis completes his expansion strand by strand; practically, he probably does not. In theory, defendant's cam or abutment has served its full office when it has turned a strand away in the other plane and bent the connectors; in practice, the cams are continued so that they control the whole expanding portion. The essence of Curtis' invention—turning the slitted sheet at an angle as it flows over the diagonal edge of the support—is present just as much if the effective strain comes from the nearest strand as if from one or several further away. There are claims which say or imply that this operating pull is to come from the further margin of the sheet, according to the form shown in the drawing; not so with claim 3.

Claim 5 we think controlled by the same consideration as claim 3, and it also should be held infringed. Claim 1 when compared with other claims cannot well be confined to a device having the diagonal edge which we think the essence of the invention. It seems intended to be broad enough to reach a sheet moving laterally over the edge of the support. Unless it has this construction, it does not seem to add anything to the other claims, and, with this construction, we think it too broad to be valid. Claims 8 and 10 are invalid for the same reasons. In view of our other conclusions, it is not very important whether claim 9 is valid and infringed; but we think it is. The claim was not rejected on Pitkin, does not contain the limitation to "drawing," and infringement is clearer than of claim 3. As to validity, Pitkin comes nearest to anticipating. Since Curtis regards his form as duplex, divided by a longitudinal center line, he must treat Pitkin from the same standpoint; but we cannot regard Pitkin's series of lower cutting laws, diagonally arranged, as the full equivalent of Curtis' diagonal edge over which the previously slitted sheet is turned and opened. We are not here constrained by the estoppel from any action by Curtis in the Patent Office.

The decree below is reversed, and the case remanded for the entry of a new decree in accordance herewith and pursuant to the disclaimer practice pointed out in Westinghouse Co. v. Cooper Co., 245 Fed. 463, 470, 157 C. C. A. 625. Appellants will recover one-half the costs of this court.

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CENTRAL RY. SIGNAL CO. et al. v. JACKSON.

(District Court, E. D. Pennsylvania. December 5, 1918.)

No. 1625.

1. PATENTS ⟸114—SUIT TO OBTAIN PATENT—NATURE OF PROCEEDING—"INDEPENDENT PROCEEDING."
A suit in equity, under Rev. St. § 4915 (Comp. St. 1916, § 9460), to obtain issuance of a patent, although necessarily part of the application for a patent, is an independent proceeding, and not appellate.

2. PATENTS ⟸114—SUIT TO OBTAIN PATENT—NOTICE TO ADVERSE PARTIES.
In a suit in equity, under Rev. St. § 4915 (Comp. St. 1916, § 9460), to obtain issuance of a patent, the court will not make an order for substituted service on a defendant, but will leave complainant to give such "notice to adverse parties" as he deems sufficient.

In Equity. Suit by the Central Railway Signal Company and Frank Dutcher against George B. Jackson. On motion for order directing substituted service. Denied.

See, also (D. C.) 238 Fed. 625.

William Steell Jackson, of Philadelphia, Pa., for plaintiffs.
Howson & Howson, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. It appears that a motion made in this case has not formally been disposed of. A statement of the record facts will present the purpose of the motion and effect of its allowance.

It is sufficient for this purpose to state that application was made for a patent, on a claimed invention of the plaintiff Dutcher, to the Commissioner of Patents. A like application was also made by the defendant, and an interference was declared, and an award of priority of invention was given the defendant. This proceeding passed through all the successive stages, original and appellate, and resulted in the final refusal of the Commissioner to issue a patent to the plaintiffs. The present bill in equity was then filed under the provisions of R. S. § 4915 (Comp. St. 1916, § 9460).

The defendant came into this jurisdiction for the sole purpose of testifying in the form of the taking of his deposition in some part of this patent litigation. He was here served with the subpœna, and a copy of the bill in this case, and was to all substantial intents and purposes so served when on the witness stand. This service was on motion set aside in deference to the general principle of comity, and the principle was strictly applied, for the reason that it would not answer to its purposes, unless it was so far recognized that a witness could come into a foreign jurisdiction, relying upon his immunity from service of process. If the immunity was sometimes granted and sometimes denied, the practical result would be the same as if no immunity was accorded. To give practical value to the principle, it must therefore be enforced and never denied, unless the case comes within the recognized exceptions. A practical test of the value of the principle is that the exceptions should be clearly enough defined,

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so that counsel would be able to advise in a given case whether immunity from service would be granted or withheld.

Behind many rules of law, however, there is to be discovered a rule of policy as well as a principle of right. In such cases, the policy of the law should be served, but never, unless it is unavoidable, at the cost of a denial of a legal right. There is a legal right, indeed, two legal rights, which are to some extent conflicting, presented in the instant case. One is the right of the plaintiff to make application for letters patent, and to pursue this application through the successive appellate actions to which the plaintiff has resorted. He is given by law the further legal right to make his appeal to a District Court, and to obtain the judgment of that court upon his other legal right to the grant of letters patent. It follows from this that no obstacle should be thrown in the way of his assertion of this right.

There is involved, also, however, the right of a defendant to be protected from any judgment or decree which will affect him, unless the court entering the judgment has jurisdiction both of the general subject-matter, of the particular cause, and of the parties. When properly interpreted, the latter means that he cannot be subjected to the judgment of any court unless he is both amenable to and has been served with the process of that court. Whenever there is a conflict between these two rights, the proper attitude of the court is to take jurisdiction of the case, if there can be found any mode of service of its process which brings a defendant before the court.

Generally speaking, there are three fact conditions, under any one of which process may be served. One is that known as personal service. This is always a good service (generally speaking) unless the defendant is for some reason at the time privileged. This method was tried, and it has been adjudged that the defendant was privileged. Another is the equivalent recognized by statutes or otherwise of personal service, as, for illustration, service by leaving a copy of the process at the dwelling house of the defendant, or other authorized place, with an adult there found.

A question of fact has been raised in this case of whether the defendant was so far a resident of this district as that he could be so served. The validity of such a service could be tested by a return setting forth the fact that service had been so made. No resort has been made to such a test.

There only remains, therefore, the third method of service, which is that now attempted, to wit, a substituted service. A trite illustration of such a form of service is afforded by cases in which service is made by publication or otherwise.

The general fact situation in the present case is this: If the defendant has any so-called home jurisdiction, it is in this district, and it is here, if anywhere, that he is amenable to the service of process. It is urged that, if the court cannot acquire jurisdiction of the defendant, the plaintiff is, as a practical consequence, prevented from asserting the right given him by the act of Congress. This would not justify the court in usurping jurisdiction, but it does call upon us to be scrupulously careful not to refuse to take jurisdiction, if such be authorized under R. S. § 4915. This court may have recourse to the

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statutes of the state and to the practice in vogue in the state courts in all "civil causes other than equity," etc., under R. S. § 914 (Comp. St. 1916, § 1537). By R. S. § 917 (Comp. St. 1916, § 1543), the Supreme Court is empowered "to regulate the whole practice" in chancery proceedings, and subordinate to this R. S. § 918 (Comp. St. 1916, § 1544), confers a like power upon the District Courts.

The equity rules promulgated by the Supreme Court, under date of November 4, 1912, by rule 13 (198 Fed. xxii, 115 C. C. A. xxii), provide for service of subpœna only by personal service, or by copy left at the "usual place of abode" of the defendant, etc.

The rules of this court as adopted by the then Circuit Court do not seem to specifically provide for any mode of service, except notices of motions, etc., in pending cases.

[1] It is in consequence in effect urged by counsel on both sides of this question that the validity of service is dependent upon the other question of whether such a bill, as has been filed in this case, is an original proceeding or appellate. It is clear that the proceeding is technically not appellate. The statutes relating to the issue of patents provide for successive appeals, the purpose of which is to secure a review of any rulings made, and, if proper, a reversal of those rulings. Such proceedings are strictly and technically appellate. It is likewise clear that section 4915 strictly and technically gives original and independent jurisdiction to the court to adjudge, it is true, the same claim of right which was made in the other proceedings, and to reach a judgment which is different from, and in that sense a reversal of, the ruling made by the Patent Office, but the ruling thus first made remains and is not technically reversed.

This is the view expressed by the court in Butterworth v. Hoe, 112 U. S. at page 61, 5 Sup. Ct. 25, 28 L. Ed. 656. The view thus expressed is entirely consistent with the comments made upon it in Gandy v. Marble, 122 U. S. at page 439, 7 Sup. Ct. 1290, 30 L. Ed. 1223.

The comment that "the proceeding is in fact and necessarily a part of the application for the patent" is ex vi termini obviously true, because the sole purpose of such a bill is to secure the grant of a patent.

The distinction before pointed out, however, remains that the proceeding, though necessarily part of the application for a patent, is an independent proceeding, and not appellate, in the sense of being an appeal from the ruling first made. In other words, although its purpose is to secure the issue of a patent, the issue of which has been refused, it does not seek that issue through a reversal of the ruling first made, but through an independent finding that the applicant is entitled upon the merits of his application to a patent. In a very practical sense the result is a reversal, but such is not its legal purpose or effect.

The correct view, as presented in Butterworth v. Hoe, is that Congress has provided two modes of procedure through and by which a patent may issue. One is the usual application to the Commissioner of Patents. The other is by bill in equity. It is true that resort cannot be had to the latter until recourse has been first had to the former, but the two proceedings none the less are distinct, separate, and independent, and in all other respects than that indicated are in the

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alternative. This results in the conclusion that no aid can be accorded the plaintiffs through the expedient of viewing the present proceeding as an appellate one, and we are driven to the provisions of R. S. § 4915, for such aid as is within the power of this court to afford.

The sections preceding 4915 provide for a mode of procedure which may in its course, as it did in this case, reach the Supreme Court of the District of Columbia. That is the high-water mark of that proceeding. Then comes into effect section 4915, which is operative only after the other proceeding has been concluded.

[2] The remedy prescribed is one by bill in equity, and the court having cognizance thereof may proceed to a finding that the applicant for a patent should have one issued to him, and such finding is authority to the Commissioner of Patents to grant letters patent. It is to be observed that what is to be determined is the right of the applicant. There may be cases in which no one has an interest in the question of the issue of the patent other than the interest of the general public. In such cases, the requirement is that a copy of the bill shall be served upon the Commissioner and all the expenses of the proceeding shall be borne by the applicant. There is in this provision recognition of the fact that there may be an "opposing party," and there is the further requirement that the court shall not proceed to an adjudication until after "notice to adverse parties and other due proceedings had."

The purpose to be served by this requirement of notice is obvious, but the proceeding itself in its main purpose and character is not only analogous to, but it is essentially, a mandamus proceeding, directed to the Commissioner of Patents, in which any party concerned may intervene pro interesse suo.

The point is not directly before us for decision, but it is incidentally involved in disposing of the motion made, as our conclusion with respect to the motion is that we should not make any order for a substituted service, but that the plaintiffs in the bill should follow the injunctions of the statute, to which reference has been made, of the service of a copy of the bill upon the Commissioner, or of notice to adverse parties, or both, and should be left free to do whatever in their judgment is a compliance with the statute, as well as a compliance with the requirements of the chancery practice and equity rules with respect to sufficiency of parties. In illustration of the latter requirement, objection might be made to a bill for defect of parties under rule 44 (198 Fed. xxx, 15 C. C. A. xxx). Such objection could then be disposed of. It would be premature to dispose of it now.

A question might also arise whether the court had cognizance of the case on "notice to adverse parties and due proceedings had" to enable it to adjudge the questions involved. This question, as all other questions in the cause, could be determined when the decree came to be entered, whether it were one pro confesso, or after trial on bill, answer, and proofs. R. S. § 4915, it is to be observed, makes no specific provision for the service of a subpœna or a copy of the bill, except in case of the Commissioner, and except, also, as such service may be implied by the requirement of notice and other due proceed-

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ings. All such questions as who are necessary parties to such a bill, and whether notice in fact, however and wherever given, is a compliance with the statute, may be determined at the proper time.

The formal motion before us is formally disposed of by being denied without prejudice.

LUTEN v. WILSON REINFORCED CONCRETE CO. et al.

(District Court, D. Nebraska, Lincoln Division. July 24, 1917.)

No. 19.

1. PATENTS ⟸328—INFRINGEMENT—REINFORCED CONCRETE CONSTRUCTION.
The Luten patent, No. 999,663, for a tension member with an anchor tip for use in concrete construction, *held* not infringed.

2. PATENTS ⟸328—INVENTION—REINFORCED CONCRETE BRIDGES.
The Luten patents, No. 818,386, No. 853,202, and No. 853,203, all relating to methods of using reinforcing members in concrete arch bridges, *held* void for lack of invention, in view of the prior art.

In Equity. Suit by Daniel B. Luten against the Wilson Reinforced Concrete Company, in which the State of Nebraska intervenes. Bill dismissed.

Russell T. MacFall, of Indianapolis, Ind., and Frank H. Drury, of Chicago, Ill., for plaintiff.

W. F. Moran, of Nebraska City, Neb., for defendant.

Willis E. Reed, Atty. Gen., Dexter Barrett, Deputy Atty. Gen., and Wallace R. Lane, of Chicago, Ill., for intervener.

MUNGER, District Judge. Suit by Daniel B. Luten, alleging infringement of letters patent issued to him. Of these no evidence was submitted relating to patents numbered 852,970, 852,971, 853,183, and 933,771. The patents relied upon are numbered 818,386, 853,202, 853,203, 999,663, but complainant has abandoned all claims, and has asked to dismiss his bill of complaint, which leave will be granted, as to all other claims except as to claims 1 and 7 of patent numbered 818,386, claim 16 of patent numbered 853,202, claims 9, 12, 14, 16, and 18 of patent numbered 853,203, and claim 6 of patent numbered 999,663.

In a general way these patents relate to methods of using reinforcing members in connection with concrete, especially in the construction of arches of bridges.

[1] The claim in patent No. 999,663 is for the use in combination with hardened plastic material, of a tension member with an anchor tip of a spiral of increasing curvature tangential to the tension member and imbedded in the plastic material. Complainant charged that a bridge built by some of the defendants infringed upon this patent. The plans called for the use of a hook at the end of the metallic tension members, but the evidence shows that these plans were not followed, and that the tension members had no curvature at or near the

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ends, and reliance was placed upon friction as a bond. As there was no infringement of the patent, no further discussion of it is necessary.

[2] The claim in patent 853,202 reads as follows:

"16. A concrete bridge having a concrete spandrel extended back of the abutments with upright rods or bars imbedded near the ends of the spandrel."

The evidence shows that this form of structure was anticipated by a number of patents and publications, especially by the Von Emperger patent of June 1, 1897, and by the Monier construction.

The claims in controversy in patent 853,203 relate chiefly to the placing of reinforcing and tension members in the arch or floor of the bridge transverse to the axis in connection with other members imbedded in the spandrels. The Monier method of construction completely anticipates any claims of complainant's patent that the defendants' bridge can be said to follow. The defendants' expert is clear upon this point, and the figure and drawings of the Monier patent and the graphic delineation of its use published in the Engineering News of 1893 leave no doubt. The use of a reading glass as a magnifier makes certain the form of construction used in that published article. Other patents, publications, and uses of similar construction show a state of the art such that Luten has no claim to invention for any of these claims that the defendants' bridge has followed.

The remaining patent, No. 818,386, involves two claims. Claim 1 reads as follows:

"An arch having imbedded therein a plurality of tension members passing alternately across the rib, said members being low at the crown and high at the haunches, and each of said members passing across the rib at different longitudinal points from the others, substantially as described."

Claim 7 is as follows:

"An arch having imbedded therein rods, bars or other tension members in two or more series, following one face of the arch rib, thence across and following the other face of the rib, the points of crossing for the different series being angularly or laterally displaced with respect to each other, substantially as described."

These claims attempt to cover the positioning of members where stresses will occasion fractures. The principles that govern the location of the danger points from live loads were old when Luten entered this field. Writers and inventors had indicated the methods of correcting these dangers by the use of tension members substantially as Luten's patent attempts to apply the correction.

In view of the state of the art, Luten cannot be said to have supplied more than ordinary mechanical or engineering skill in giving functions to tension members when applied to the problem of arches upon which is to be imposed a live load.

For these reasons, a decree may be prepared, dismissing complainant's bill.

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UNITED STATES v. HIRSCH.

(District Court, E. D. New York. November 11, 1918.)

ARMY AND NAVY ⟹36—OFFENSES BY PERSONS IN MILITARY SERVICE—JURISDICTION OF CIVIL COURTS.

Articles of War enacted August 29, 1916 (Comp. St. 1916, § 2308a), do not deprive the civil courts, either in time of peace or war, of the concurrent jurisdiction previously vested in them over crimes against either federal or state law, committed within the United States, by persons subject to military law.

Criminal prosecution by the United States against Harry Jean Hirsch and 17 others. On plea to the jurisdiction by defendant Hirsch. Overruled.

Melville J. France, U. S. Atty., of Brooklyn, and H. Harvey Harwood, Asst. U. S. Atty., of New York City.

Stephen C. Baldwin, of New York City, for defendant.

CHATFIELD, District Judge. Under a plea denying jurisdiction to the court, motion is made by Harry J. Hirsch, one of the defendants (18 in number) in the above-entitled action, to dismiss the indictment as against him, and for an order directing his release, and that all charges relating to the matters set forth in the indictment be left exclusively, so far as he is concerned, to the military forces of the United States for hearing before a military court, under the present Articles of War.

The indictment charges a conspiracy to defraud the United States, between July 15, 1916, and September 19, 1918, and the commission of overt acts, attributed to each of the defendants, between August, 1916, and August, 1918.

The defendant making the motion is a colonel of the Regular Army detailed to the Quartermaster's Corps. His present application is based upon the language of the Articles of War, adopted by the act of Congress of August 29, 1916, and contained in the Army Appropriation Bill of that date (39 Statutes at Large, chapter 418, at page 650 [Comp. St. 1916, § 2308a]).

This new codification "shall at all times and in all places govern the armies of the United States," and took the place of old section 1342 of the Revised Statutes, which was repealed, in so far as inconsistent with the new law. But it especially provides that all offenses committed prior to August 29, 1916, shall be governed by the law as it stood before that date; that is, by old section 1342 of the Revised Statutes.

It would therefore follow that some of the acts of conspiracy alleged in the indictment might prove to have occurred before August 29, 1916, and would be considered under the provisions of former section 1342, while the new articles would be in force as to matters occurring after that date.

But if the indictment will lie against the defendant Hirsch, under the new section 1342, its validity would not be affected by the amend-

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ment of 1916, for it might include any act within three years prior to the filing of the indictment. On the other hand, if the defendant Hirsch's contention is correct, further consideration would be required, in order to determine whether any part of the alleged conspiracy, or the commission of overt acts, antedated August 29, 1916.

Passing to a consideration of the point really presented, we find that under the previous Articles of War concurrent jurisdiction was given to the civil courts and to courts-martial to deal with any offender who happened to be at the time within the court's jurisdiction. Under this law both courts-martial and civil courts necessarily respected the jurisdiction which was being exercised by the other, and the court first apprehending the defendant was thus able to proceed with a trial, without reference to the concurrent jurisdiction of the other. In the same way double jeopardy was avoided. Each statute was therefore valid, and constitutional rights were entirely preserved.

This construction was upheld in the cases of Dynes v. Hoover, 61 U. S. 65, 15 L. Ed. 838, Coleman v. Tennessee, 97 U. S. 509, 24 L. Ed. 1118, Grafton v. United States, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084, 11 Ann. Cas. 640, and Franklin v. United States, 216 U. S. 559, 30 Sup. Ct. 434, 54 L. Ed. 615.

The new Articles of War embodied many paragraphs worded in exactly the same way as those previously in force, but new sections have been added, and some sections have been so changed as to require construction by the courts with reference to the matters considered in the cases above cited.

The general paragraph conferring jurisdiction read:

"The armies of the United States shall be governed by the following rules and articles."

To this has been added the words "at all times and in all places." This change was evidently inserted to cover the needs of the army when on foreign soil (as, for instance, in Mexico), and to avoid the possible contention that the "armies of the United States" included only the forces of the United States within its borders. But the defendant here claims that the intent of the provision is to exclude, even within the United States, the exercise of any jurisdiction, other than that of the Articles of War, over the members of the army.

Article 12 is new, and gives general courts-martial "power to try any person subject to military law for any crime or offense made punishable" by the Articles of War. The defendant argues that this excludes the exercise of jurisdiction by any civil court.

A new section (article 15) states that the jurisdiction conferred upon courts-martial "shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction" over offenses triable by those bodies. The point is made by the defendant that the words "civil tribunals" are not specifically included, and it is argued that their former concurrent jurisdiction is thereby inferentially repealed.

The new articles show recognition of the existence and procedure of civil criminal courts by the wording of the authority to subpœna wit-

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nesses before courts-martial and by the authority to punish those who disobey subpœnas, through a proceeding "in the District Court of the United States," and add the words "jurisdiction being hereby conferred upon such courts for such purpose" (articles 22 and 23). This last provision was evidently made necessary from the fact that the District Courts of the United States did not have, prior to this legislation, jurisdiction to punish for contempt committed before a court-martial or in defiance of its subpœna. But the defendant argues that these words show a limitation of the jurisdiction of the District Court to the express powers therein conferred.

The other sections of the new Articles of War present no phase of the present subject different from the former articles until we reach section 74, under the general subdivision of "Arrest—Confinement." Article 74 (which takes the place of the former article 59) provides that:

"When any person subject to military law * * * is accused of a crime or offense committed within the geographical limits of the states of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him, shall be dismissed from the service or suffer such other punishment as a court-martial may direct."

The words "except in time of war" are old, but are of course significant at the present moment, for the case at bar arises when the United States is at war, and the evident purpose of the section is to provide that an army officer is not to be delivered over or hunted out and run down by the army upon the demand of the civil authorities, if his services in time of war are required in the army.

The new words, "the geographical limits of the states of the Union and the District of Columbia," evidently specify the territory between the Atlantic and Pacific Ocean and between the Canadian boundary and the Mexican line, and they thus include the civil authorities of the United States; but the section is not limited to crimes or offenses committed against a state or its inhabitants or the District of Columbia, or under state laws, as opposed to laws of the United States.

The penalty of dismissal from the service applies as before to a refusal or neglect to aid the the civil authorities "except in time of war." This bears out the contention of the government that the law does not and cannot mean to prohibit all delivery of accused military persons during war time. On the contrary, it is evidently intended to give the military officers discretion in war time as to whether a person should be delivered, but to make such delivery compulsory when the nation is not at war.

When we reach articles 83, 84, 87, 92, 93, and 94, we find definitions of military offenses similar to those defined as crimes in the civil Penal Code.

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Article 92 provides the penalty of death for murder or rape "as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the states of the Union and the District of Columbia in time of peace." This adds to the language of old section 58 the words quoted above, but the provision conferring jurisdiction is no broader than the words of the old statute, "shall be punishable by court-martial."

Article 93 provides in similar words with reference to the other crimes formerly covered by section 58.

Article 94 is as follows:

"*Frauds against the Government.*—Any person subject to military law who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

"Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

"Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim," etc.

The remaining articles present no particular variation from the questions stated above. Article 96 and article 104 are general sections to cover matters not before expressly defined, and by a separate section of the Appropriation Law of August 29, 1916, the provisions of the Articles of War are in some respects not to take effect until March 1, 1917. Article 92, which includes definition of the offense similar to that in the present indictment, was, however, to take effect at once.

The question of martial law during the occupation of a military force is not involved in this application. Under such conditions the Articles of War may become the sole law of the place, and the civil law or territorial laws would be suspended. Even in a foreign country, the new Articles of War would be the code under which the army would be governed. Coleman v. Tennessee, supra, 97 U. S. at pages 516 and 517, 24 L. Ed. 1118.

But the question involved in the present motion is simply whether the new Articles of War have repealed by act of Congress the concurrent jurisdiction previously vesting under the Constitution in civil courts for the trial of crimes committed by an officer or member of the army, and, if not, whether the new language produces that effect in time of war, even though the army does not act under the Articles of War, to exert its own, and in such case superior, jurisdiction to deal with the charge by retaining physical control of the accused, and by proceeding to hear and dispose of the case before relinquishing him for civil arrest (article 74).

But in these respects the new Articles of War show no intent on the part of Congress to limit jurisdiction over crimes to courts-martial even in time of war. The language of the sections is in each case evidently intended to confer jurisdiction on the army; but it does not, except in express instances, restrict such other jurisdiction as may already exist. Nor does the language support the proposition that the changes were intended by inference to effect a different result.

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The defendant has drawn a wrong conclusion from the words extending concurrent military jurisdiction over certain matters, which previously had been debatable, and has sought to show a similar extension in the nature of the jurisdiction conferred. But the words which actually create the jurisdiction (as opposed to those defining its application to specific matters) are the same in the new law as in the old.

The defendant has likewise incorrectly interpreted the words defining the territory within which the Articles of War shall be in force, by assuming that these words are made a limit to, and a part of, the definition of what kind of jurisdiction shall be exercised therein. His error in interpretation of the words "within the geographical limits of the states of the Union and the District of Columbia" has been already pointed out, and further illustrates the idea on his part that these words affect the nature of the jurisdiction, itself, which is conferred within those limits.

But there is nothing in the entire Code as amended which supports the idea that the law in its present form confers sole jurisdiction upon the military authorities in any different way, or of any different nature, than that which was conferred by the law previously in force and interpreted by the cases above cited.

In the present case the defendant has in effect been delivered over to the civil authorities, even in time of war, by the mere fact that, without interference from his superior officers, he has been subjected to arrest, and has been, and is being, allowed to appear to answer the charge. The jurisdiction of the civil court is therefore complete, and will continue so far as is proper and necessary, giving due regard to the needs of the country as expressed through its military officers. His limits of confinement have been enlarged on bail, but the rights of this court to proceed when he is before it, in the usual meaning of those words, have been in no way repealed by the passage of the present Articles of War.

The defendant will therefore be required to plead generally to the indictment, and his special plea to jurisdiction will be overruled.

ALTMAN v. NEW HAVEN UNION CO.

(District Court, D. Connecticut. November 2, 1918.)

No. 1427.

1. COPYRIGHTS ⇐83—SUIT FOR INFRINGEMENT—EVIDENCE.
In a suit for infringement of copyright, a receipt given by complainant on settlement with another infringer, from whom defendant obtained the photograph which it copied, *held* not admissible as a defense, although competent as bearing upon the equities between the parties; the rule being no different in copyright cases than in other actions.

2. COPYRIGHTS ⇐9—SUBJECTS OF COPYRIGHT—PHOTOGRAPH.
A photograph of a high school class, made under an arrangement by which the photographer was to receive for his work only the proceeds of such copies as he might sell, *held* copyrightable by him.

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3. COPYRIGHTS ⟸77—INFRINGEMENT—JOINT INFRINGERS.
One who obtained and published a copy of a photograph, which was an infringement of a copyright, but without knowledge of the fact, was not a joint, but an independent, infringer.

4. COPYRIGHTS ⟸52—SUIT FOR INFRINGEMENT—DEFENSES.
That defendant innocently published a copy of a photograph, and had no knowledge that it was copyrighted, is not a defense to a suit for infringement of the copyright.

In Equity. Suit by Charles Albert Altman against the New Haven Union Company. Decree for complainant.

Arthur W. Chambers, of New Haven, Conn., for plaintiff.
Philip Pond, of New Haven, Conn., for defendant.

THOMAS, District Judge. This is a bill alleging infringement of a copyrighted photograph, containing the usual prayer for an injunction and damages, and the action is based upon the provisions of the Copyright Law of March 14, 1909, c. 320, 35 Stat. 1075, as amended by Act Aug. 24, 1912, c. 356, 37 Stat. 488, Act March 2, 1913, c. 97, 37 Stat. 724, and Act March 28, 1914, c. 47, 38 Stat. 311 (Comp. St. 1916, § 9517 et seq.).

The answer is in effect a general denial, and sets up certain facts which show the circumstances under which the picture was printed, all of which amount to a confession and avoidance of the claims of the plaintiff, that the photograph was not copyrightable, and that the plaintiff was paid in full by reason of the receipt given for $300 in settlement of a suit in this court entitled Altman v. New Haven Printing Co. et al.

The relevant facts upon which this decision must be based are found to be as follows:

The graduating class of the New Haven High School of 1914, acting through a committee duly appointed, arranged with The New Haven Printing Company to print its Class Book, which was to contain, among other things, a group photograph of the class.

In order to secure this photograph, a committee of the class was appointed to make the necessary arrangements, to the end that a proper photograph could be secured, which could also be sold separately to such of the individual members of the class as desired to secure a copy.

After conferring with various photographers, arrangements were finally made with the plaintiff, whereby he was to take the picture of the class on the front steps of the High School building, and for which he was to receive $1.50 for each photograph sold to such members of the class as desired to purchase a copy at that price. The plaintiff was under no other contract as to price than as stated; i. e., no arrangement or contract was made whereby he was to receive any pay for his services as a photographer. At the appointed time the class, some 500 in number, assembled on the front steps of the High School. The plaintiff is, and has been for some years past, one of the leading photographers of the city, and has had a wide and varied experience

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in taking all kinds of indoor and outdoor photographs, and thoroughly understands the art. He grouped the members of the class, arranged their positions, and did all of the work necessary to secure a proper negative, from which an acceptable photograph could be made, and which resulted in a pleasing, satisfactory, and, so far as such a production may be, an artistic photograph, at least sufficiently so as to bring it within the realm of those things which may be copyrighted in accordance with the provisions of the Copyright Law of 1909, as amended.

As soon as the photograph was developed, steps were immediately taken by the plaintiff to protect his rights in the same by applying to the Copyright Office in Washington, and pursuant to the steps so taken, and in conformity with law, on May 23, 1914, plaintiff received his certificate of registration under the seal of the Copyright Office. The negative from which the photographs were printed was marked by the plaintiff in conformity with the provisions of law, so that all photographs made from the negative were properly and legally marked.

In due time the proper members of the class committee submitted the photograph to the New Haven Printing Company for entry in the Class Book. The photograph was too large, and it was decided that it was necessary to cut the picture down; hence the members of the committee having charge of the matter cut the top and bottom of the photograph off. In doing so, all of the background and foreground were taken away, leaving only the members of the class, with a scant margin around the four sides of the picture. In cutting off the top or background of the picture, all of the High School building shown in the original disappeared; and in cutting away the front or foreground, all of the street and some of the sidewalk disappeared, and with them the copyright marks: "© Altman, New Haven, Conn. N. H. H. S. 1914."

In this reduced condition the photograph was taken by the class committee to the Stoddard Engraving Company, which made a copper cut from which the New Haven Printing Company printed the pictures. But it was finally decided that, instead of including the picture as part of the book, it should be printed separately and distributed with the book to each member of the class purchasing the book, and some 350 or more were thus printed by the New Haven Printing Company and distributed to the members of the class. This reduced the sale of photographs the plaintiff expected to make, because by purchasing the Class Book each member thereby secured a copper-plate photo identical with the original photo, except for the trimming and cutting off as above described. In fact, the sales by the plaintiff of his original photograph were so few as to make them negligible.

The defendant is, and has been for many years past, the publisher of one of the large newspapers of the state, printing a daily and Sunday edition of many thousand copies, and has a wide and extensive circulation in the city of New Haven and vicinity, and is always active in advancing the civic interests of the city, and takes a lively interest in all that pertains to the educational welfare of the community. Through one of its reporters, duly assigned by the manager of the

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paper for such purpose, it secured one of the photographs of the class, made from the Stoddard Engraving Company's plate and printed by the New Haven Printing Company, for the purpose of using the same by way of embellishment to a "story" or news item in its issue of Sunday, May 31, 1914, concerning the graduating class of the New Haven High School, which was then soon to graduate. From such photograph, in its own photo-engraving rooms, a proper cut was made, and the picture printed in the Sunday issue of May 31, 1914. This was done without knowledge that the original photograph was copyrighted, and without knowledge, so far as the evidence shows, that the picture then in its possession and printed in its newspaper was even a copy of a copyrighted photograph. The evidence is conclusive that the acts of the defendant in printing the picture were entirely innocent, and that its violation of the plaintiff's rights, if any, was technical in the highest degree.

[1] On August 25, 1915, the plaintiff brought suit in this court against the New Haven Printing Company, the members comprising it, and the Stoddard Engraving Company for violation of his copyright for the acts above set forth, which suit was on the 13th of October, 1914, settled, and a release given, as appears from the following receipt, which was offered in evidence at the trial of this case, and tentatively received, subject to final ruling at this time:

"Whereas, the Stoddard Engraving Company, a Connecticut corporation, doing business in New Haven, Connecticut, and Edward G. Fenton and Frederick A. Krooner, individually and doing business under the name and style of Fenton & Krooner and New Haven Printing Company, have infringed the copyright of Charles A. Altman, for a photograph entitled 'New Haven High School 1914 Graduating Class'; and

"Whereas, suit has been instituted by said Charles A. Altman against said Edward G. Fenton and Frederick A. Krooner, individually and under the name and style of Fenton & Krooner and New Haven Printing Company, and the same is now pending in the District Court of the United States, District of Connecticut; and

"Whereas, the said Stoddard Engraving Company and said Edward G. Fenton and Frederick A. Krooner, individually and as Fenton & Krooner and as New Haven Printing Company, agree to discontinue said infringement:

"Now, therefore, in consideration of the sum of three hundred dollars ($300) in hand paid, the receipt of which is hereby acknowledged, I do hereby relinquish any and all claims I have against the said Stoddard Engraving Company, said Edward G. Fenton and Frederick A. Krooner, individually and under the name and style of Fenton & Krooner and New Haven Printing Company, arising out of said infringement.

"Dated at New Haven, this 13th day of October, 1914.

"Charles A. Altman,
"By George E. Hall, His Attorney."

Not until April 12, 1915, and nearly a year after the infringement complained of, did the plaintiff bring this suit against this defendant. While this fact has no bearing upon the decision to be reached, it has some bearing upon the inferences to be drawn as affecting the equities of the case, taken in connection with other facts bearing upon this feature of it.

Before discussing the law applicable to facts, it is necessary to now rule upon the question of the admissibility of the receipt above quoted,

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which was offered as a bar to a recovery in this action, having been pleaded as a defense in the answer. The fact that it was pleaded in the answer does not of itself make it admissible. It would not be contended by counsel, I apprehend, that if A. was suing B. in a state court for violation of a personal right, that a receipt in full in an action between A. and C. for the violation of a personal right, even of the same kind and character, offered as a bar to a recovery, would be admissible. Is there any rule of evidence peculiar to copyrights which would change the ruling in other cases?

In Beifeld v. Dodge Pub. Co. (C. C.) 198 Fed. 658, Judge Ward, in a suit for infringement of a copyright on a painting sold to plaintiff and copyrighted in his name, excluded correspondence between the artist and a third party, as to the publication of a sketch of the picture from which defendant's copies were printed, because relating to transactions between third persons.

The rules of evidence in copyright cases are the same as in other cases (16 Cyc. 382, 821), and I am unable to find any authority to the contrary, and so the receipt, for the purpose for which it was offered—i. e., to defeat the action—is excluded, but it may be admitted as bearing upon the equities between the parties.

Having thus disposed of the receipt, let us now discuss the defense set forth that the photograph was not copyrightable.

[2] Prior to 1865 it was held that a photograph was not a "print, cut or engraving," within the meaning of the earlier law, and was not therefore a proper subject of copyright. Congress, however, in 1865, extended copyright protection to negatives and photographs by expressly including them among the articles for which copyright was provided. Act March 3, 1865, c. 126, 13 Stat. 540. This express designation of photographs has been continued in all subsequent statutes. Act July 8, 1870, c. 230, § 86, 16 Stat. 212 (R. S. § 4952); Act March 3, 1891, c. 565, 26 Stat. 1107; Act Jan. 7, 1904, c. 2, 33 Stat. 4; Act March 3, 1905, c. 1432, 33 Stat. 1000. Although it was questioned whether a photographer is an author, and a photograph a writing, within the constitutional provision under which copyrights may be granted, the constitutionality of the act was sustained. Thornton v. Schreiber, 124 U. S. 612, 8 Sup. Ct. 618, 31 L. Ed. 577; Burrow-Giles Lith. Co. v. Sarony, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349; Harper v. Kalem Co., 169 Fed. 61, 94 C. C. A. 429.

Accordingly, since the act of 1865, photographs have been, and now are, copyrightable as such, and photographers have frequently been protected in the enjoyment of a copyright in their photographic productions. Thornton v. Schreiber, supra. The basis and justification of such copyrights is the undeniable fact that a photograph may embody original work and artistic skill, and be in fact an artistic production, the result of original intellectual conception on the part of its author. Pagano v. Chas. Beseler Co. (D. C.) 234 Fed. 963; Gross v. Seligman, 212 Fed. 930, 129 C. C. A. 450; Bamforth v. Douglass Post Card Co. (C. C.) 158 Fed. 355. The fact that the photographer arranged the light, the grouping, the posing, and other details of a photograph, so as to produce an artistic and pleasing picture, is sufficient to sustain

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a copyright for such photograph. Burrow-Giles Lith. Co. v. Sarony, supra; Pagano v. Beseler Co., supra.

Under the facts found and the law, which is clear and explicit, the photograph here under discussion was clearly copyrightable.

The material allegations of the bill have been satisfactorily established by competent evidence to show, that under the decisions of the cases cited, the plaintiff had a valid copyright, and was the lawful owner of the copyright secured upon the photograph taken of the group entitled "N. H. H. S. 1914."

Further facts set forth in the answer by way of defense suggest that the defendant claims that the property right in this photograph belonged to the high school class. This would be true, provided the committee of the high school and the plaintiff had entered into a contract whereby the high school committee was to pay the photographer a fixed price for his services. In such an event the defense pleaded would avail the defendant, but from the evidence no such situation is disclosed. On the contrary, the proof is conclusive that the plaintiff was to take the group picture and charge each individual who saw fit to make a purchase of him $1.50 per photograph. Hence there is nothing consistent in these facts with the contention that the property right in the photograph belonged to the high school class or to the committee representing it.

Where the photographer takes the portrait for the sitter under employment by the latter, it is the implied agreement that the property in the portrait is in the sitter, and neither the photographer nor a stranger has a right to print or make copies without permission from the sitter. Moore v. Rugg, 44 Minn. 28, 46 N. W. 141, 9 L. R. A. 58, 20 Am. St. Rep. 539. Where, however, the photograph is taken at the expense of the photographer and for his benefit, the sitter loses control of the disposition of the pictures, and the property right is in the photographer. Press Pub. Co. v. Falk (C. C.) 59 Fed. 324. So here, no other conclusion is possible, under the evidence, save the one here reached, that the plaintiff was the lawful owner of the right in the photograph, bound only to sell each photograph at a price not to exceed $1.50 to each member of the class desiring to purchase one. By no possible stretch of the evidence could it be said that the class had or owned the right in the photograph.

[3] As to the next defense set forth in the answer, but little need be said in view of the testimony. It is alleged that the defendant was a joint offender with the Stoddard Engraving Company and Fenton & Krooner, individually and doing business under the name and style of the New Haven Printing Company. The doctrine of contributory infringer is not in the least applicable, in view of the testimony and finding of facts. In order that the defendant might successfully avail itself of this defense, it would have to appear from the evidence that, at the time of the transactions between the Stoddard Engraving Company and the New Haven Printing Company, the defendant had knowledge of the arrangements and participated in them, sanctioned the violation of the plaintiff's rights, and that its violation of the plaintiff's rights was part of that transaction. Harper v. Shoppell (C.

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C.) 28 Fed. 615. Of course, it is manifest that such was not the case; but, on the contrary, the defendant was in ignorance of that transaction, and had no knowledge of it.

[4] And as a last defense the defendant pleads, and the court finds as a fact, that its infringement was entirely innocent. Under the law, is that a defense? The law is decisive and clear on this point, and rules against the defense, for it has been repeatedly held that ignorance of a copyright, or honest intention, affords no defense to an action for infringement.

In Morrison v. Pettibone (C. C.) 87 Fed. 330, at page 332, the court said:

"The authorities are clear that the question of knowledge or intent does not enter into consideration upon the issue of infringement."

In Stern v. Jerome H. Remick & Co. (C. C.) 175 Fed. 282, Judge Hand said:

"It is not necessary that the defendant should have intended to violate the copyright of the plaintiff. He had means of knowledge from the copyright office that the song had been in fact copyrighted; and he, like any one else, took his chances when he published the song without any inquiry."

Judge Hollister, in Meccano v. Wagner (D. C.) 234 Fed. 912, at page 921, said:

"Intention is held to be immaterial, if infringement otherwise appears."

The author's property is absolute when perfected by copyright, and the intent or purpose of an invasion is nowhere made an excuse for it.

The defenses pleaded being of no avail, in view of the law and evidence, the plaintiff is entitled to a judgment, and section 25 of the statute provides in this connection:

"That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

"(a) To an injunction restraining such infringement;

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, * * * but in case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars." Comp. St. 1916, § 9546.

In deciding the amount to be awarded, the court should take into consideration all the facts and circumstances of the case. Here we have an innocent infringement, for which suit was not brought for nearly a year, and after a substantial settlement for the real damage done the plaintiff, which was the negligible sale of the original photograph, and while the court would not be permitted by law to speculate as to the profit the plaintiff would have enjoyed, had he been so successful as to sell one copy to each member of the class, it is a fair conclusion that the printing in the Sunday edition of the New Haven Union of the class picture did not cost the plaintiff the loss of a single sale of the original photograph, especially when one carefully examines a copy of the newspaper containing the picture. But Congress has seen fit to fix the minimum recovery at $50, below which this court cannot assess the damages, on the theory, presumably, that proof of the actual dam-

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age would be very difficult, if not impossible, but that always some damage would result from such an infringement, which would not and could not be less than $50. The law of the case is with the plaintiff, the equities with the defendant, and the equities justify the court in giving every consideration possible to the defendant in deciding upon the amount the plaintiff may recover.

The plaintiff is entitled to an injunction, and it may issue; but, in view of the highly technical character of the infringement, and for the reasons above expressed, I am constrained to order that the plaintiff may recover judgment for $50, without costs.

Ordered accordingly.

UNITED STATES v. STILSON et al.

(District Court, E. D. Pennsylvania. November 26, 1918.)

No. 114.

1. CRIMINAL LAW ⟸921—NEW TRIAL—GROUNDS.
The admission in evidence in a criminal case of admissions of defendant, though erroneous, is not ground for new trial, where the fact admitted was not really in controversy, and was independently proven.

2. CONSPIRACY ⟸40—CRIMINAL CONSPIRACY—PERSONS CHARGEABLE.
Where offenses are being committed, of such character that they are necessarily the result of concert of action all who participated in the things which are done resulting in such offenses may, if the inference fairly arises out of everything which has been done, be found guilty of conspiracy to commit the offenses.

3. CRIMINAL LAW ⟸915—NEW TRIAL—INDICTMENT—CONSPIRACY.
In view of Rev. St. § 1025 (Comp. St. 1916, § 1691), providing that no indictment shall be deemed insufficient by reason of defects in matter of form which do not tend to the prejudice of defendant, an indictment *held* not fatally defective, on motion for new trial, because it charged in separate counts a conspiracy to commit acts which constituted offenses under different statutes.

4. CRIMINAL LAW ⟸814(1)—TRIAL—INSTRUCTIONS.
Every charge to a jury ought to reflect the real issue arising out of the evidence, and also as presented in the arguments addressed to the jury.

Criminal prosecution by the United States against Joseph V. Stilson, Joseph Sukys, K. Vidikas, and J. V. Stalioraitis. On motion in arrest of judgment and for new trial. Denied.

Francis Fisher Kane, Owen J. Roberts, and Samuel Rosenbaum, all of Philadelphia, Pa., for the United States.

Henry John Nelson and Henry John Gibbons, both of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. The spirit of frank and candid discussion of the legal merits of the case and defense which have been manifested throughout by counsel, not only justifies, but calls for, full consideration of all the points which counsel deem worthy of discussion. We shall therefore follow the line of thought presented by the

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arguments, although discussing the points involved in a somewhat different order.

1. First, with respect to the second point (reason 5) discussed by counsel. The defendants asked for a severance at the trial. Following the denial of this motion, a demand was made for the allowance of peremptory challenges to the limit which would have been allowed in the aggregate, had the defendants been separately tried. Perhaps the only comment for which this reason for a new trial calls is afforded by that made by counsel in moving for the severance, and demanding on behalf of each defendant the full number of challenges given by the act of Congress to all of the defendants jointly. The comment in effect was that it was made with the knowledge that the unbroken practice in the trial of cases in the courts of the United States was in line with the denial of the motion and of the claimed right of challenge. This was accompanied with an expression of the expectation of counsel that the trial judge would feel constrained to follow these precedents. This expectation was realized. As the trial judge did not feel at liberty to depart from the established practice, and as the same view is still entertained, no discussion of the principles of law involved seems to be called for, inasmuch as it is deemed unnecessary to vindicate a practice authoritatively established. Any relief to which the defendants may feel themselves entitled must be accorded by an appellate court.

2. Again, with respect to the question of the constitutional freedom of the press being involved, which is discussed by counsel as point 6 (reason 9). This may be passed with a very apt quotation from the brief of counsel. It is there recognized that, so far as a trial court is concerned, the question has been settled, but it is raised because (and here comes in the quotation) "hope springs eternal in the human breast," and the hope is expressed that the line of cases which admittedly rule the question against the defendants may be overruled. This court, however, is, of course, not asked to overrule them.

3. The point discussed as point 3 (reason 6) calls for nearly the same comment. A search warrant had been regularly issued, under the authority of which papers and things had been seized. These were subsequently offered in evidence. One of the defendants made certain statements at the time of the visit of the officers of the United States in serving the warrant.

It is not denied (in fact, is almost categorically conceded) that the weight of authority at least (to quote the briefs submitted) justifies the admission of the evidence which was admitted. Several additional observations may be made. The papers which were seized were so seized, not only by authority of a warrant for the purpose regularly issued, but they were not the papers of the defendants, but of the publishing corporation. Again, the papers consisted in the main of the files of the Kova publication, and the seizure was of little practical importance, beyond the facility thereby afforded the authorities to examine the publications as they chronologically appeared, and saved them the time and trouble of collecting them elsewhere.

[1] A like observation may be made as to the admissions made by the defendants. They were admissible because clearly voluntary. The

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presence or absence of this finding is admittedly the test of admissibility, and the finding is not in question. Here, again, the point is robbed of all practical value because of the circumstance that the fact admitted was not in real controversy and was independently proven. Spari v. United States, 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343; Bram v. United States, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568.

4. This brings us to a consideration of those reasons for a new trial which present the substantial defense interposed. The defense is that there was no evidence to justify a finding that the defendants were engaged in a conspiracy to have committed the acts which admittedly are offenses condemned by the Espionage Law. Without going into details, there was the publication of the paper known as Kova, which not only contained articles which in themselves were violations of the law, but which in their whole tone and spirit, and in the tone and spirit of the publication itself, evidenced a defiance of the law and a purpose to oppose the operation of the law. In addition to this, there were other publications, in the form of pamphlets or circulars, which in every line breathed sedition.

The connection of one of the defendants with the commission of these acts was directly and clearly shown. The authorship of some of the articles and circulars was traced to him with satisfying directness. He was shown further to have been a party to the publication and circulation of others. This evidence went to the overt acts averments.

[2] The distinction between the crime of conspiracy and the commission of the offenses which are the object of the conspiracy is clear enough, and sight of this should not, of course, be lost. When, however, offenses against the law are being committed, and are of such a character that they are necessarily the fruit of concert of action, all who participate in the things which are done, resulting in the act which is of this common product character, may, if the inference fairly arises out of everything which has been done, be found guilty of a conspiracy to do what has been done. It is, of course, true that the connection may have been such as to justify no more than a suspicion of participation in the conspiracy, and may evidence nothing more than knowledge that the offenses were being committed, or of an intention on the part of others to commit them. Neither evidence which would warrant such a suspicion nor a finding of the fact of such knowledge would in itself afford a sound basis for a finding of the guilt of conspiracy; but if, in addition to the knowledge, there is evidence of a participation in or connection with the acts which are committed, and this participation or connection was an intentional act, it may support a finding of guilt.

The point is made that so far, at least, as the defendant Sukys is concerned, there was nothing upon which to base a finding that he was a participant in anything in the nature of a conspiracy, beyond the fact that he had to do with the mechanical work of getting out the paper, and the doctrine which was announced in United States v. Newton (D. C.) 52 Fed. 275, is invoked as applicable to his case. When anything which is the common product of several persons is done, that there are gradations or differences of degree in the guilt of those involved may be clear enough. It is also true that the participation of some of those involved may be so casual or so perfunctory, or be of

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such an irresponsible character as that they cannot be said in any real sense to be parties to a conspiracy to do the thing which has been done. Such a finding, however, is essentially a fact finding, and is to be determined by the triers of fact.

Bringing the discussion of the principle involved from its statement in the abstract to its application to this concrete case, the evidence against the defendant Sukys was such that the trial judge would not have been justified in withdrawing the case against him from the consideration of the jury, but required the submission of it as it was submitted under what we still think to have been adequate instructions to the jury to enable them to pass upon the question of his guilty participation in what was done, and in consequence his connection with the conspiracy, which the jury found to exist. After a verdict of guilty, the same reasons which controlled the trial judge in submitting the question forbid an interference with the verdict. There remains, of course, the duty of giving all the considerations which affect this particular defendant their due weight in imposing sentence.

[3] 5. In the supplemental paper book which has been submitted the point is made that the indictment under which the defendants were tried is bad for duplicity. The proposition of law that it is bad pleading to incorporate in one count two offenses, made such by different statutes, and calling for different measures of punishment, is a proposition the soundness of which must be admitted. Ammerman v. United States, 216 Fed. 326, 132 C. C. A. 470. This admission, however, does not carry with it the further admission that the principle is applicable to this indictment.

The first count presents the fact of the United States being in a state of war, and that during the time of the existence of this state the defendants entered into a conspiracy to have committed certain acts which at such time were offenses against the law. One of them was the offense of causing insubordination. Another was to obstruct enlistments, and it further charges that in pursuance or furtherance of this unlawful conspiracy the defendants committed certain overt acts, and indicates the conspiracy charge to be that which is defined, and the punishment of which is provided for, in section 4 of the Act of June 15, 1917, c. 30, 40 Stat. 219.

The second count differs from the first, in that it charges that the object of the conspiracy was to bring about the offense of inducing men in the military service to desert; the offense being that defined, and the punishment of which is provided for, in the fifth section of the Act of May 18, 1917, c. 15, 40 Stat. 80.

It is true that we have two acts of Congress declaring and defining the offense of conspiracy. One is that which was re-enacted in the 1909 Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1088 [Comp. St. 1916, § 10165 et seq.]). The other is that which is to be found in section 4 of the Act of June 15, 1917. A conspiracy to have committed any of the acts which are offenses against the law in the Act of June 15, 1917, would have been, within the limitations imposed, an offense against the law under the Criminal Code provision of 1909. The two enactments are substantially the same in their provisions, section 4 of the 1917 act being a re-enactment of the act of 1909, except that its

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provisions are limited to the acts declared by that act to be offenses, while the act of 1909 applies to any act which is an offense against the law. It would not, we assume, be asserted that an indictment charging a conspiracy to have committed any of the offenses defined in the Act of June 15, 1917, would not have been good under section 4 of that act. It would not, we assume again, be asserted that an indictment for a conspiracy to have committed the offenses defined in the other sections of the act would not have been a good indictment under the provisions of the Criminal Code of 1909, if there had been no section 4 in the act of 1917.

The offense which the defendants are charged to have conspired to have committed by the second count of the indictment is an offense defined by the Act of May 18, 1917, and is, we think, properly charged as an offense against the 1909 enactment. In the sense intended by counsel, the charge of conspiracy in count 1 is in legal intendment a different offense from the conspiracy charge in count 2. Had the two offenses been charged in one count of the indictment, the count would have been bad for duplicity, and on demurrer would have been so held. It does not follow, however, that an indictment charging the two offenses in separate counts would be open to the same criticism. The question might, of course, be raised by demurrer, and in a sense may be now raised. In view of the provisions, however, of section 1025 of the Revised Statutes (Comp. St. 1916, § 1691), counsel exercised, we think, good judgment in not so raising it. In every real case there is a substantial question of law or fact presented for discussion. Sometimes issues of law and fact are both raised. Sometimes good tactics as well as strategy on the part of counsel calls upon them to bring the stress to bear on one issue and sometimes on the other. When, however, the real issue is one of fact, it is usually the part of wisdom in counsel to meet it as such, and not to obscure the substantial issue through and by raising questions of procedure. There are times, of course, in which the opposite tactics may be wise, but they are exceptional.

Obeying the injunction of section 1025, we must now apply to this indictment the test there prescribed. Applying this test, we are unable to find that there was anything in the form of this indictment which tended "to the prejudice of the defendants." This conclusion is uninfluenced by any of the cases to the effect that the door is closed against the objection now urged, because not made before plea and trial. It is put upon the broad ground that the form of the charge played no part in the trial of the case, and because of this did not injuriously affect the defendants. If counsel, upon a back view of the events of the trial, had changed their minds, and now think anything could have been gained by raising an objection, which they before thought would not have been to the advantage of the defendants to have raised, and were able to show that the defendants had been prejudiced by anything in the form of the indictment, the time of making the objection would not influence us. We are, however, strongly of opinion that counsel exercised good judgment in what they did, and that the defendants were not prejudiced thereby. The case was tried

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on its fact merits, and in a very gratifying atmosphere of fairness and of candor throughout.

The argument addressed to us is in effect that the objection now under discussion would not have pertained to the case, if the second count had been abandoned or withdrawn. A verdict upon an indictment containing only the first count would thus admittedly have been good, and this count will support the verdict in the eyes both of the law and of substantial justice.

6. The position that there must be evidence of a conspiracy before overt acts of some of the conspirators can be shown is well taken. We think, however, this principle was recognized and applied in the trial of the case.

It would give undue length to this already over-long opinion to discuss the evidence, in order either to point out what evidence there was of conspiracy, or to discuss the other point of what evidence there was to connect Sukys with it; nor do we see occasion to discuss the objections which have been urged to the charge of the court, beyond making one or two observations. This brings us to the final point in support of the reasons for a new trial which voice objections to what the trial judge said to the jury.

7. As to the connection of Sukys with the newspaper publication, he had written himself down as the individual who was responsible for that publication. This act, as any other act, was open, of course, to explanation, and it cannot be denied that the explanation given might well go far in the direction of reducing the degree of his criminality. In the face of this, however, and the other evidence in the case, no trial judge could have been supported in a refusal to submit the evidence for the consideration of the jury. The consideration which it should receive has already been intimated as one having an important bearing upon whatever sentence should be imposed upon the defendants. The trial judge did not feel called upon to advert to this feature of the defense in the charge, because it had been fully, clearly, and with marked ability discussed by counsel.

[4] With respect to the charge of the court, this observation is to be made: Every charge to the jury, which is a real charge, and not merely a colorless statement of the law and of the issues of fact involved, ought to reflect the real issue arising out of the evidence, and also as presented in the arguments addressed to the jury. It can never be rightly interpreted unless it is read in the atmosphere of the trial. If the parties, in presenting their cause, strip it of all formalities and technical distinctions, and get right down to the marrow of the case, and to a discussion of the substantial questions involved, it is not only helpful to the jury, but inevitable, that the charge should reflect the same spirit. There can never be applied to a charge under such circumstances the canons of criticism to which a treatise on the law of the case could properly be subjected. The attempt was made in the charge to direct the attention of the jury to the distinction between something which had been made an offense against the law and a conspiracy to have that offense committed. It was therefore impressed upon the jury that it was necessary for them to find, not merely a conspiracy, but a conspiracy to have a crime committed; and this carried with it

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the further necessity of making clear the essentials of the crime to commit which the defendants were charged with having conspired. We do not see that this was confusing to the jury, and, on the contrary, think it was helpful to them.

The rule for a new trial is discharged, and the United States may move for judgment on the verdict and sentence.

EARN LINE S. S. CO. v. SUTHERLAND S. S. CO., Limited.

(District Court, S. D. New York. November 12, 1918.)

1. CONSTITUTIONAL LAW ⟸72—ENCROACHMENT ON EXECUTIVE—ACTS OF FOREIGN SOVEREIGNTY—LEGALITY.
   A domestic court cannot, without trenching on the prerogative of its own executive, hold invalid the act of a foreign sovereign; so the action of the British Admiralty in requisitioning a British steamer under charter must be deemed legal, in an action in the United States by the charterers against the owner.
2. SHIPPING ⟸58(3)—CHARTER PARTY—REQUISITION OF VESSEL—EVIDENCE.
   In an action for breach of a time charter party by the charterers against the owner of a British vessel, requisitioned by the British Admiralty, *held*, that the requisition was legal and in invitum.
3. SHIPPING ⟸51—CHARTER PARTY—REQUISITION OF VESSEL.
   The requisitioning by the British Admiralty of a British vessel, under time charter excepting restraints of princes, etc., *held* to excuse the owner, a British subject, for refusal in Cuba of cargo which the charterer had directed transported, etc.
4. SHIPPING ⟸38—CHARTER PARTY—REQUISITION OF VESSEL.
   Where a time charter of a British vessel contained the usual breakdown clause, and excepted the restraints of princes, etc., and the vessel was requisitioned by the British Admiralty at a rate lower than the going rate, and there appeared no likelihood the vessel would be released before expiration of the charter, *held*, that the owner was warranted in treating the charter at an end, and in refusing to receive further hire and allow the charterer to collect sums paid by the Admiralty.

In Admiralty. Libel by the Earn Line Steamship Company against the Sutherland Steamship Company, Limited. Libelant given leave to move to amend, and libel ordered dismissed, if no motion is made.

This case arises on a libel in personam in the admiralty by the charterers against the owners of the steamship Claveresk for breach of a time charter party entered into in New York on February 8, 1913, under which the Claveresk was let for "about five years from the time of delivery" within the following limits: United States, West Indies, Central America, Caribbean Sea, Gulf of Mexico, South America not south of Bahia Blanca, Europe, and Africa not east of Port Said. Delivery and redelivery were to be made United Kingdom or continent between Bordeaux and Hamburg, and the hire was £1,320 per month. Clause No. 17 read as follows: "Should the vessel be lost, freight paid in advance and not earned (reckoning from the date of her loss) shall be returned to the charterers. The act of God, enemies, fire, restraint of princes, rulers, and people, and all dangers and accidents of the seas, rivers, machinery, boilers, and steam navigation, and errors of navigation throughout this charter party always mutually excepted." The ship was not to carry "molasses or wet sugar," and there was the usual "breakdown" clause.

The Claveresk entered upon the charter on April 17, 1913, and was used in carrying coal south and ore north between Cuba and the United States

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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under a subcontract between the libelant and an iron company. On January 26, 1917, when the charter had a little over a year to run, the owners, who were situated at Newcastle-on-Tyne, in England, received a telegram as follows: "Your steamer Claveresk required for government service after completion discharge in West Indies. Formal requisition follows. Please inform date steamer expected available for government service. Transports L Room 108a." This telegram was sent by a subordinate in the office of the Director of Transports, itself a department of the Lords Commissioners of the Admiralty, to which the respondents answered on the same day by telegram as follows: "Telegram received requisitioning Claveresk. This steamer arrived Baltimore January seventeen expect would discharge ore load coals and sail again about twenty-third. Therefore expect now on passage to Felton, Cuba, where due about thirtieth. Ought to be discharged there one day and ready your service end this month. Can you arrange for government agent in Cuba give captain orders? You will doubtless remember when you requisitioned Claveresk in May, 1915, time charterers intercepted our telegrams and prevented captain receiving orders until ship loaded when you released her."

On January 27th one Cyril Hurcomb, for the Director of Transports, sent a letter to the respondents in confirmation of the Director's telegram. This letter inclosed a requisitioning letter and two copies of a pro forma charter party to be executed by the Lords Commissioners of the Admiralty. It stated that it was not proposed at the time to enter into a formal charter, but that hire would be paid in accordance with the agreement attached. It further stated that the ship would be required to load a full cargo of sugar and that the master should apply to A. H. Lamburn Company, Havana, for instructions. The requisitioning letter, which was inclosed, stated that it had been found necessary by the Lords Commissioners of the Admiralty to requisition the steamer under royal proclamation and under the conditions of the pro forma charter party inclosed. It further stated that the rates of hire as fixed for requisitioned ships had been generally accepted by shipowners, and that payments on this basis would be made as soon as possible.

On January 29th respondents wired their captain as follows: "Steamer requisitioned national service by British government apply to Lemborn [sic?] Havana for orders. Telegraph us acknowledging this message. Refuse load iron ore." The master answered on February 1st: "Instructions received. Wiring Laborn [sic?] Havana." On February 2d, Culliford & Clark, shipping agents, wrote the respondents that they had received the following cable from New York: "Notify owners that hire has been paid. If steamer definitely requisitioned, collect hire from admiralty account Earn Line." To which the respondent answered on the same day that, owing to the action of the government, they had been "frustrated" in completing the time charter and that no hire would be received thereafter on their account. This information was conveyed to the libelant in New York by the respondent's agent on February 17, 1917, at the time of refusing a half month's hire. The steamer was discharged at Felton, Cuba, on February 10, 1917, and has since that time been under requisition by the British Admiralty.

On August 3, 1914, the King of Great Britain issued a proclamation authorizing the Lords Commissioners of the Admiralty to requisition any British ship or vessel within the British Isles or the water adjacent thereto. On November 10, 1915, he issued a second proclamation that any British ship registered in the United Kingdom might be requisitioned for the carriage of food stuffs, and that such requisition should take effect on notice thereof served as therein provided. The notice was to be deemed sufficient and effective if addressed to the corporation owner in proper cases, and might be signed by any person authorized for such purpose by the president of the Board of Trade. On March 16, 1916, Parliament passed an amendment to the Defense of the Realm Act declaring that, when the fulfillment by any person of a contract is interfered with by the necessity of such person's complying with any requirement of the Admiralty, such necessity should be a good defense, and no action should be taken against such person for nonfulfillment of his

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contract. An analogous amendment was also passed on July 10, 1917, the details of which it is not necessary to set out.

The testimony was taken in London by deposition of Sir Henry Erle Richards, for the libelant, and Charles Robertson Dunlop, Esq., for the respondent, upon the validity of this proclamation and of the requisition made in accordance with it. Mr. Dunlop was of opinion that the prerogative of the Crown authorized it to seize British property anywhere for the defense of the realm, and that this prerogative was limited in no sense by the terms of any proclamation which the King might utter. Sir Henry Erle Richards was of opinion that the prerogative extended only to the seizure of such property within the realm as was necessary for its defense, and that, regardless of the terms of the proclamation itself, the King could not under his prerogative seize property outside the realm. He also thought that the prerogative extended only to the actual seizure of property, and did not include a notice operating in personam upon the individual.

Mr. Dunlop was also of opinion that, the notice of requisition being legal, the owners were bound to obey it, and if they disobeyed would be liable to punishment by fine and imprisonment as for a misdemeanor, without specific statutory authority; also that the Crown could compel the owners to obey by a writ of mandamus issuing from the King's Bench Division of the High Court. He believed that the right itself could also be enforced directly by the Crown's seizing the ship on the high seas, or indirectly in a foreign port if the British representatives at such port had power to refuse clearance papers to the master. On these questions Sir Henry Erle Richards expressed no opinion.

Upon the trial of the cause Mr. Frederic R. Coudert and Lieut. Col. Howard Thayer Kingsbury prayed leave to intervene as amici curiæ, on the ground that they had been retained by the British Embassy at Washington to suggest upon the record that the Claveresk had been requisitioned by the government of Great Britain for government service upon the prerogative of the British Crown, on January 27, 1917, at which time the steamer was at sea; that the period of requisition was indefinite, and became operative on February 10, 1917, that she had remained continuously thereafter in the service of the British government under the orders of the Lords Commissioners of the Admiralty, and that such requisition was a governmental act of the government of Great Britain. This suggestion was evidenced by a certificate under the Embassy's seal, signed by Colville Barclay, British Chargé d'Affaires, in the absence of the British Ambassador. The suggestion was entered upon the record and the certificate received in evidence over the objection of the libelant.

Two points were raised: First, whether the requisition of January 27th was a valid excuse within the "restraints of princes" clause, and whether it justified the respondent in finally withdrawing the Claveresk from her charter on February 17, 1917; and, second, in case this point went against the libelant, whether in this proceeding it might have a decree for the difference between the hire received from the admiralty for the duration of the charter and the charter hire under the charter party.

Upon the second point the respondent raised the question of pleading and of jurisdiction. The libel was drawn for a breach of the charter party by repudiation, and contained no allegations concerning hire received by the owners from the Admiralty. The respondent asserted that under the pleading there could be no such award, and that in any event the action was at most for money had and received which was not properly cognizable in a court of admiralty. To meet this objection the libelant, upon the hearing, was allowed to file a replication setting up as new allegations that hire was due under the pro forma charter party between the Admiralty and the owners, and that the hire was greater than the hire reserved in the charter.

Charles S. Haight and Wharton Poor, both of New York City, for libelant.

J. Parker Kirlin and John M. Woolsey, both of New York City, for respondent.

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Frederic R. Coudert and Lieut. Col. Howard Thayer Kingsbury, both of New York City, amici curiæ.

LEARNED HAND, District Judge (after stating the facts as above). [1] The first question in this case is whether the respondents are guilty of a breach of the charter party for refusing to carry ore on February 10, 1917, at Felton, Cuba, a few days before this libel was filed. That question I quite distinguish from their right to repudiate the charter party altogether on February 17, 1917, a point I am reserving for the moment. The libelants object, first, that the action of the British Admiralty was not authorized by the prerogative of the Crown, and could not be an excuse, at least until followed by some threat of compulsion. The act of another sovereign within its own territory is of necessity legal. Underhill v. Hernandez, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456; American Banana Co. v. United Fruit Co., 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047; Oetjen v. Central Leather Co., 246 U. S. 297, 38 Sup. Ct. 309, 62 L. Ed. 726; Ricaud v. American Metal Co., 246 U. S. 304, 38 Sup. Ct. 312, 62 L. Ed. 733; Hewitt v. Speyer, 250 Fed. 367, — C. C. A. —. It is quite true that the act of any public official of a foreign state may in fact be illegal by the municipal law of that state, but no domestic court may admit such a possibility without trenching upon the prerogative of its own executive. The presupposition upon which states must deal with each other is that each is responsible for, and so bound by, the acts of its own functionaries. The Invincible, Fed. Cas. No. 7,054. A court may not, therefore, make any assumption contrary to the fundamental presupposition upon which its executive will act. Hence I should not entertain this issue, whether or no the Embassy's certificate were in evidence.

The libelants urge that in Brunner v. Webster, 5 Com. Cas. 167, the court went into the question of the authority of a foreign official under his own law; but I cannot agree. In that case, while the ship was at Beyrut, the owners inquired of a Roumanian official, one Dr. Obregea, whether a cargo of rice might be discharged at Galatz, a place at which he had jurisdiction. Dr. Obregea answered that he should prevent the discharge, and the owners treated it as a restraint of princes. Kennedy, J., held that in his judgment Dr. Obregea's opinion would have been found erroneous, had the ship proceeded, and held that there was no restraint. The point is a narrow one, but it is still quite true that the official had not undertaken to stop the discharge; he had only indicated his purpose to do so, and Kennedy, J., was not undertaking to pass upon the validity of an official act, but to express his doubts as to what would in the sequel have been the definitive action of the Roumanian government, had the owners proceeded to Galatz.

[2] Nor am I impressed with the suggestion that the formal requisition followed the original telegram only because of the respondents' complaisance in its telegraphic answer. It appears to me somewhat naive to suppose, under such circumstances as then existed, that the British Admiralty made requisitions dependent upon the consent of the shipowner. That the respondents were eager enough to have their

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ship taken is clear enough, as well as is their desire to get rid of a charter then become onerous, and to substitute the Admiralty hire; but that this attitude had any effect upon the result seems to me a thin supposition.

[3] I must therefore assume that the requisition was legal and that it was in invitum. Did it excuse the owner? I think it did. I distinguish between the legality of the requisition which was sent and received in Great Britain and of the respondents' refusal to load in Cuba. The breach was committed in the territory of another state, and its legality was dependent wholly on the law of the place where it occurred, of, if one will, upon the law of New York, where the charter party was made, I do not care which. It was a wrong, not by virtue of British, but of Cuban, law, and no supposed law of the flag has anything whatever to do with it, in my judgment. No command of a foreign sovereign to its subject can legalize a wrong committed elsewhere. The refusal was excused only in case the owner was within the terms of the exception. Mr. Haight says that no coercion was exercised, or even threatened, which is quite true; but I think it is not enough. The ship might have been seized on the high seas by British cruisers—the only testimony is that it would—or it might have been detained by the British consul at Felton. That possibility was alone thought enough in The Athanasios, 228 Fed. 558.

But I do not rely upon restraints directed against the ship itself, for the case was between sovereign and subject, not between the owner and a foreign power. In the former case, at least now in England, a legal command of the sovereign is enough, though it operates only in personam. Brit. & Foreign Mar. Ins. Co. v. Sanday, [1916] 1 A. C. 650; Furness Withy & Co. v. Rederiaktiegelabet Banco, [1817] 2 K. B. 373. There is no case in the United States, so far as I know; but I accept the rule there laid down. It appears to me quite unreasonable to suppose that the parties should have supposed the owner to be released when his ship was restrained by a foreign power, but not when he was himself within the sanctions possible to his own sovereign. Nor do I think it necessary to show to what sanctions he would have in fact been subject. Force is implied in the very nature of law, and the requisition was a command having the force of law. The restraint was in existence, unlike that in Watts, Watts & Co. v. Mitsui, [1917] A. C. 227. It was the "direct" cause of the breach, unlike Becker, Gray & Co. v. London Assur. Co., [1918] A. C. 101. If the actual incidence of power was still somewhat contingent, that is no objection in this country, if reasonable prudence justified compliance, and not defiance. The Styria, 186 U. S. 1, 22 Sup. Ct. 731, 46 L. Ed. 1027; The Kronprinzessin Cecilie, 244 U. S. 12, 37 Sup. Ct. 490, 61 L. Ed. 960. I cannot agree that the owners were called upon to undertake the risks of disobeying a valid command of their sovereign, in order to see whether the command would be pressed with penalties. This was the assumption throughout in Tamplin, etc., Co. v. Anglo-Mexican, etc., Co., [1916] 2 A. C. 227.

So it follows, as I view it, that the refusal to load at Felton was excused, and if the case rested there nothing more need be said; but

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it does not. While the respondents might safely have continued to refuse all orders while the ship remainded on requisition, they would have been obliged to receive the hire and allow the libelants to collect the Admiralty hire; but this they did not do. On the contrary, they repudiated the charter party altogether and that was quite another thing.

[4] This repudiation the respondents justify upon the ground that the adventure has been "frustrated," in the language of the English cases. Whether one looks at it in that way, or as a question arising under the "restraint of princes" clause, makes in my judgment no difference. Certainly under the clause the owner was excused from observing the charterer's orders, because he could not; but if the charterer gave no orders of his own, and was content to adopt the directions of the Admiralty, how did the clause operate to relieve the owner from going on until the ship was used for purposes not covered by the charter party? This had as yet not happened; a voyage from Cuba to England was within the charter limits, and the cargo was not, so far as appears, either "molasses or wet sugar," which were excluded. While the charterer paid the hire, and the ship was not used for such other purposes, I can see no excuse under the clause for refusing to allow the charterer to adopt the Admiralty orders. Nor is there any difference, if one regards the question upon the basis of "frustration." The owner's adventure remained what it had been.

Now, the case is different with the charterer, whose rights must be considered, I believe, although the reason is not at once apparent. The requisition did not, of course, prevent his continued payment of the hire, or his performance of any of the other covenants in the charter party, not even the payment for coals, port charges, and dunnage, if demanded. Yet the restraint of princes clause the parties inserted as a mutual exception. As such it must be given some effect, if it can, and I can think of nothing so natural as to say that it excused the covenant to pay hire when the charterer could not have stipulated use of the ship. I recognize the force of Lord Parker's judgment in Tamplin, etc., Co. v. Anglo-Mexican, etc., Co., [1916] 2 A. C. 397, based upon the "breakdown" clause; but, as I view this charter, we have not the case of implying a condition which the parties have not expressed, but of giving effect to all the language which they used. The purpose evidenced by that clause is to put the vessel off hire when the charterer has no use of her. It is altogether consonant with that purpose to interpret the restraint of princes clause as effecting the same result, and the embarrassment felt by Lord Parker appears to me largely overcome when the parties have provided express language which must be taken as supplementary to the conditions specified in the "breakdown" clause.

However, as I have already implied, that excuse depends upon the failure of the consideration of the covenant to pay hire, not upon the impossibility of performance of the covenant, and when the ship is requisitioned on full hire there appears to me to be no failure at all. It is true that the charterer loses the use of the ship, but by hypothesis he gets the full equivalent in money. Presumably he could fix other

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equal tonnage with the substituted hire, but it makes no difference whether he can or not. The venture is commercial, and may be settled in money. The changed situation is changed only in form; the charterer has the risk, and the advantage of any variation in the rates, and the owner his original assurance of the stipulated hire, which is precisely what each party agreed to accept. Moreover, if the charterer alone be allowed to disaffirm, he will do so only when the rates have fallen, and not if they rise. Such a right is obviously unfair, and could not have been the purpose of the parties. It deprives the owner of the security of a fixed hire, and relieves the charterer of the risk of a fall in rates. If, therefore, the charterer have such a right, so must the owner, which means that the contract is at an end, though, if continued, it would for the balance of the term leave the parties in substance in exactly that position which they accepted at the outset. Hence, if the Admiralty hire in the case at bar be fixed at the market rates for tonnage, I think that the charterer had no right to disaffirm upon requisition, and the owner no reciprocal right. That question the record does not answer.

If, on the other hand, the requisition be not at going rates, but at a substantially lower amount, as was, indeed, conceded arguendo, the situation appears to me quite different. I think it should fall as much within the clause as though the ship had been made a prize. Now it is quite true, and the case at bar is an instance of it, that notwithstanding that fact the actual Admiralty hire may be greater than the charter hire. The proper time at which to look is not, however, after the event, and when the rates have changed. The chief purpose of the charter, as I have said, is to impose upon one the risk of change, and to secure the other against it. But if the parties had been faced with the possibility that during the term the ship would have been seized at a large discount from the then going hire, obviously, if both were fair, they would have treated it as like a seizure without hire at all. The charterer's right and risk in the variation in rates would be "loaded," in the language of an actuary, with a heavy discount. He would not, if I may use the phrase, be getting a fair run for his money. Such an event the clause seems to me to cover as much as the capture of the ship or the like. And if the charterer have such a right, then so must the owner in similar case, and for the same reasons as when the requisition is at full rates. He may not be deprived of his assurance of a fixed hire when the venture turns out to be a loss, and deprived of the gain when it results in a profit.

There is, it is true, some artificiality in speaking of the right of the charterer to repudiate as a protection when the charter party was made before the war; but I suppose we must agree that the rule should apply generally both to charters made before the war and after it had affected rates. We necessarily look at the putative situation presented to the parties when the contract is made somewhat abstractly, not in the full concreteness of what afterwards occurred. If we did not, there could never be a bargain at all. Therefore, as I view it, if the requisition be permanent, the right of either party to disaffirm turns upon the Admiralty rate.

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The English cases, and they are the only ones which deal with the question, do not, I must own, consider the matter quite in this way, though the result is the same as that which I have reached. The question always is of an implied condition which the parties have not expressed, an approach not really different in practice, though it is somewhat different in theory, at least if the exception be mutual. The absence of any consideration of the amount of the Admiralty hire I apprehend is due to the fact that the hire is never in fact a full equivalent. It would, indeed, be hardly excusable to consider the question so generally as I have, were it not that the difference in judicial opinion in England had left the law not wholly settled in theory. The rule is nevertheless quite the same as that which, as it seems to me, theoretical considerations would suggest.

The cases all take their origin from Tamplin, etc., Co. v. Anglo-Mexican, etc., Co., [1916] 2 A. C. 397, in which the owner had repudiated the charter party upon requisition of the ship. In both the courts below he had been unsuccessful, upon the ground that his concern was only with his hire, and that he could not complain if the charterer chose to accept the changed status, so long as he paid regularly. In the House of Lords the decision was affirmed by a vote of three to two, but for quite different reasons. Lord Parker of Waddington thought that the whole doctrine of an implied condition contradicted the express provisions of the charter party, and that the requisition did not affect the charterer's obligations or his rights to the Admiralty hire. Lord Haldane and Lord Atkinson thought that any requisition interrupted so vitally the basis on which the parties had contracted that the charter party was at an end. Lord Loreburn agreed with them in principle, but thought that the rule applied only when it was apparent that the requisition would outlast the charter party and that there was no such evidence. The case has been accepted as ruling, that, when the requisition to the mind of a reasonable man would seem likely to outlast the charter party, it terminated the contract, and that it applies as well to time as to voyage charters.

The charterer repudiated, and was sued by the owner, in Countess of Warwick S. S. Co. v. Le Nickel Soc. An., 34 T. L. R. 27, Admiral Shipping Co. v. Widner, Hopkins & Co., [1917] 1 K. B. 222, and Lloyd Royal Belge, etc., v. Stathatos, 33 T. L. R. 390 (as to the counterclaim); while the owner repudiated, and was sued by the charterer, in Chinese Eng. & Mining Co. v. Sale, [1917] 2 K. B. 599, and Heilgers v. Cambrian, etc., Co., 33 T. L. R. 348. Throughout, the only question discussed has been the probable duration of the requisition at the time when it was made; Tamplin, etc., Co. v. Anglo-Mexican, etc., Co., supra, being interpreted as leaving open only that issue.

There remains the question of the probable duration of the requisition. Even if the English rule be adopted, it appears to me that the probabilities were all strongly that the requisition would outlast the remainder of the term. I take it that the whole circumstances must be considered, and not merely the unexpired part of the term. If so, the evidence is strongly with the respondents. All the shipping men called were of opinion that there was small chance of any release at

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the time, and the well-known facts bear them out. In February, 1917, Germany had already declared her unrestricted U-boat campaign and it was in force. The seriousness of the situation to Great Britain is a matter of such common knowledge that I may refer to it. The following months of that year were among the most critical of the war, and the crisis turned wholly upon the destruction of shipping. The avowed purpose was to prevent the victualing of the United Kingdom, and there was no reason to question the relentless determination with which it was announced. While the success of the project was, of course, uncertain, the large diminution of Britain's mercantile marine was to all intents a certainty, as well as the continued necessity of a national mobilization of all bottoms. Of course, no one could say how long the war would last; but the necessity of continuing that mobilization would not terminate with the war, for the shortage would in every probability be felt for long thereafter. The likelihood that a vessel then requisitioned should be released within 14 months appears to me, therefore, very slight.

If, on the other hand, the time at which the contract must be repudiated is at an interval after requisition, the result is the same. Every month after February, 1917, until April, 1918, only made the need of ships more pressing, and the event in fact justified the respondents' assumption.

I should myself incline to think that any requisition ought prima facie to terminate the charter party. As I have said, I do not regard the conditions of the "breakdown" clause as necessarily exclusive. It does not seem to me, with deference, a very practicable rule to speculate upon whether the charter party will outlast the requisition by any period at all. Suppose it does outlast it by a few months. The charterer may have been deprived of the use of the ship without adequate return for perhaps all but a short time. It seems unfair to hold him to the hire. I recognize the difficulties where the charter may have years to run; but when, as here, the question is of months, it seems to me that a requisition which is presumably intended for a substantial time should terminate the contract. This question it is not, however, necessary for me to decide.

Hence it follows that the libel should be dismissed, unless the libelants can show that the Admiralty hire was intended to be a full equivalent for the going rates. It is not necessary, therefore, to consider the questions of jurisdiction and of pleading which the case raises until it appears that they wish to raise that question. Within ten days after the filing of this opinion I will entertain a motion to amend the libel, alleging that fact; but, if none is made, the libel will be dismissed. The replication in no event appears to me valid.

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UNITED STATES v. SCHAFER et al.

(District Court, E. D. Pennsylvania. December 9, 1918.)

No. 89.

1. War ⟹4—Espionage Act—Making False Reports.
An indictment against newspaper publishers, under Espionage Act, for making false reports, etc., by altering original news dispatches before publication, is supported by evidence showing that, while defendants received no dispatches from news agencies, they took dispatches from other papers and so altered them as to give aid to the enemy.

2. War ⟹4—Espionage Act—Making False Reports.
It is not a defense to a prosecution for making false statements to promote the success of the enemy in time of war in a newspaper published by defendants that the statements were not made from motives of personal disloyalty, but to further the purposes of an organization of which the paper was the organ.

3. Criminal Law ⟹862—Jury—Application of Personal Knowledge.
The jury in criminal case may properly take cognizance of facts which are matters of general information.

Criminal prosecution by the United States against Peter Schafer, Paul Vogel, Louis Werner, Martin Darkow, and Herman Lemke. On motions in arrest of judgment and for new trial. Discharged.

See, also, 248 Fed. 290.

Samuel Rosenbaum, Asst. U. S. Atty., Francis Fisher Kane, U. S. Atty., and Owen J. Roberts, Sp. Asst. U. S. Atty., all of Philadelphia, Pa.

Wm. A. Gray, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The reasons for a new trial in this case number 49 in all. Some of them are necessarily what may be characterized as formal. Many of the others indicate in their statement whether they are well or ill taken, and call for no discussion. This leaves for discussion three questions, two of which bear upon the course of the trial as affecting all of the defendants, and one as affecting two or possibly three of them.

[1] One of the questions presented may be thus stated: It goes to the proposition of charging a defendant with one offense and convicting him of a different offense, and one with which he has not been charged in accordance with legal forms. As a basis for the reason for a new trial advanced, the assertion is made with respect to certain counts in the indictment (those which may be called "false news" counts) that the theory upon which the indictment was framed is that a news dispatch emanated from a certain source and place, as, for illustration, an associated press dispatch from Berne or Amsterdam, and that the defendants altered this dispatch so as to change its meaning. The falsity is thus charged to have consisted in this alteration.

Another basis for the reasons for a new trial advanced is the further assertion that there was no proof of either the sending, receipt, or alteration of any such dispatches, and the inference is drawn that there

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could be no lawful conviction of guilt of that charge in the absence of evidence to support it.

With respect to the evidence which was introduced, the further assertion is made that it was confined to what might support a charge that the defendants had published a false report, but was wholly barren of anything which would support the charge as made.

The basis for these assertions is the fact that the newspaper office from which the publication issued received no dispatches of any kind. The paper frequently contained what purported to be dispatches from the different news centers of the world, and they were so published as to present the appearance of being news which had come to the office by cable or otherwise. Their real origin was this: Newspapers printed in English and other languages came to the office. Those who had to do with the publication of the newspaper of the defendants made free use of the contents of other papers. In newspaper parlance, they "lifted" the news from other papers.

The real gravamen of the offense of which they were guilty, in so far as they were guilty, without regard to any of its purely legal aspects, was that they changed the news which they had thus "lifted" so as to give it a tone which would afford comfort and encouragement to the enemies of the United States, or would be injurious to our cause. It will thus be seen that in no aspect did the act which was committed differ in substance from the act which was charged. Whether it did so differ in the strictly legal view depends wholly upon what the indictment means by the phrase "original dispatch."

The thought entertained by the learned counsel for the defendants, and sought to be impressed upon the trial judge, and now reexpressed, is that the indictment charged a specific offense and charged it in the narrow sense of being the act of falsifying a dispatch which had emanated from a news collecting agency, and that the dispatch so changed was one which in fact had been received by the defendants.

The logical outcome of this thought is that the only evidence which would support such a charge would be the testimony of some one connected with such a news agency that such a dispatch had been sent to the defendants, followed by evidence of its contents, and further evidence that the dispatch had been published in a falsified form.

The trial judge refused to put this narrow construction upon the charge as laid in the indictment, but read it as expressive of a charge of the substantial offense of disseminating false statements which tended and were put out with intent to promote the success of the enemies of the United States.

The charge thus made would emphatically embrace the act of taking a news dispatch from another paper and so changing it as to make it serve a disloyal purpose. The dispatch so changed would be an "original dispatch" within the meaning of the indictment.

To give emphasis to the distinction sought to be expressed, we are of opinion although there is nothing in this case to require us to go so far, that the charge in substance would have been supported by proof that the defendants had wholly faked a dispatch, so that it had

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no other origin than an emanation from the brain of the person who faked it.

The question as now presented is wholly an appellate question, and we take the view, as above expressed, because we deem it to be in line with the command of Rev. St. § 1025 (Comp. St. 1916, § 1691). As we view it, the motive for that command is a very practical one. A very short experience in the trial of causes, criminal or civil, brings out with cameo-like clearness two methods of trial. When one method is resorted to, procedure questions are given such prominence that the substantial questions of fact or of substantive law are wholly or almost lost to view. When the other method is employed counsel and parties by an agreement, tacit or expressed, join in presenting the substantial issues which arise in the case, and as the phrase is, agree to try the case on its merits without regard to form.

The injunction of Rev. St. § 1025, was laid upon the courts with the contrast between these two systems of trial practice in the mind of Congress, and the command is that no indictment shall be held to be insufficient or effect be refused to a verdict if the indictment and trial be such as that a trial may be had and the trial is had in accordance with the second method described. This, as we understand it, is what Congress means in saying that the test of every question of this character which is raised is whether or not there has crept into the indictment or the trial anything which has worked to the prejudice of the defendants. There is a class of distinctions with which highly trained and bright intellects love to deal which may fitly be characterized as metaphysical. As an intellectual exercise, discussion of them is always pleasurable and may have a high didactic value, but the practical affairs of life cannot be made to await the end of the discussion.

We adhere to the view entertained by the trial judge that the indictment charged and the evidence supports the offense defined by the Espionage Law relating to the making of false reports, etc.

The second of the points remaining for discussion in the cause arises out of that part of the charge which dealt with the distinction between treason and the acts condemned by the Espionage Law (Act June 15, 1917, c. 30, 40 Stat. 217) as criminal. As has often been observed, a charge to a jury should always be read in the atmosphere of the trial in which it was delivered. One of the functions of the charge is to enable a jury to comprehend the issues of a cause as presented to them by the evidence and the arguments of counsel. The cause which they have in their minds as the one to be determined by them is the cause as thus presented, and it would only work confusion if the trial judge did not shape the charge accordingly. There was evidently, as the charge itself indicates, some occurrence of the trial which prompted the comment of which complaint is now made. A part of that complaint is that the comment was irrelevant and tended to prejudice the defendants.

There is nothing which we have been able to find in the record which either suggests or revives a recollection of what the happening was. In the absence of any such recollection, it must be left to

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surmise. As counsel for the defendants now read the charge, and perhaps as they heard it, they have received the impression that the charge magnified the crime laid in the indictment. Such was not its purpose, nor do we think its practical effect. The jury was made up of high-minded and intelligent men. This does not mean that they would not be swayed by the emotions which we all feel when what we call our love of country is hurt; but it does mean that they would distinguish between acts which have been made criminal and publications or speeches which affect us unpleasantly. Aside from the particular happening, whatever it was, which provoked this part of the charge, the comments complained of had evidently a double purpose. One was that it would not follow that, because mere words might not be overt acts of treason, mere words could not constitute a crime. The other is that, no matter how objectionable they might be to the hearer or the reader, because coming within the category of what was disloyal, or what would be in the common acceptation treasonable, they would not be a crime, in the legal sense, of which any one could be convicted, unless the objectionable acts had been declared to be a crime by some act of Congress. This thought is, we think, clearly expressed in the main charge, and is certainly clearly presented in what was added to the main charge upon exception taken by defendants.

The point now made is properly enough vigorously pressed by counsel, and we have given it very careful consideration. The result is we are unable to see in this any reason for interference with the verdict.

[2] The benefit of the third point is limited to the defendants Lemke, Schafer, and Vogel. Its application to Lemke is not conceded. Some countenance is lent to it by the act of the district attorney in not asking the jury for the conviction of Schafer and Vogel, except upon the conspiracy count. The connection of these two men with the publication was such as, we assume, to admittedly affect the degree of guilt, and because of this is a consideration in the imposition of sentence. What may in a sense be called their formal responsibility for the publication furnishes in itself evidence to be submitted to a jury. Their real connection with it was at least this: That while their main motive in being parties to the publication of the newspaper was to promote the interests of the organization with which they were connected, there were justifying grounds for the finding that in order to promote this interest they were not only willing, but deemed it helpful, that the newspaper as the organ of their organization should assume an attitude which the jury has found to be a disloyal one. The truth many be that their motive was not a disloyal one, in the sense that they wished to promote the success of the enemies of the United States; but the evidence again justified the finding that their intent was an unlawful one, because they could not cater to those whose support they sought, unless they did have the newspaper do all which it could do toward promoting the success of that government with the people of which we were at war. Indeed, in disclaiming disloyal motives, there was a plain, if not a frank, admission of this intent, and of the selfish reason behind it.

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We do not find this reason for a new trial to be any ground for interference with the verdict.

[3] Perhaps one other thing calls for some comment. There was an attempt made to express in the charge to the jury the thought that with respect to all matters which are matters of general information the jury had the right to call upon this fund of general knowledge which was in their keeping. This must be so, because there is no practical method of having such a state of facts enter into the make-up of a judgment other than by drawing upon this fund. The kind of knowledge which is based upon what are classified as historical facts supplies us with an illustration of the distinction intended. The quoted parts of the charge dealing with this thought were not very happily, or at least very clearly, expressed. What was in mind was that the jury would want to know how they were to deal with certain questions which were essentially questions of fact, and yet in respect to which there was, strictly speaking, no evidence.

One of these was the question of the existence of a state of war. This was in no important sense a question, but with respect to how a state of war could be found to be a fact, the method employed afforded an illustration of how these other questions of fact with which the jury had to deal, which were matters of general knowledge, could be met. Many instances of so-called propaganda in this and other countries may be used as illustrations. What is put out is known to be false, because so pronounced by the information which is common to all. The question, however, is what will justify a finding of falsity? Upon what can the finding be based? The answer is that, if the statements made are of matters which are the subject of general information and are part of our common knowledge, their truth or falsity may be thus tested. The line between what may be thus tested and a specific fact, which must be proven, is a line which cannot otherwise be defined than by the statement that we may judge of anything which is within, and the subject of common knowledge, although we may have no other light leading us to a judgment than that afforded by such common knowledge as we have.

The complaint made is that the instruction given was so general as to be misleading, and was fraught with danger (to use an extravagant illustration) that the jury might accept it as a warrant, in cases which had aroused a popular interest and in that sense were matters of common knowledge, to convict defendants who were thus commonly thought to be guilty.

We have carefully re-read the charge with the thought thus indicated in mind, and when read in the light of the events of the trial and of the arguments addressed to the jury, we cannot think the jury failed to grasp the distinction made between those things of which judicial notice could be taken and facts which must be affirmatively and even formally established by evidence.

The motions in arrest of judgment and for a new trial are discharged.

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UNITED STATES RAILROAD ADMINISTRATION, W. G. McAdoo, Director General of Railroads (Atlantic Coast Line Railroad), v. BURCH, Sheriff.

(District Court, E. D. South Carolina. November 30, 1918.)

No. 206.

1. RAILROADS ⟸5½, New, vol. 6A Key-No. Series—TAKING POSSESSION OF RAILROADS—COURTS.

The extent of the power conferred by Act Aug. 29, 1916 (Comp. St. 1916, § 1974a), authorizing the President, through the Secretary of War, to take possession of railroads in time of war, etc., and the determination of the property to be taken possession of, are questions for the court.

2. RAILROADS ⟸5½, New, vol. 6A Key-No. Series—TAKING POSSESSION OF RAILROADS—EFFECT.

Under Act Aug. 29, 1916 (Comp. St. 1916, § 1974a), authorizing the President in time of war to take possession of railroads, etc., and the presidential proclamation of December 26, 1917, and despite Act March 21, 1918, the Director General of Railroads was not authorized to take possession of land belonging to a railroad company which was not used in its business as a carrier; hence sale of such land under execution against the railroad company will not be enjoined on suit of the Director General, the company making no objection.

3. COURTS ⟸508(3)—FEDERAL COURTS—JURISDICTION.

The federal courts, by virtue of their general equity powers, have jurisdiction to enjoin the enforcement of a judgment in the state courts upon the usual principles under which a court of equity will enjoin enforcement of a judgment.

4. RAILROADS ⟸5½, New, vol. 6A Key-No. Series—FEDERAL COURTS—JURISDICTION.

A suit by the Director General of Railroads to enjoin sale of land owned by a railroad under execution issued on a judgment of a state court, on the theory that, having taken possession of the same, it was exempt from process under act of March 21, 1918, is a suit of a civil nature arising under the laws of the United States, etc., of which the federal District Court has jurisdiction, for it must be deemed that Act March 21, 1918, modified Jud. Code, § 265 (Comp. St. 1916, § 1242).

In Equity. Bill by the United States Railroad Administration, W. G. McAdoo, Director General of Railroads (Atlantic Coast Line Railroad), against Thomas S. Burch, as Sheriff of Florence County. On order to show cause why defendant should not be restrained and enjoined, etc. Preliminary injunction refused, etc.

Rutledge & Hyde, of Charleston, S. C., for complainants.
Logan & Grace, of Columbia, S. C., for defendant.

SMITH, District Judge. This matter came on to be heard under the order of this court made November 26, 1918, requiring the defendant to show cause on the 2d day of December, 1918, at 9 o'clock a. m., why he should not be restrained and enjoined from further proceeding to advertise or sell the property of the Atlantic Coast Line Railroad Company, described in Exhibit A, annexed to the bill of complaint herein. By consent of counsel the hearing was had this day, in lieu of being had on the day named in the said order, to wit, 2d day of December, 1918.

The defendant duly appeared and filed his return to the order to show cause, and counsel on both sides have been heard; the hearing being had upon the bill of complaint and the exhibits and the return to the rule to show cause and exhibits.

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The allegation of the complainant is that he is in actual physical possession of the property (sought to be sold by the defendant) under the terms of the statutes passed by the Congress of the United States, to wit, the act approved August 29, 1916, entitled "An act making appropriations for the support of the army for the fiscal year ending June thirtieth, nine hundred and seventeen, and for other purposes" (U. S. Stat. at Large, vol. 39, p. 645, c. 418), and of the proclamation of the President of the United States made the 26th of December, 1917, in pursuance thereof, and also of the act approved March 21, 1918, entitled "An act to provide for the operation of transportation systems while under federal control, for the just compensation of their owners and for other purposes."

So far as the papers now before the court are concerned, to wit, the bill of complaint and exhibits, and the return and exhibits, the facts appear to be that a final judgment has been recovered in the state court of South Carolina, in a cause of Travis Barnes, by his Guardian ad Litem, John J. Barnes, v. Atlantic Coast Line Railroad Co. This final judgment was recovered on the 18th day of March, 1918, and, upon an appeal therefrom by the defendant Atlantic Coast Line Railroad Company, the judgment was, by the Supreme Court of South Carolina, in August, 1918, affirmed (96 S. E. 530), and the remittitur affirming the same was forthwith duly filed in the court of common pleas for Charleston county.

Under the provisions of the state law of South Carolina, this final judgment was transcripted to the county of Florence, and, upon execution issued thereon in the county of Florence, a levy has been made upon certain real estate of the defendant the Atlantic Coast Line Railroad, in the county of Florence, and the same has been advertised for sale to satisfy the execution. To enjoin the sale under the execution, the bill of complaint in this cause has been filed.

It further appears that the action in the state court was begun on September 21, 1915, for a cause of action accruing on the 13th of February, 1915, and long anterior to the enactment by Congress of the statutes above referred to.

It also appears that the property levied on and advertised for sale consists of several pieces of land in the city and county of Florence, S. C. These tracts of land are mostly lots in the city of Florence and land adjacent thereto; and according to the statement of the tax agent of the defendant the Atlantic Coast Line Railroad, made in February, 1918, when the same were returned for taxation, this property so levied on was returned as real estate belonging to the Atlantic Coast Line Railroad, not necessary to the daily running of the road in Florence, S. C., and, as a conclusion of fact based upon the only reasonable inference that can be made from the papers before the court, these lots of land would not appear in any wise to be property or land essential or necessary to the performance of the transportation duties and operations of the defendant Atlantic Coast Line Railroad.

The question, therefore, is whether or not the complainant William G. McAdoo, as Director General of Railroads, is legally in possession of this property so as to be entitled to the protection of that clause of the

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act approved March 21, 1918, which provides that no process, mesne or final, shall be levied against any property under such federal control.

[1, 2] The first question to be determined under the statutes is as to what property the President was entitled, through the Secretary of War, to take possession of and legally to hold, so as to be entitled to the benefit of such exemption from the levy of final process. Under the terms of the act of the 29th August, 1916, it is declared as follows:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with emergency as may be needful or desirable." Comp. St. 1916, § 1974a.

An inspection of the whole statute, as well as of this clause, shows that the purpose and intent of the statute was to provide for the speedy and expeditious transportation of troops, war material, and equipment; and for that purpose to give possession of the systems of transportation to the government, through the Secretary of War, with power to use such systems for such transportation to the exclusion, as far as may be necessary, of all other traffic, either in passengers or freight, thereon. That is the purpose of the statute, and it is evident that the purpose of the statute giving such enlarged powers, to be exercised during the emergency of war, was not for the purpose of taking possession of any property which might be owned by the different corporations operating and owning systems of transportation, and which property was wholly independent of transportation uses, and neither incidental nor necessary for them, but was simply to allow the government to get control of everything necessary or appropriate for transportation purposes.

Under this statute, the President could authorize the Secretary of War only to take possession of such property as he himself is authorized to take possession of under the statute. The extent of his powers, and the definition of what property he was authorized to take possession of under the statute, would be necessarily a judicial question. All acts done and all property taken possession of within the adjudicated extent of the powers allowed might be a ministerial question; but as to the extent of those powers, and whether the powers were given, must always, under the Constitution of the United States, remain a judicial question, and one to be decided by the courts of the land.

Under the terms of this statute, the President issued a proclamation on the 26th of December, 1917, referring to the statute, and declaring that, through the Secretary of War, he took possession and assumed control at 12 o'clock noon on the 28th day of December, 1917, of each and every system of transportation, and the appurtenances thereof, located wholly or in part within the boundaries of the continental United States, and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies, and terminal associations, sleeping

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and parlor car lines, elevators, warehouses, telegraph and telephone lines, and all other equipment and appurtenances, commonly used upon or operated as a part of such rail or combined rail and water systems of transportation, to the end that such systems of transportation be utilized for the transportation and transfer of troops, war material, and equipment, to the exclusion, so far as may be necessary, of all other traffic thereon.

The proclamation further proceeds that the possession, control, operation, and utilization of such transportation systems shall be exercised by and through William G. McAdoo, who was by the proclamation appointed and designated Director General of Railroads.

The language of this proclamation, assuming that the entire language is warranted by the powers extended to the President under the terms of the statute, and which powers he could not in any proclamation lawfully exceed, would not itself appear to include the property in question in these proceedings, unless it should be supposed to be included under the general designation of all other equipment and appurtenances, commonly used upon or operated as a part of such rail or combined rail and water systems of transportation. The outlying lots of land held by a railroad company as an investment, or which it may have purchased at some time and still continued to hold, would not appear to be included within any of the language of this proclamation. The position of counsel for the complainant is that the statute and the proclamation must be considered to include all property of a railroad. If this contention were correct, it would cover all moneys of the railroad in its possession, when possession was taken under the proclamation of the President. It would also cover all personal property, including stocks in industrial corporations, if any such were owned by the railroad at that time.

A fair construction of the statutes, and of the proclamation itself, however, would not appear to warrant any such inference that their provisions include such property. The language appears to be clearly limited to transportation systems, and to property which was used for transportation purposes, including therein all property fairly incidental or necessary for use in effecting such purposes. Separated, disconnected, unutilized tracts of land would not appear to come within this definition.

The later statute of March 21, 1918, would not appear to affect this conclusion. There is nothing in it which extends the powers of the President as to the character of the property he could take possession of under the previous statute. By section 9 it is provided that the provisions of the act of August 29, 1916, shall remain in force and effect except as expressly modified and restricted by the late act; and the President, in addition to the powers conferred by that statute, is given such other and further powers necessary or proper to give effect to the powers therein and theretofore conferred; that is to say, the President has only the powers in two acts conferred, and he is given such further powers as are necessary or appropriate to give effect to those powers. That is all.

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If the purpose, intent, and meaning of the original statute was to give him power to take possession of only transportation facilities, there is nothing in the later act to extend the powers given him so as to give him the right to take possession of disconnected property and property unnecessary for the purposes of transportation.

The proclamation of the President expressly provides that regular dividends theretofore declared, and maturing interest upon bonds, debentures, and other obligations, may be paid in due course; the said regular dividends and interest may be continued to be paid until and unless the said Director General shall from time to time otherwise, by general or special order, determine; and the later statute of 21st March, 1918, expressly provides a method by which the carrier might be paid a rental for the use of its transportation facilities, and the proceeds of such rental might be by the carrier devoted to the payment of its own obligations.

The present case presents the case of a creditor holding a final judgment, which should normally be paid forthwith, and with the right to the creditor, if the same be not paid, to enforce payment out of any property of the judgment debtor liable to judgment execution. To hold that the railroad company is by these statutes put in a position where it is not bound to pay any of its debts until the possession of its property is restored to it, although it may receive the rentals in the meantime, might mean that, while the railroad company would still continue to be in possession of the rents and profits and other results flowing from the property, its creditors, who are entitled to payment therefrom, might be greatly injured by their inability to collect payment for an indefinite period.

The case before the court, however, does not depend upon any inability or unfortunate position that the railroad is placed in, because its property has been taken possession of by the government, or at least so much of its property as is necessary for use for transportation purposes. Were the railroad company to file a bill in equity, stating that all of its property had been taken possession of by the government by virtue of these acts, and that it had no property or funds which could be applied to the payment of this debt, and that a creditor ought not to be allowed by the compulsory process of judgment and execution to sell away the property of the railroad company, and deprive it of its legal title, when through the action of the government it was powerless to make payment, it might present a question calling for the interposition of an injunction from a court of equity until the railroad company should be in a position to use its funds to meet the claims of its creditors.

In other words, if the railroad company were in position to claim that the effect of these statutes was a compulsory statutory moratorium, it might be in a position, in view of the great injury and injustice worked to it by permitting a creditor to assert his legal rights under execution—it might be in a position to have an injunction. That is not the case, however. The Atlantic Coast Line Railroad Company is not before the court. The Atlantic Coast Line Railroad Company asks no injunction. The injunction is sought on behalf of the Director

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General appointed by the President's proclamation, upon the single ground that he is legally in possession of this property, and that, being in possession of this property, then under the terms of section 10 of the act of the 21st March, 1918, no final process could be levied upon it. The only question thus for the court is whether or not, under the terms of the statutes of the United States, the complainant in this case is legally in possession of the property, so as to entitle him to the benefit of the exemption given by the act from the levy of final process. It does not appear to the court that the property is property of which, under the terms of the statute, the President was authorized to take possession. If the President was not authorized to take possession, then he could not authorize the Secretary of War or the Director General to take possession, and any possession taken by them would be unlawful and would in no wise divest the rights of other parties.

The complainant being thus not in legal possession of this property, and the property being, in the opinion of this court, not property of which he could legally take possession, under the terms of the statutes, it is not property which, under the terms of those statutes, is exempt from the levy of final process; and it follows from that, that the injunction should be refused.

If it in any wise appeared to the court that the Atlantic Coast Line Railroad Company was itself bona fide seeking relief because it had been actually divested of the possession of the property by the act of the government, and that it had in consequence been deprived of the power and means to pay its creditors, the case would be otherwise.

But from the facts the court must infer that the railroad company is amply able to meet its debts, and, if such be the case, then the effect of an injunction now would be to permit the railroad company, if it desired, to use the position of the Director General of Railroads as a screen to shield it from the just claims of its creditors.

[3, 4] The defendant in his return to the rule has raised the question that this court has no jurisdiction of the cause, and cannot enjoin a sale under execution under a judgment in a state court. Inasmuch as this question is a question arising in a case which asks for the enforcement of a right claimed to exist and be given under the terms of an act of Congress, it is evidently an action of a civil nature in equity, brought by an officer of the United States authorized to sue, and arising under the laws of the United States, where it appears upon the face of the bill of complaint that the right claimed by the plaintiff and sought to be enforced arises by virtue of and under a statute of the United States.

The question whether or not final process can be levied against this property is one that arises under the very terms of the act of March 21, 1918; nor is the position that this court has no jurisdiction to stay the execution of a judgment recovered in the state court well taken. It has been laid down that the United States courts, by virtue of their general equity powers, have jurisdiction to enjoin the enforcement of a judgment in the state court upon the usual principles under which courts of equity will enjoin the enforcement of a judgment. Simon v. Southern Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492;

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Union Ry. Co. v. Illinois Cent. R. Co., 207 Fed. 745, 125 C. C. A. 283; Schultz v. Highland Gold Mines Co. (C. C.) 158 Fed. 337; Linton v. Safe Deposit & Title Guaranty Co. (C. C.) 147 Fed. 824.

Further, the special statutory exemption from process, created by the act of 21st March, 1918, must be construed, in connection with the provision of section 265 of the Judicial Code of the United States (formerly section 720, U. S. R. S.; Comp. St. 1916, § 1242), as modifying the language of that section, and creating another exception, under which the attempted enforcement of the mesne and final process from a state court may be restrained in proper cases.

It would appear, therefore, that the court has jurisdiction of the proceedings, although, upon consideration of the facts of the case, it does not appear to be a case in which a preliminary injunction should be issued; and the motion for a preliminary injunction is accordingly refused, and the injunction contained in the order of this court, dated November 26, 1918, is hereby vacated.

BROWN v. CRAWFORD et al.

CRAWFORD et al. v. KASTE et al.

(District Court, D. Oregon. November 25, 1918.)

Nos. 7426, 8015.

1. COURTS ⟸497—JURISDICTION—COMITY.
   Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts, though of concurrent jurisdiction, and they have no power to render judgment disturbing the possession of the property while in custody of the court which seized it.
2. COURTS ⟸493(3)—JURISDICTION—COMITY.
   Where the controversy is not the same—that is, where the issues in one suit are different from those in another, etc.—there can be no infringement of jurisdiction, as between the courts, in obtaining cognizance of the cases, though the court first obtaining possession of the res is entitled to retain the same for purpose of disposition, etc.
3. COURTS ⟸493(3)—JURISDICTION—COMITY.
   Though a state court had taken possession of the property of an insolvent corporation which was subject to mortgages, by appointing a receiver, *held* that the federal court had jurisdiction of a suit to foreclose the mortgages, the two tribunals being concurrent, and the foreclosure proceedings not necessarily disturbing the state court's possession of the property.
4. BANKRUPTCY ⟸20(2)—TRUSTEE—AUTHORITY OF.
   Where the state court appointed a receiver to take possession of the property of an insolvent corporation, *held*, bankruptcy proceedings having subsequently been begun, that the trustee in bankruptcy is entitled to possession of the property in preference to the receiver.
5. BANKRUPTCY ⟸20(2)—TRUSTEE—RIGHTFUL POSSESSION.
   Where a receiver had been appointed by the state court to take possession of the property of an insolvent corporation, and one who had acquired the equity of redemption of land which the corporation had mortgaged agreed that, if a receiver was appointed, such equity would

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be subordinated to the protection of the unsecured creditors, *held* that the subsequently appointed trustee in bankruptcy, who represents the unsecured creditors, might execute the trust.

6. BANKRUPTCY ⊂⇒288(1)—TRUSTEE—TAKING POSSESSION OF PROPERTY IN HANDS OF A RECEIVER APPOINTED BY STATE COURT.

Where trustee in bankruptcy, under order of referee, took possession of property of the bankrupt in the hands of a receiver appointed by the state court, *held* that possession was taken by summary process, which is not in accordance with the comity existing between state and national courts.

In Equity. Suit by William W. Crawford, trustee, and another, against John W. Kaste, consolidated with a suit by Russell H. Brown, as trustee in bankruptcy of the Monarch Lumber Company, a bankrupt, against William W. Crawford, trustee, and others. Decree of foreclosure, with directions.

See, also, 252 Fed. 248.

Ralph A. Coan, of Portland, Or., for Brown.

O. A. Neal, of Portland, Or. (Wirt Minor, of Portland, Or., of counsel), for Crawford and Assets Realization Co.

Carey & Kerr and C. A. Sheppard, all of Portland, Or., for David Inv. Co.

Martin L. Pipes, of Portland, Or., and Dey, Hampson & Nelson, of Portland, Or., for Kaste.

Platt & Platt and Hugh Montgomery, all of Portland, Or., for Brayton & Lawbaugh.

Maurice W. Seitz, of Portland, Or., for Moody.

WOLVERTON, District Judge. This is a suit to foreclose a mortgage and to subject the property covered thereby to the payment of the mortgage obligations. Previously to this a suit was instituted by Russell H. Brown, trustee in bankruptcy of the estate of Monarch Lumber Company of Oregon, against the Assets Realization Company and William W. Crawford, for an accounting touching the property supposed to have been covered by the mortgage. A cross-bill was filed by the David Investment Company, claiming that as guarantor it had paid certain installments of interest on the mortgage obligations, and seeking subrogation for a recovery of the sums paid. The mortgage was set up in all its features. Brayton & Lawbaugh, and Moody, the successor to Bjelik, controverted the legality of the execution of the mortgage, charging that it was usurious, and that recovery thereon should be reduced to less than the face value of the obligations. After hearing, a decision was rendered sustaining the mortgage and settling the account as prayed for by the trustee in bankruptcy. Later, by leave of court, the defendants Assets Realization Company and William W. Crawford, trustee, filed a cross-bill setting up the mortgage and praying foreclosure, and the issues on the pleadings have been subsequently completed. These two causes were consolidated for trial. The former case has been largely lost sight of on the present hearing, and the trial has proceeded in the main upon the direct foreclosure proceeding as above entitled.

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The defendants Brayton & Lawbaugh and J. D. Moody set up their judgments, which it is claimed are liens against the mortgaged property, and again insist that the mortgage is usurious.

The David Investment Company by its answer again claims that it is entitled to subrogation for interest paid on the principal obligations.

The defendant Kaste answers that he is the owner of the legal title covered by the mortgage; that in a certain cause pending in the circuit court of the state of Oregon for Multnomah county, entitled Brayton & Lawbaugh v. The Monarch Lumber Company et al., upon condition that the state court appoint a receiver of the mill property covered by the mortgage, he subordinated his title for the benefit of the general creditors, he to retain the legal title when they were paid; that a receiver was accordingly appointed, who, through a writ of assistance, was put into possession of the property, and is now entitled to such possession, although the same was wrongfully taken from him by Russell H. Brown as receiver in bankruptcy, but who now retains the same as trustee; that by reason thereof this court is without jurisdiction of the subject-matter to entertain cognizance of the foreclosure suit.

Russell H. Brown, trustee, for answer relies upon his right of possession of the property, with a view to administering it for the benefit of the general creditors.

[1-3] The question of prime importance is one of jurisdiction. It is insistently urged that the federal court is without jurisdiction to entertain the present suit to foreclose the Monarch Lumber Company mortgage. The basis of the proposition is that the state court is entitled to the possession of the res, and, being so entitled, no suit or action will lie in any other court, whether federal or state, with respect thereto.

Let it be conceded for the present that the state court, by the rules of comity, is entitled to such possession; or we may go further, and let it be admitted that such court has the actual possession, and is holding it in accordance with such rules of comity. I am persuaded that in either aspect the position of counsel is unsound. Reference will later be made to the state of the record. The Supreme Court, in a comparatively recent case, has laid down the broad rule applicable in the following language:

"The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction, for both the state and federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different states the federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case." McClellan v. Carland, 217 U. S. 268, 282, 30 Sup. Ct. 501, 505 (54 L. Ed. 762).

And in an earlier case, Gordon v. Gilfoil, 99 U. S. 168, 178 (25 L. Ed. 383), the court observes:

"It has been frequently held that the pendency of a suit in a state court is no ground even for a plea in abatement to a suit upon the same matter in a federal court."

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The proposition is very well illustrated by the case of Mercantile Trust Co. v. Lamoille Val. R. Co., 17 Fed. Cas. 25, No. 9432. The plaintiff in that case, being the owner and holder of certain railroad mortgage bonds, instituted a suit, in behalf of itself and other like owners and holders, to foreclose the mortgage and for removal of trustees who were seeking to foreclose an alleged preference mortgage upon the same property in the state court, one of whom had been appointed receiver in that court, and was at the time in possession of such property. The court stated the question for its decision not to be whether it would grant relief that would disturb the state court, for "surely," it was declared, "it will not do that," but whether it would hear and determine any question or grant any relief concerning the right to the property, and not extending to possession, while the state court had possession. The question is the direct one involved here. Answering it, the court says:

"There is nothing, either in the letter or the spirit of the statute, that prohibits a party having a question of right, or a claim to relief, that can be determined without meddling with the possession of any court, from having the question determined or the relief granted by any court of competent jurisdiction for the purpose. Neither is there anything in the nature of things which should prevent."

After referring to the case of Watson v. Jones, 13 Wall. 679, 20 L. Ed. 666, the court goes on to say:

"In this case, as in that, some of the relief which the bill might cover would interfere with the possession of the state court, and some of it would not. The execution of an order of sale, under the provisions of the mortgage, or of an order for the delivery of possession, under other provisions, would have that direct effect, and, perhaps, the general prayer for relief would cover either; but, as before mentioned, it is clear that the plaintiff cannot have such relief. None can be had except that which will not interfere with the present possession. A decree of forclosure would not. It would only cut off the equity of redemption of the plaintiff's bonds, which the mortgagors now have, and would not affect the possession at all, but only the right. * * *

"The objection on account of the receivership cannot prevail to prevent proceeding in this cause, so far as it can go without interfering with the receivership; and a decree of foreclosure can be had, if the plaintiff is otherwise entitled to one, without involving such interference."

The principle relied upon by counsel as inimical to the jurisdiction of this court of the subject-matter is one well settled and not to be controverted; but it is wholly without application here. It is, as stated in Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 54, 28 Sup. Ct. 182, 187 (52 L. Ed. 379), that:

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it."

The principle is applied in Palmer v. Texas, 212 U. S. 118, 125, 29 Sup. Ct. 230, 232 (53 L. Ed. 435), the court saying:

"If the state court had acquired jurisdiction over the property by the proceedings for the appointment of its receiver, and had not lost the same by the subsequent proceedings, then, upon well-settled principles, often recognized

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and enforced in this court, there should be no interference with the action of the state courts while thus exercising its authorized jurisdiction."

Counsel confuses jurisdiction over the subject-matter for entertaining a cause respecting it and jurisdiction of the res by possession with power of disposal within the purview of the cause brought upon the record. Eliminating the idea of possession, the state and the federal court, though exercising concurrent jurisdiction, may proceed at one and the same time, though the parties be the same and the subject-matter and the cause the same; but, of course, only one relief can be had in the end. Comity, indeed, forbids any unseemly conflict between such courts for possession of the res involved, but does not prevent a pursuit of the same right in both courts where such conflict does not arise. While possession gives jurisdiction over the res, it does not control jurisdiction as to the subject-matter. Another court will respect possession, but it is at liberty to entertain another cause concerning the same subject-matter, so long as it does not oust the court first acquiring possession of the res, or interfere with its disposal of the same in the manner appropriate to the cause there entertained. The distinction is not new, and is well recognized. Logan v. Greenlaw (C. C.) 12 Fed. 10; In re Hall & Stilson Co. (C. C.) 73 Fed. 527.

Another application of the principle is that, where the controversy is not the same—that is, where the issues in one suit are different from those involved in another, and the subject-matter is not identical—there can be no infringement of jurisdiction as between the courts maintaining cognizance of the cases. But in such cases the first acquisition of the possession of the res dominates the right to retain the same for the purpose of disposition appropriate to the cause pending. Knudsen v. First Trust & Savings Bank, 245 Fed. 81, 85, 157 C. C. A. 377, and cases cited.

The controversy here is by no means the same as that presented in the state court. The issues are not the same, nor is the subject-matter identical or of like nature. So it is clear that the pendency of the cause in the state court stands in no way as an impediment to this court's entertaining jurisdiction of the present cause, and the objection that this court is without jurisdiction of the subject-matter cannot be maintained. The state Supreme Court voiced its realization of the propriety of the institution of a separate suit when it said, in the Brayton & Lawbaugh Case, that "the appointment of the receiver should in no wise interfere with the foreclosure of the notes and mortgage"; which statement it deemed opportune to accompany with the admonition that, "whenever the holder of the notes desires to sue, permission to do so should be promptly granted." 87 Or. 365, 391, 169 Pac. 528, 536.

[4] The immediate question is whether this court should exercise jurisdiction to retain possession of the res for application to the purposes of the suit. It is admitted that the real property subject to the mortgage is now in the possession of the trustee in bankruptcy, who is a party defendant here, but it is contended that the state court receiver is rightfully entitled to the possession. Let us inquire about that.

On November 18, 1914, Brayton & Lawbaugh instituted a suit in the circuit court of the state of Oregon for Multnomah county against

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the Monarch Lumber Company of Oregon, Monarch Lumber Company of Maine, Assets Realization Company, Ira M. Cobe, and William W. Crawford, individually and as trustee. Plaintiff claimed to be the owner of a judgment rendered against the Monarch Lumber Company of Oregon on December 8, 1913, with a lien on the premises covered by the present mortgage, acquired by attachment dating from August 13, 1913. The purpose of the suit was to set aside certain conveyances of the real property and a bill of sale for the personal property; also to reduce the amount of the mortgage and to subject the property to the payment of its judgment. The insolvency of the Monarch Lumber Company of Oregon was specifically alleged. This complaint was, on December 14, 1914, amended by adding E. W. Spencer, W. T. Patton, John Bjelik, and A. C. Springer as parties defendant. As amended, it contained the same general allegations as to the insolvency of the Monarch Lumber Company, and demanded the same general relief. On February 4, 1915, a second amended complaint was filed adding as party defendant T. M. Hurlburt, sheriff of Multnomah county, but with like allegations as to insolvency of the Monarch Lumber Company of Oregon, and like prayer for relief. Still later, on November 13, 1915, a third amended complaint was filed. This purports to be in behalf of the plaintiff and other creditors of the Monarch Lumber Company of Oregon similarly situated, and contains the same general allegations of insolvency, but prays an accounting and general relief.

On January 3, 1917, W. T. Patton, appearing by his attorney, J. W. Kaste, filed a motion for the appointment of a receiver, assigning as a reason therefor, among others, that the Monarch Lumber Company is an insolvent corporation, has ceased to do business for the past three years, is defunct, and has no officer now within the state, and has forfeited its corporate rights. In pursuance of this motion, Felix W. Isherwood was appointed receiver of "all and singular the property, real, personal, and mixed, heretofore owned and operated by the Monarch Lumber Company."

When it came to the final disposition of the case, the court, among other things, found as its conclusion of law:

"That said receiver herein appointed should by the decree of this court be continued until the further order of this court, with the duty and powers in him vested to administer upon said estate of said defunct corporation, to wind up its affairs, and to settle the claims, and to dispose of its property for that purpose, under the orders and directions of this court."

When the case got to the Supreme Court, that court based its approval of the appointment of the receiver upon the ground that the Monarch Lumber Company was an insolvent concern. Brayton & Lawbaugh v. Monarch Lumber Co., 87 Or. 365, 169 Pac. 528, 536, 170 Pac. 717.

So that, in consideration of this record, it can scarcely be further controverted that Isherwood was appointed receiver of an insolvent corporation, with a view to winding out its affairs and disposing of its property subject to the orders of the court. In such a case there can be not doubt, as the court decided in the matter of the Monarch Lumber Company, a bankrupt, that the trustee in bankruptcy had the lawful right to the possession of the property of the Monarch Lumber

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Company in preference to the receiver in the state court. Such is the settled law upon the subject.

[5] The next phase of the case relates to the ownership of the property, namely, the real estate which is covered by the mortgage, at the time of the appointment of the trustee in bankruptcy. It is settled by the judgment of the Supreme Court that Patton was the owner of the equity of redemption of the real property at the time of the appointment of the receiver. Shortly after the receiver had been appointed in the state court, to wit, on February 2, 1917, Patton deeded the premises to Kaste, and Kaste is now the owner of Patton's interest therein. The consideration for the transfer was $800. Of this $705 was paid from contributions made by one or more of the general creditors, and the balance by Kaste himself. Kaste was unwilling to purchase the title without the assistance of the general creditors, and the arrangement was accordingly made whereby the general creditors should participate in the proceeds to be derived from the property before the receiver was appointed. This resulted in a proposition by Kaste, he at the time representing Patton, made in open court, to the effect that, if the court would appoint a receiver in that cause, Patton would subordinate his title in and to tract "A" for the benefit and protection of the unsecured creditors of the said Monarch Lumber Company; and the appointment was accordingly made by the court. Kaste has explained that it was his intent and purpose to retain the legal title after the unsecured creditors had been satisfied, and such is the effect of the transaction in appointing the receiver. Tract "B" was not subjected to the condition, and Patton continued to hold the title thereto unaffected by any subordination to the claims of the unsecured creditors.

The testimony here further shows that on January 29, 1917, Isherwood was, through the aid of a writ of assistance issued out of the circuit court, put into the possession of the property, both tract "A" and tract "B." After he had been in possession for the space of an hour, possibly longer, Russell H. Brown, the receiver in bankruptcy of the Monarch Lumber Company, appeared and demanded possession, producing his authority from the referee in bankruptcy for so doing. Isherwood, unwilling to resist an officer of the court, yielded to the demand, but did so under protest, and Brown assumed possession. Brown subsequently was appointed trustee, and now holds the property as such.

The question arises what interest the trustee in bankruptcy has in tract "A," and whether he is entitled to administer it for the benefit of the unsecured creditors. I am persuaded that he has a direct interest, as trustee of the property, by reason of the fact that it was subordinated both by the act of Patton and by the order of the court for the benefit of the unsecured creditors of the Monarch Lumber Company of Oregon, and with their co-operation and assent. The trustee represents the creditors of that concern by operation of law, and as such is competent to administer the property for their benefit. While it is true that the title to the property passed from the Monarch Lumber Company, the subordination restored it for the benefit of these creditors, whereby they were accorded a lien for the protection of their

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claims. The trustee representing the creditors, there would seem to be no good reason why he may not execute the trust, and subject the property to the payment of such claims. The residue, of course, would go to Kaste.

[6] But, however, this may be, the possession was taken from the state receiver by summary process. This, I am convinced, is not in accord with the suggestion of comity existing between state and national courts, and, if persisted in, would lead to unseemly conflict between such courts respecting the possession of property. In re Watts and Sachs, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933; In re Lengert Wagon Co. (D. C.) 110 Fed. 927, 928; Carling v. Seymour Lumber Co., 113 Fed. 483, 51 C. C. A. 1; In re Rathman, 183 Fed. 913, 106 C. C. A. 253.

The question respecting usury attending the execution of the Monarch Lumber Company of Oregon mortgage was settled in the suit for an accounting, and need not be further attended to or discussed here.

So, also, at the former trial it was determined that the plaintiffs were entitled to recoup for premiums paid for fire protection, and for taxes, expenses of watchmen, and necessary repairs to prevent dissipation of the property, the sum of $50,000. That amount, as nearly as could be ascertained, covered the whole of such expense and outlay up to the time of that trial. At least, I am unable to say that a larger sum is subject to recoupment under sections 6, 7, 10, and 12 of article 2 of the mortgage, so as to entitle the plaintiffs to a lien within these provisions; but I hold that they are entitled to such lien covering that sum.

Further expenditures were incurred by Lester W. David subsequent to the former trial, and while it is claimed he was in possession of the property, to the amount of $12,780.84, which it is sought to have declared a lien under the mortgage for like reasons as the above sum of $50.000 was so adjusted. David, however, entered into a contract with the trustee in bankruptcy to keep up the property and maintain it in as good condition as he found it at the time, and to pay the insurance. This contract and undertaking on the part of David are fatal to the contention. The said sum of $12,780.84 is therefore not subject to such adjustment.

As conclusions of mixed fact and law, and without further analysis, I make the following findings:

The plaintiffs are entitled to recover the principal of the 12 notes	$300,000 00
The interest from September 1, 1913, to this date, at 7% per annum, the David Investment Company having paid the first two years' interest	109,900 00
Also money that the mortgagee was compelled to pay to keep down the taxes and insurance, and to preserve the property so that insurance could be had, and prevent dissipation	50,000 00
Amount found to be reasonable as attorneys' fees for foreclosing the mortgage	15,000 00
Total	$474,900 00
The David Investment Company is entitled to recover the amount it was compelled to pay on interest installments as guarantor	$37,500 00
And interest on such payments from date made at 7% per annum	16,182 25
Total	$53,682 25

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Plaintiffs are entitled to a foreclosure of the mortgage, and the David Investment Company is entitled to subrogation for the amount of interest it was compelled to pay, and the accumulated interest thereon, as above indicated.

The property incumbered by the mortgage should be sold to satisfy these demands of plaintiffs and the David Investment Company, together with the costs of this suit, which are awarded to plaintiffs.

Whatever money or property may remain after the satisfaction of these demands should be applied in satisfaction:

First, of the judgment of J. D. Moody, including interest thereon from June 30, 1913, the date of its rendition, at 6 per cent. per annum.

Second, of the judgment of Brayton & Lawbaugh, including interest thereon from December 8, 1913, the date of its rendition, at 6 per cent. per annum. The lien of this judgment was acquired by attachment levied August 13, 1913, which gives the lien over the Patton judgment, and subordinates Kaste's title thereto. These judgment holders have not asked that they participate in the foreclosure, but it is only fair that they should participate in the funds arising from the mortgaged property according to their priorities.

Third, the general or unsecured creditors of the Monarch Lumber Company of Oregon are entitled to the payment of their claims out of any surplus that may yet remain of the proceeds of tract "A."

Fourth, John W. Kaste is entitled to any balance that shall remain, either of money or property, after all these demands are satisfied.

All the defendants, including Kaste, should be foreclosed of whatever right, title, or interest they or either of them have or hold in the property.

The property, however, should be at once returned to Felix W. Isherwood, the receiver in the state court, and order of sale under the decree of foreclosure should be stayed pending action in that court.

The trustee in bankruptcy is entitled to a like accounting as was awarded him upon the former trial.

The decree of foreclosure should remain open for such further provision to be made at the foot thereof as may hereafter seem meet and proper.

Let a decree be drawn and entered in conformity with this opinion and these findings.

THE ROSERIC.

(District Court, D. New Jersey. November 22, 1918.)

1. INTERNATIONAL LAW ⊜10—ACTS OF SOVEREIGNTY OF FOREIGN NATION—RECOGNITION BY UNITED STATES COURTS.

An admiralty court of the United States will not exercise its jurisdiction in rem over a vessel under requisition by the British government, and used by it for purposes of the war in which such government and the United States are cobelligerents against a common enemy, so long as the vessel remains in such service, and the fact that its officers and crew are still in the employment of the owner is immaterial.

2. ADMIRALTY ⊜43—ARREST—IMMUNITY—VESSELS IN PUBLIC SERVICE.

A vessel engaged exclusively in public service is as exempt from delay caused by arrest as from final condemnation.

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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3. ADMIRALTY ⊂⊃43—JURISDICTION—PROCESS—EXEMPTION—SHIPS IN PUBLIC SERVICE.
Unarmed vessel employed by a sovereign in public service is as exempt from judicial process to enforce private claims as one of his battleships.

4. COURTS ⊂⊃1—JURISDICTION—SOVEREIGN.
No jurisdiction will be exercised over a sovereign, whether local or foreign, or over instrumentalities employed by it in the public service, by any proceedings in invitum, regardless of the form or character of the process.

5. ADMIRALTY ⊂⊃43—SHIP IN PUBLIC SERVICE—REQUISITIONED SHIP.
Where ship and its equipment was requisitioned into public service, and the officers and crew continued to operate ship, the ship and its officers and crew for the time being became the sovereign's instrumentalities, and the ship was as much in possession of the sovereign as if he had taken it over by a regular charter or manned it for his navy.

6. PROCESS ⊂⊃115—IMMUNITY FROM PROCESS—PUBLIC SERVICE.
The immunity of the sovereign's instrumentalities devoted to public service from process of its own courts is not based upon the idea that it may be safely accorded, but on account of its dignity and independence, and because it is necessary for the well-being of the nation that it shall not be hampered or interfered with in the use of such instrumentalities.

7. INTERNATIONAL LAW ⊂⊃10—IMMUNITY FROM PROCESS—SHIPS IN SERVICE OF FOREIGN COUNTRY.
The immunity from process granted to ship in public service of country by courts of another country is based upon the idea that sovereigns are of equal dignity and independence, and that out of regard for the right of a sovereign to be unhampered in use of such instrumentalities, and to maintain amicable relation between sovereigns, it is tacitly agreed that one sovereign should decline to exercise some of its prerogatives when it would necessarily place another sovereign in a subordinate position.

8. PROCESS ⊂⊃115—EXEMPTION—INSTRUMENTALITIES IN PUBLIC SERVICE.
It is not the ownership or exclusive possession of the instrumentality by the sovereign, but its appropriation and devotion to public service, that exempts it from judicial process.

9. ADMIRALTY ⊂⊃72—IMMUNITY OF VESSEL IN SERVICE OF FOREIGN GOVERNMENT—PRESENTATION OF CLAIM.
While a claim of immunity of a vessel in the service of a foreign government from arrest under process from a court of the United States may properly be presented by the Department of Justice, the court may, in its discretion, act on suggestion of the Embassy of the foreign government.

In Admiralty. Suit by the McAllister Lighterage Line, Incorporated, against the British steamship Roseric. On suggestion that writ of arrest be quashed, or suit stayed. Suit stayed.

Vredenburgh, Wall & Carey, of Jersey City, N. J., and Burlingham, Veeder, Masten & Fearey, of New York City, for libelant.

Frederick R. Coudert and Howard Thayer Kingsbury, both of New York City, as amici curiæ, for British Embassy.

John M. Woolsey, of New York City, appearing specially for the Roseric.

RELLSTAB, District Judge. [1] The libel alleges that on April 16, 1918, the steamship Roseric negligently collided with libelant's barge McAllister Bros. No. 63, in New York Harbor, to its damage. After seizure by the marshal, within the territorial jurisdiction of this court, the steamship was released by the order of libelant upon an undertaking by the owners to bond her, in case the court should hold that she

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was not immune from process, on grounds to be urged on behalf of the British Ambassador. Thereupon counsel for the British Embassy, appearing by leave of court as amici curiæ, filed a suggestion in the following terms:

"(1) The said Roseric is in the service of the British government as an admiralty transport by virtue of a requisition from the Lords Commissioners of the Admiralty and is engaged in the business of the British government and under its direction and control.

"(2) Any interruption of the voyage of said vessel by arrest or other process will interfere with the government business upon which said vessel is engaged, and thereby with the efficient prosecution of the present war.

"(3) This court should not exercise jurisdiction over a vessel in the service of a cobelligerent foreign government.

"(4) The British courts have refused to exercise jurisdiction over vessels in government service, whether of the British government or of allied governments, and by comity the courts of the United States should, in like manner, decline to exercise jurisdiction over vessels in the service of the British government.

"(5) The questions involved in this cause are of great importance to the British government, by reason of the large number of vessels in the service of the British government which enter ports of the United States, and of the important relation borne by the government service performed by these vessels to the efficient prosecution of the present war.

"And, upon such suggestion, for leave to represent to this honorable court as such amici curiæ that the said writ of arrest should be quashed and dissolved in so far as it runs against the said steamship Roseric, and that all proceedings to arrest or detain the said steamship Roseric under said writ, or otherwise, should be stayed so long as said steamship Roseric remains in the service of the British government as aforesaid."

From this suggestion and the deposition of the ship's master, which was not offered in evidence, but produced for the information of the court, it appears that, while the steamship is owned by a British subject and its navigation in charge of the owner's officers and crew, who receive their compensation from such owner, it, as well as the officers and crew, is under the complete control of the British government, and is engaged in its business as an admiralty transport, carrying such cargo, and going to and from such ports, as that government directs. For the time being it is appropriated by the British government for its public use, and was when the collision occurred and the arrest was made.

On the face of the libel, the libelant, an American citizen, has an inchoate lien on the ship, and this court prima facie jurisdiction to perfect it. If the arrest is set aside and the writ quashed, the libelant has no present remedy but in the British courts. If the proceedings to arrest the ship are stayed for as long as it remains in the service of the British government, the libelant's rights will be seriously prejudiced, and in the end it may find itself remediless.

[2] On the other hand, if the right to arrest this ship, so requisitioned, is sustained, the sovereign rights of the British government, at a time when it is engaged in a war, will be subordinated to those of a private claimant. Furthermore, the right to seize one ship so requisitioned means the right to seize any number of ships similarly conditioned, with the result that during the continuance of the war, not only that government, but the United States and other sovereignties, cobelligerents in

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prosecuting such war against the common enemy, will be seriously hampered in their joint struggle to maintain their sovereign rights. It is of no moment that in this case, by arrangement between the proctors of the libelant and the ship's owner, no prejudicial detention of the ship resulted. The right to arrest involves the right to detain; detention includes the probability of loss to the users of the vessel; and exemption from delay of a vessel engaged exclusively in the public service of a nation is as much the privilege of sovereignty as the vessel's exemption from final condemnation. For present purposes the steamship must be regarded as still subject to or threatened with process of arrest. The Florence H. (D. C.) 248 Fed. 1012.

Libelant asserts that, "if this court drops or stays its jurisdiction, that must be done for reasons which our courts have declared to be not well founded," and that to grant such immunity would go "far beyond the principles which have been laid down by our courts as determining whether a ship shall be immune from process."

In The Exchange, 11 U. S. (7 Cranch) 116, 3 L. Ed. 287, a pioneer in this field of judicial inquiry, it was held that—

"A public vessel of war of a foreign sovereign at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country."

In that case libelant, an American citizen, asserted title to a vessel found within the waters of the United States and in the possession of the French government, which had converted it into a war vessel. Chief Justice Marshall, speaking for the court, after premising that all sovereignties possess equal rights and equal independence, declared that, as a result of mutual intercourse, impelled by a common interest, they "have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers," and that such jurisdiction "would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects."

After dealing with the admitted exemptions of the person of a sovereign, his ambassadors, and the passage of his armies under certain circumstances, from interference by the sovereign of the territory into which they had been permitted to enter, the learned Chief Justice said:

"That all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that, when implied, its extent must be regulated by the nature of the case, and the views under which the parties, requiring and conceding it, must be supposed to act." 7 Cranch, 143, 3 L. Ed. 287.

After pointing out the difference in the status of a private individual and a merchant ship, on the one hand, and a public armed ship, on the other hand, of one nation coming into the territory of another, with reference to amenability to the latter's jurisdiction, and that the foreign sovereign could have no motive for the former's exemption from such jurisdiction, he, referring to the foreign sovereign's attitude to the public armed ship, said:

"She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in na-

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tional objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place, without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and, it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality." 7 Cranch, 143, 3 L. Ed. 287.

The Exchange is a strong case, but it has always been accepted as law both here and abroad. There the allegation was that libelants had been wrongfully dispossessed of their vessel by the representatives of a foreign sovereign. The inconvenience or possible injustice that may happen to the libelant in the instant case, if the Roseric is held immune from arrest, is incomparable with that apparently sustained by the libelant in the cited case.

The immunity there accorded was not due to a lack of judicial power. The power was assumed, but its exercise was waived out of a due regard for the dignity and independence of a sister sovereignty, with whom this nation was at peace. The implication is that to insist upon jurisdiction in such instances likely would be considered by the foreign sovereign as a reflection upon its dignity and an interference with its independence, and would tend to strain and possibly disrupt amicable relationships.

[3] Though in The Exchange an armed ship of war was the subject before the court, there is nothing in the reasoning resulting in its exemption from judicial process that limited the immunity of that character of vessels. The privilege was based on the idea that the sovereign's property devoted to state purposes is free and exempt from all judicial process to enforce private claims. Such idea is as cogently applicable to an unarmed vessel employed by the sovereign in the public service as it is to one of his battleships. The exemption declared in that case was considered in The Santissima Trinidad, 20 U. S. (7 Wheat.) 283, 353, 5 L. Ed. 454, and Mr. Justice Story, who sat in The Exchange, in stating the grounds thereof, referred to them as applicable to foreign public ships.

In Briggs et al. v. Lightboats, 93 Mass. (11 Allen) 157, Justice Gray, in answering the contention that these lightboats, though owned by the United States, were not intended for military service, and therefore were subject to judicial process, stated the ground of exemption as follows:

"The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty, and does not depend on the extent or manner of their actual use at any particular moment, but on the purpose to which they are devoted." Page 165.

In granting immunity to property devoted by a sovereign to public use, neither its ownership nor the particular public use made of it is treated as important in the British courts.

In The Parlement Belge, L. R. 5 P. D. 197, immunity was accorded to an unarmed vessel belonging to a foreign sovereign in the hands of officers commissioned by him and employed in carrying mails, though

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it also carried merchandise and passengers for hire. In that case Brett, L. J., after reviewing the American and other cases, said:

"That as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise, by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." Page 217.

In The Broadmayne, L. R. (C. A. 1916) 64, the immunity was extended to a ship owned by private parties, while under requisition by the British Admiralty, in an action for salvage. This exemption was granted in spite of the urgings of plaintiff's counsel (being similar to those pressed here):

"That the effect of requisitioning a ship is not to change the ownership, and the ship requisitioned remains the property of the owners, notwithstanding the requisitioning, and that when the use of the ship by the crown ceases the ship is restored to her owners." Page 70.

Swinfen Eady, L. J., in reply to such insistence, said:

"That is so, but it does not prevent a ship, so long as she remains under requisition, being in the service of the crown, and as such exempt from process of arrest." Page 70.

In The Messicano, 32 T. L. R. 519, a vessel requisitioned by the Italian government from private owners, and carrying war material for that government, was held to have the same privilege from arrest in a collision case as a ship requisitioned by the British government.

In The Errisos, reported in Lloyd's List, October 24, 1917, pages 5–8, a vessel owned by Greek subjects, and which, by arrangement between the Greek and British governments, had been requisitioned for the use of the British and Italian governments, and was carrying coal for the latter, was held free from arrest or detention "so long as the ship shall remain in the service of either the Italian or the British government for public or state purposes."

[4] These cases, in my judgment, must be accepted as declaring the judicial policy to exercise no jurisdiction over a sovereign, whether local or foreign, or over instrumentalities employed by it in the public service, by any proceedings in invitum, regardless of the form or character of the process. The libelant, however, insists that The Johnson Lighterage Co. No. 24 (D. C.) 231 Fed. 365, and The Attualita (C. C. A. 4) 238 Fed. 909, 152 C. C. A. 43, announce a different rule and control the instant case. The Johnson Lighterage Co. Case (decided by this court) was a proceeding to recover for salvage services. Both cargo and vessel were seized. On an order to show cause why such cargo (munitions of war) should not be released from seizure and turned over to the Russian government, who was the owner thereof, it was held that, as the possession of the cargo at the time of its seizure was not in that government, but in the charterer of the vessel, under a contract for transportation, it was within the exception declared in The

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Davis, 77 U. S. (10 Wall.) 15, 19 L. Ed. 875, and subject to arrest. The lack of actual possession of the property by the government at the time of seizure is the basis of the exception established by the Davis Case, and distinguishes both it and the Lighterage Case from the case at bar.

The contention of libelant that, as the ship's officers and crew operated the Roseric, she was within the exception established by these cases, is not tenable. The British government, in the exercise of its sovereign powers, took the Roseric and devoted it to its own purposes. That no change in the officers and crew took place, and that they continued in the employment of the ship's owner, is unimportant. The ship, its owner, officers, and crew, were under the compulsion of sovereignty.

While the fact that the operation of the ship was by the owner's officers and crew may be important on the question of the owner's present, and the ship's ultimate, liability for the negligence charged in the libel, it is immaterial upon the question of the right of a private individual to enforce such liability by seizing the ship while it remains appropriated to the sovereign's public use. Whether the government should operate the ship by the owner's officers and crew or others was for the sovereign's exclusive determination.

[5] The effect of its requisition was to put the ship and its equipment into the public service. The officers and crew, as well as the ship, for the time being became the sovereign's instrumentalities, and whatever possession of the ship they obtained by reason of this employment was the sovereign's possession while the requisition was in force.

In legal effect a ship so subjected to vis major is no less in the possession of the sovereign than if he had taken it over by a regular charter or had manned it by his navy. In The Davis, with reference to the goods there in question, the court found:

That the United States was not in the position of a charterer of the vessel, but that "the case was the usual one of a common carrier contracting to deliver goods on his own responsibility," and that "the possession of the master of the vessel was not the possession of the United States. He was in no sense an officer of the government. He was acting for himself, under a contract which placed the property in his possession and exclusive control for the voyage." 10 Wall. 21, 22, 19 L. Ed. 875.

The Attualita (C. C. A. 4) 238 Fed. 909, 152 C. C. A. 43, is more in point. In that case, notwithstanding the ship had been requisitioned by the Italian government and was engaged in its public service, it was held subject to arrest in a proceeding in rem to recover damages for an alleged tort. That case was decided before this country became a cobelligerent with the Italian government in the war against Germany. In all other respects the facts of that case are seemingly identical with those of the case at bar. The District Court had held that the ship was immune from arrest, basing its decision on the ground of international comity. The Circuit Court of Appeals, observing that to allow the immunity would require it to go beyond any of the decided cases, said:

"There are many reasons which suggest the inexpediency and the impolicy of creating a class of vessels for which no one is in any way responsible." 238 Fed. 911, 152 C. C. A. 45.

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And, after referring to the immunity granted to the diplomatic representatives and the vessels or other property in the possession and control of a sovereignty, it said that such immunity—

"can be safely accorded, because the limited numbers and the ordinarily responsible character of the diplomats or agents in charge of the property in question and the dignity and honor of the sovereignty in whose services they are, make abuse of such immunity rare." 238 Fed. 911, 152 C. C. A. 45.

That the seizure of the vessel interfered with sovereignty's rights and deprived it of the use of the ship, unless and until it or the owner thereof submitted to the court's jurisdiction (by bonding, etc.), was not referred to.

So far as the suggested irresponsibility of any one for a tort committed in the operation of a vessel so requisitioned is concerned, it should not be overlooked that the owner could be made personally liable for the negligence of his servants in operating the ship, even though the ship should be exempt; and so far as the ship itself is concerned the immunity need not be extended beyond the period of the sovereign's requisition; for, as soon as the sovereign restores the ship to the owner, the reason for its immunity is gone.

[6] It seems to me, and I state my judgment with deference, that the decision in that case unduly subordinates the rights of sovereignty to those of the individual. The immunity of the sovereign's instrumentalities devoted to public service from the process of its own courts, as I understand the previous cases, is not based upon the idea that it may be "safely accorded," but on account of its dignity and independence, and because it is necessary, for the well-being of the nation that it serves, that it shall not be hampered or interfered with in the use of such instrumentalities.

[7] In the case of the courts of one sovereignty waiving jurisdiction over another sovereignty's instrumentalities, the thought of safety to private litigants, to my mind, is at least equally irrelevant. The immunity in such cases, as already noted, is based upon the idea that sovereigns are of equal dignity and independence, and that out of regard for such rights, and to maintain and further amicable relations among them, it is, by tacit agreement, recognized as needful, in certain particulars, that one sovereign should decline to exercise some of its prerogatives when to exercise them would necessarily place another sovereign in a subordinate position.

In line with this thought, the following language of Judge Thompson in The Luigi (D. C.) 230 Fed. 495, is pertinent:

"It is far more important for the courts of the United States to recognize the international rule of comity that an independent sovereign cannot be personally sued, because such a suit would be inconsistent with the independence and equality among the nations of the state which he represents, than it is to take cognizance of private rights, if by so doing that rule is violated." Page 496.

[8] If these ideas dominate the question whether immunity should be granted to a foreign sovereign's property devoted to the public service, it logically follows that it is not the ownership or exclusive possession of the instrumentality by the sovereign, but its appropriation

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and devotion to such service, that exempts it from judicial process. That in such use the owner of the instrumentality, through its servants, is permitted to remain in physical possession thereof, and, in consequence, may become personally liable for its agents' torts, is of no moment, where, as in this case, the ship and its entire equipment is under the absolute dominion of the sovereign.

The Florence H. (D. C.) 248 Fed. 1012, is said by analogy to support the libelant's contention in this behalf. The denial of immunity in that case was based solely upon the ground that by congressional action (Act Sept. 7, 1916, c. 451, § 9, 39 Stat. 730 [Comp. St. 1916, § 8146e]) the Florence H., though owned by the United States and devoted to national purposes, because of her employment as a merchant vessel, was made subject to all laws, regulations, and liabilities governing merchant vessels. The ground of the decision negatives the pertinency of the citation.

Thus far I have considered this question as if no relations other than those arising from a state of peace and amity existed between this nation and the one suggesting the immunity. If, then, the consent of one sovereignty to waive jurisdiction over the public instrumentalities of another is implied, when the two live in amity, and in part because their mutual well-being is promoted thereby, as announced in The Exchange, upon what theory is this immunity to be withdrawn from a sovereignty with whom this nation is actively engaged in prosecuting a war against a common enemy? The mutual benefit that accrues from such exemption in time of peace is at best but little in comparison with that which actually accrues in time of such a war.

The extraordinary conditions that environ the present suggestion of immunity, if they did not bring the instant case within the principle here deduced from the cases, would justify the announcing of one that did. However, as indicated, no such judicial declaration is needed. The Roseric is well within such principle, and, unless the British Embassy's *suggestion* is to be disregarded for the reasons now to be considered, must be held immune.

Libelant further contends that the suggestion of the British government is not conclusive, and, if so intended, is not properly before the court, because not presented by the United States attorney. As to the conclusiveness of the suggestion: In The Exchange, supra, the libelant answered the suggestion interposed on behalf of the French government and sought to put it in issue. The Supreme Court, however, accepted the facts as declared in the suggestion. In The Parlement Belge, supra, the court, to a like contention, by Brett, L. J., said:

"The ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the state. It seems very difficult to say that any court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the court is to submit to its jurisdiction. It has been held that, if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of The Exchange. Whether the ship is a public ship, used for national purposes, seems to come within the same rule." Pages 219, 220.

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In the instant case none of the allegations of the suggestion have been put in issue. It is therefore, so far as this case is concerned, sufficient to say that, if the suggestion has been properly presented, it is conclusive as to all its material statements of fact. To the same effect, see The Luigi, 230 Fed. 495, 496, supra.

[9] As to the source from which the suggestion came: What is to prevent one sovereignty from appearing in the courts of another sovereignty? Or, stated more to the point, why should the court of one sovereignty refrain from receiving a suggestion as to its lack of jurisdiction, because it comes solely from the representative of a foreign sovereignty? It is not merely a proper, but a commendable, practice for such suggestions to come through the Attorney General or one of his representatives; but is it to be disregarded unless it does so come? No case has been cited that holds as matter of law that such a suggestion will not be received from a foreign sovereign's official representative. True, in The Luigi, supra, upon an oral suggestion made in open court—seemingly as amicus curiæ for a foreign government—Judge Thompson said he "was of the opinion that, inasmuch as the suggestion raised a question of international comity, it should come through official channels of the United States government."

In The Florence H., supra, Judge Learned Hand declined to receive the suggestion made on behalf of a foreign sovereign that to assume further jurisdiction might result in diplomatic embarrassment, unless such suggestion came through the diplomatic channels of this government. But I do not understand that either Judge Thompson or Judge Hand denied the power of the court to receive the suggestion through any other channels.

There may be good reasons in a given case why a suggestion from a foreign sovereignty should not be entertained, save through the executive branch of the government, of which the court is a part. To my mind, the sources from which such suggestion will be received is a matter of judicial discretion. Each case must be governed by its own circumstances, and The Luigi and The Florence H. I take to be instances where, in the exercise of judicial discretion, it was thought best not to receive the suggestions made on behalf of foreign governments, unless they came through the executive department of our government, and not as determinations that no such suggestions would be received from any other source.

In the instant case there are no considerations influencing the judicial discretion to refuse to act upon the suggestion made directly to the court by the British Embassy. On the contrary, from what has already been said concerning our national interests as a cobelligerent with the British government in the war pending at the time of the Roseric's seizure, they lead so obviously to an opposite determination that, in the absence of an intimation from the executive branch of this government that the public interests would be disserved by receiving such suggestion, its rejection would not be justified.

The only remaining question is whether, in following the British Embassy's suggestion, the writ of arrest should be quashed, or merely that the suit be stayed. While full immunity is to be accorded the British

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government in the use of the Roseric while she is under its requisition, no good reason calls for the dismissal of the suit, a result which would follow the quashing of the writ.

A decree may be entered, staying all proceedings to arrest or detain the Roseric so long as she continues in the service of the British government.

In re MASON CO.

(District Court, D. Connecticut. November 20, 1918.)

No. 3714.

1. INSURANCE ⟸79—TERMINATION OF AGENCY—NOTICE.
Insurance agency contract construed as requiring 30 days' notice of cancellation only when without cause, and to give right to cancel at once for cause.

2. INSURANCE ⟸80—AGENCY—NATURE OF CONTRACT—OWNERSHIP OF PREMIUM.
Contract whereby in terms insurance company appointed a general agent, and required bond for payment of all moneys that became due from agent to company, *held* one of principal and agent, and not of seller and buyer, so that title in premiums, except agent's commission, is in insurer, though clause providing for agent's each month, on the 20th, reporting business up to the 15th, and within 60 days thereafter remitting all premiums thereby shown due the company, provides all credits extended for payment of premiums shall be at sole risk of agent.

In Bankruptcy. In the matter of the Mason Company, bankrupt. On petition of the Massachusetts Bonding & Insurance Company to review order of the referee denying its claim to premiums on insurance policies collected by the trustee. Order modified.

Ralph H. Clarke, of New Haven, Conn., for petitioner.
Albert H. Barclay, of New Haven, Conn., for trustee.

THOMAS, District Judge. This matter is now before the court on a petition for review of the referee's order denying the petition of the Massachusetts Bonding & Insurance Company, claiming as its property $1,311.09, the same being the amount of certain premiums on insurance policies written by said company through its general agents, the Mason Company, now bankrupt, which premiums, pursuant to an order of the referee, have been collected by the trustee and are held by him subject to the order of court.

The petitioner and the Mason Company entered into a contract in writing, which the petitioner alleges was a contract binding the Mason Company, the general agent, to sell policies of insurance written by the petitioner within certain prescribed limits in Connecticut and for certain commissions detailed in said contract. The petitioner claims that this is a contract between principal and agent; the trustee claims that it is a contract between vendor and vendee. Before passing upon this question, which is the main feature in the case, let us dispose of the subordinate issues.

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Among other things the contract provided:

"That for any violation of, or failure to comply with, the conditions or provisions hereof, the general agent or the company shall have the right to cancel this agreement, and shall not be liable to the other for any loss, injury, or damage that may result therefrom. That this agreement will become effective from the 15th day of August, 1913, and will continue in force thereafter, subject to cancellation upon 30 days' notice from either party to the other, in writing. Depositing said notice in the United States mail, registered, shall be deemed a sufficient service thereof."

On the 3d day of March, 1915, the petitioner wrote the Mason Company the following letter:

"The Mason Company, 185 Church Street, New Haven—Dear Sirs: Confirming the writer's conversation with you of the 1st inst., you are hereby advised that, for reasons well known to your company, your appointment as agents of the Massachusetts Bonding & Insurance Company is revoked from the close of business March 1, 1915, and that from and after that date you have no authority to act as agent of said company in any capacity, nor to collect any premiums on policies or bonds issued by said company.

"Kindly acknowledge receipt of this communication at your early convenience, and oblige,

"Very truly yours, C. W. Fletcher, Assistant Secretary."

The Mason Company was adjudicated a bankrupt on the 20th day of March, 1915, and on March 31, 1915, Franklin L. Homan was appointed trustee.

[1] Some controversy arises in the minds of counsel respecting the right of the home office to cancel the contract under the terms of it, but this feature of the case need present no difficulty whatever. As I read the terms of the contract, either party had the right to cancel the contract at once for cause; but, if either party desired to cancel the contract without cause, each was bound to give the other 30 days' notice. The Mason Company at the time this letter was written was much indebted to the home office, at least to the extent of $4,000, because suit for this amount was brought in the state court upon a note for premiums *other* than those now claimed by the petitioner, which note was dated on the 3d day of June, 1914, and was payable on or before December 31, 1914. This failure to pay according to the terms of the contract laid the basis for the home office to cancel the contract at once. So it was acting well within the terms of the contract and lawfully when it sent the above-quoted letter on the 3d of March, 1915.

[2] In passing upon the controlling feature of this case, it now becomes important to decide whether or not the contract was a contract of agency between principal and agent, or a contract between vendor and vendee, and the correct interpretation of the contract will determine the issues involved between the parties in this proceeding. Without quoting the entire contract, and for the purpose of ascertaining, if possible, the intent of the parties at the time of the execution of the contract, it will be necessary to refer to certain portions of it. In the preamble it is provided that, in consideration of the covenants hereinafter specified, the Massachusetts Bonding & Insurance Company (hereinafter called the company) hereby appoints the Mason Company (hereinafter called the general agents), its vice

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president, secretary, and treasurer, as its general agents, etc. Later on the contract says: "The General Agents Agree"—which is a heading, and then follows the various things the general agents agree to do and not to do, and among others they agree to "keep an accurate record on the company's registers, books, or cards, which may be provided, of all business transacted, and forward to the home office a daily report of such business, together with applications for all policies, where an application is required." And further it is provided:

"That they will furnish the company, at its expense, a satisfactory surety bond in the sum of $3,000 specifically providing for the payment of all moneys that may become due from the general agents to the company."

Then, under the heading of what "The Company Agrees" to do, the contract provides:

"That it will furnish the general agents and all subagents with licenses, etc.; that it will furnish the general agents and all subagents with printed forms, stationery, etc."

And then, under the heading of what "It is Mutually Understood and Agreed," it is provided that the territory of the said general agency is defined as follows:

"That the territory of the said general agency is indeterminate, but in a general way will comprise that section of the state lying south of a line from Norwich, on the east, running through Middletown, Waterbury, and Danbury to the New York state line, on the west, the general agents expressly agreeing that they will not compete with, or interfere in any way with, agencies already established, in any of the cities mentioned, or within the territory assigned, without the full knowledge and consent, in writing, of the company."

And under the cancellation clause reference therein is made to what the *general agents* and *the company* shall have the right to do.

The fourth paragraph of the original contract was amended to read as follows:

"It is Hereby Mutually Understood and Agreed:

"That the fourth paragraph on the first page of said contract under the caption 'The General Agents Agree,' is amended to read as follows:

"That all credits extended for the payment of premiums shall be at the sole risk of the general agents, and that not later than the 20th day of each month they will forward to the home office a full and accurate report in the form required by the company of all business transacted for or on its behalf for the period ending on the 15th day of the month for which such report is made, and will remit the full amount of all premiums shown by such report to be due the company within sixty days after the date on which such report is due at the home office of the company; that is to say, the general agents will forward on the 20th day of January a report of business transacted from the 15th day of the preceding December to the 15th day of January, and on March 20th will remit the premiums shown to be due the company by said report. Reports and remittances for succeeding months to be made upon the same basis."

Here again reference is made to the *general agents*, so that it must be apparent that the intent of the parties, at the time the contract was executed, so far as the reading of the same is concerned, conveys, without question, the idea that the parties contemplated a contract of agency, and such must be the ultimate conclusion here found, un-

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less some rule of law intervenes to prevent the court from reaching such conclusion.

The trustee maintains that this is not a contract of agency in any sense of the word, but "it was clearly a contract between these parties of vendor and purchaser," and in his brief says that the contract "by its terms expressly eliminated any trust or fiduciary relationship that might, in the ordinary course of the conduct of such business, exist between the parties. The agreement created a relation of debtor and creditor." It is therefore apparent that, so far as the trustee is concerned, he relies upon the terms of the contract in order to find a correct interpretation of the contract itself, insisting that under the fourth clause of the contract, as amended, in view of the fact that it is provided that the credits extended for the payment of premiums shall be at the sole risk of the general agents, and that not later than the 20th day of each month they will forward to the home office a full and accurate report, in the form required by the company, of all business transacted for or on its behalf, for the period ending on the 15th day of the month for which such report is made, and will remit the full amount of all premiums shown by such report to be due the company within 60 days after the date when such report is due at the home office—that is to say, the general agents will forward on the 20th day of January a report of business transacted from the 15th day of the preceding December to the 15th day of January, and on March 20th will remit the premiums shown to be due the company by such report—that such provisions establish a contract between a vendor and vendee, and not a contract between a principal and agent.

In this conclusion I cannot concur, and, while no dispute can be had with the law cited in support of the facts as applied to the various cases relied upon, nevertheless the plain import of the question in this contract as to the intentions of the parties, as clearly expressed by it, forecloses the conclusion relied upon by the trustee in support of his claim. In my view of the situation, as disclosed by the record and careful reading of the contract, the outstanding premiums unpaid were clearly the property of the petitioner, who had appointed the Mason Company as general agents to sell its policies of insurance and collect its premiums for it, subject only to the right of the agents to comply with the regulations set forth in the contract, and to deduct certain commissions for services thus rendered as general agents. Further support for this conclusion is found in the provisions of the contract concerning the bond to be given by the general agents to the company, providing for the payment of all moneys that become due from the general agents to the company. If the money collected or to be collected for premiums was in the contemplation of the parties to be the property of the Mason Company, no bond would have been necessary; but it clearly appears that it was understood that the money collected for premiums was the property of the home office, and it was to secure the payment of it that the bond was given.

It is further argued by the trustee that creditors of the Mason Company could, in a suit to recover on their claims, have attached by garnishee process the uncollected premiums in the hands of the

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various subagents of the Mason Company and even of individual policy holders, and urges this fact for the further reason of showing that the premiums were the property of the Mason Company, and now should be held by the trustee for the benefit of the estate. In this statement I cannot concur. Assuming that no bankruptcy proceedings had intervened, in such circumstances as the trustee outlines, would not the Mason Company have contended, and contended successfully, in those suits brought by the various creditors against it, that it had a contract whereby it had been appointed a general agent to collect these premiums, and that the money represented by it is not its property to the extent that it had a right to collect it and appropriate it to its own use, but rather that the money represented by premiums was the property of the home office, subject only to a deduction for commissions allowed by the terms of the contract, and that only to the extent of such commissions did they have an interest in the premiums? To that extent, and to that extent only, in my view of such an assumed situation, would an attaching creditor secure any part of the fund. In other words, upon proper proceedings it would be bound to appear that the only moneys which were legally attached under such circumstances, and which belonged to the Mason Company, would be the commissions due it under the terms of the contract, and the balance of the money thus attached would have to be released in favor of the Massachusetts Bonding & Insurance Company.

The trustee relies upon Ætna Powder Co. v. Hildebrand, 137 Ind. 462, 37 N. E. 136, 45 Am. St. Rep. 194, and says in his brief exactly the same situation as in this case existed before the court, in which conclusion, after carefully reading the case, I cannot concur, for there the contract was an entirely different contract than the one here under consideration. But the trustee goes on further to say that in that case it was held that, where by the terms of a contract goods are consigned by one person to another to sell as agent upon a commission, the conclusion was reached by the court that this was a contract between the vendor and vendee. With that proposition there can be no quarrel, but that is not the case here, because goods here were not consigned by the home office, and, as I view it, the terms of the contract here under consideration make no such provision, and such was not the intention of the parties, even though the fourth paragraph of the contract provided that the credits extended should be at the risk of the general agents.

While it is true, as counsel have stated in the briefs, it has been difficult to find cases where this exact situation has arisen, I think it must be due, doubtless, to the fact that the propositions involved seem so clear and of such a fundamental character as to require the citation of no authority to support the contention; but my attention is directed to Jefferson Fire Ins. Co. v. Bierce & Sage (C. C.) 183 Fed. 588. This was a suit by an insurance company against its general agent for an accounting of premiums. The insurance company undertook to terminate the agency by the appointment of a receiver, and the question was whether the agency had been lawfully terminated,

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and in the course of the opinion written by Judge Denison, of the Sixth Circuit, now of the Circuit Court of Appeals, he said at page 592:

"As to the uncollected accounts, it is not equitable that complainant should insist upon the defendant's guaranty, found in the contract, and at the same time deprive defendant of the power to collect, as was done by procuring the appointment of a receiver. The resort to these proceedings operated as a waiver of the guaranty. The accounts belong to the complainant."

This dictum is in line with the conclusion here reached.

If Lebanon Mutual Insurance Co. v. Hoover, 113 Pa. 591, 8 Atl. 163, 57 Am. Rep. 511, cited by the trustee, is at all pertinent to the question here to be decided, it in no way alters the conclusion here reached. Note carefully what Judge Sterrett, in writing the opinion of the court, says:

"They [the jury] found the established course of dealing between the three parties concerned [the assured, the agent, the company] was that Tredick, the agent, was treated as debtor to the company for premiums on all policies or renewal certificates procured through him, whether he received such premiums from the parties in whose favor they were issued or not, and that he was not expected to account and pay to the company until a statement was rendered during the next succeeding month; that as between Tredick [the agent] and the assured the latter were not expected to pay in advance, but upon demand made by him a month or more after the insurance was effected. * * * The true answer to the narrow technical defense, interposed in this case, is not that there was an actual waiver of the condition in question, but that there was a mutual understanding between the parties that instead of a strictly cash payment of premiums at the time of effecting insurance, a short credit would be given by the company to its agent and by him to the assured."

So here, if we adopt the reasoning of the Hoover Case, the conclusion is that, even though the contract here does provide that "all credits extended for the payment of premiums *shall be at the sole risk of the general agents,*" that provision simply made the Mason Company the "debtor" of the insurance company for all premiums collected or uncollected, and in no way could such a clause be construed so as to make the Mason Company the owner of the fund, which would have to be the case if the trustee is entitled to it. The contract was a "mutual understanding between the parties that, instead of a strictly cash payment of premiums at the time of effecting the insurance, a short credit would be given by the company to its agent and by him to the assured," and that by such a provision the express terms of the contract could not be altered to make it a contract of vendor and purchaser, even though the Mason Company became a "debtor." The language of the contract in the Hoover Case was not held to be a contract of vendor and purchaser, as urged by the trustee, but, on the contrary, a contract of agency pure and simple.

Nor is the Ætna Powder Co. Case, referred to and relied upon, at variance with the conclusion here reached, because the facts there are not the facts here. The contract there was different from the contract here. The wording of the contract itself clearly showed the intention of the parties, even as it does here, and even though the appellant there contended that the contract was one of principal

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and agent, the court held that the language of the contract showed otherwise. The contract there provided that the Powder Company agreed to "consign" to Hildebrand & Fugate, to sell as agents, at a price to be fixed by the Powder Company below which the goods so "consigned" should not be sold, authorizing Hildebrand & Fugate to sell the goods "so consigned" at the established prices; and all through the contract the wording of it shows clearly that it was a contract of consignment and necessarily governed by the well-known legal principles respecting contracts of consignment, and not by the legal principles affecting contracts of sale by principal and agent.

In the course of the opinion Judge McCabe said:

"The only difference, therefore, between counsel on both sides as to this point, is that appellant's counsel contend that a different relation between the parties than that provided in the contract may arise or be created by the act of one of the parties thereto without any new contract, or the modification of the old by mutual agreement of both. Such a doctrine is at variance with the plainest and most familiar elementary principles of the law of contracts. It is manifest that the contract fixes the relations between the parties thereto at every stage of the transactions provided for therein."

So here by the very terms of the contract the parties were bound by the rules applicable to principal and agent, and not by those to vendor and vendee, and, thus concluding, I find that the fund was the property of the insurance company and the only property right the Mason Company had in it, and which the trustee now takes, is the property right in the commissions provided for in the contract, which vary slightly, as will be seen by reference to it, according to the character and kind of policy issued, but which amount may be easily computed by the trustee, for the purpose of determining what part of this fund he is entitled to hold for the benefit of the estate and what part shall be paid over to the petitioner.

It is further urged in support of the claim of the trustee that the insurance company by its own acts has created the relation of debtor and creditor, thus creating the relation of vendor and purchaser, by bringing its suit on the $4,000 note, which represents premiums collected by the Mason Company other than those here claimed; and it is also urged in this connection that, as the contract provided "that all credits extended for the payment of premiums shall be at the sole risk of the general agents," the fund here in dispute, by the acts of the parties and the terms of the contract, became the property of the Mason Company, and, now that bankruptcy has ensued, ipso facto, the property of the trustee. In my opinion such a statement refutes such a claim and answers the inquiry here presented, because the suit brought shows conclusively that the insurance company was endeavoring to collect what it considered was its property, and that it never treated the fund as the property of the Mason Company, to which it has always maintained that it had title, and the clear intendment of the clause of the contract above quoted simply shows that the "mutual understanding between the parties" was, to use the language of the court in the Hoover Case, supra, that, "instead of a strictly cash payment of premiums at the time of effecting insurance, a

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short credit would be given by the company to its agent and by it to the assured," and if the Mason Company saw fit to extend credit to customers on the insurance company's money, it, the Mason Company, must assume the risk as to whether the customers it saw fit to do business with were financially responsible, in view of the fact that by the very nature of the transactions the insurance company could not and would not undertake to decide the question of financial responsibility of the Mason Company's customers.

In other words, assuming that the contract had not made any provision for the extension of credit, and provided that the business should be strictly cash from assured to the Mason Company—from the Mason Company to the home office—could it be claimed with any seriousness that the cash premiums collected by the Mason Company were its property, to which it held title? The very statement compels a negative answer. So it seems very clear to me that, as the contract simply provided a means for the very same transaction on a credit basis, the legal effect of the transaction was in no way changed and so the title to the premiums was in the insurance company, less what, under the contract, the Mason Company was entitled to deduct as a commission, and to this commission, and that only, the Mason Company had title, and this sum, and this only, is what passes to the trustee for the benefit of the estate.

Therefore the order of the referee is modified, and an order may be entered providing for the payment of such an amount to the trustee as is represented by the commissions provided for in the contract, and the balance shall be paid by the trustee to the Massachusetts Bonding & Insurance Company, the petitioner herein, all in accordance with this opinion.

Ordered accordingly.

In re ROSENWASSER BROS., Inc.

(District Court, E. D. New York. October 31, 1918.)

1. SEARCHES AND SEIZURES ⟸3—SEARCH WARRANTS—AUTHORITY TO ISSUE.
The action of a commissioner in issuing a search warrant under authority given by Act June 15, 1917, c. 30, tit. 11, may be reviewed by the court on motion.

2. SEARCHES AND SEIZURES ⟸3—SEARCH WARRANTS—PROBABLE CAUSE.
Probable cause for the issuance of a search warrant must be shown by the facts alleged, and is to be determined therefrom by the magistrate, and not by the opinion of the affiant, although the facts may be averred on information, if the source of the information is stated.

3. SEARCHES AND SEIZURES ⟸3—SEARCH WARRANTS—SEIZURE OF CORPORATE RECORDS.
Corporation records, which would be evidence against individuals charged with crime, may be taken under a search warrant; and it is no objection that they might also be evidence against the corporation.

4. SEARCHES AND SEIZURES ⟸3—SEARCH WARRANTS—PROBABLE CAUSE.
Not only the affidavit made for the issuance of a search warrant, but also the complaint and affidavit charging the crime, may be considered in determining probable cause for issuance of the search warrant.

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5. SEARCHES AND SEIZURES ⟸3—SEARCH WARRANTS—GROUNDS FOR ISSUANCE.

Issuance of a search warrant by a commissioner *held* justified by the showing of probable cause.

6. SEARCHES AND SEIZURES ⟸3—SEARCH WARRANTS—SUFFICIENCY OF AFFIDAVIT.

An affidavit for a search warrant need not set forth the entire details for exactly passing upon the materiality of every document which the search warrant might properly produce, but general allegations showing materiality are sufficient.

In the matter of the application of Rosenwasser Bros., Incorporated, for vacation of search warrant. Denied.

Fitzgerald, Stapleton & Mahon, of New York City (Luke D. Stapleton, of New York City, of counsel), for petitioner.

Melville J. France, U. S. Atty., of Brooklyn, and H. Harvey Harwood, Asst. U. S. Atty., of New York City, for the United States.

CHATFIELD, District Judge. Motion has been made to this court to vacate and set aside a search warrant, and to direct the return of property taken under this search warrant from the factory of Rosenwasser Bros., Incorporated, one of the defendants in the case.

The record shows that complaint was presented to a United States commissioner against Rosenwasser Bros., Incorporated, with relation to a charge of conspiracy which it was alleged had been formed and carried out by the corporation with certain of its employés and certain inspectors and officers of the United States, who were concerned with government contracts in the process of fulfillment by the corporation.

[1] This search warrant was issued under the provisions of Act June 15, 1917, c. 30, tit. 11, §§ 1–3, 40 Stat. 228, and the particular ground upon which the search warrant was issued is that of section 2, par. 2:

"When the property was used as the means of committing a felony."

Section 3 provides:

"A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched."

For the purpose of this motion it may be assumed that the other sections of this statute have been substantially complied with, that the property seized has been inventoried, that the return of such papers as are not material to the criminal charge has been secured through the act of the commissioner, and that the books and papers necessary to the ordinary conduct of the defendant company's business have been made available to them.

The only question presented is whether probable cause as to the commission of a crime was shown in such a manner as to meet the requirements of the provisions of articles 4 and 5 of the Constitution, forbidding unlawful searches and seizures and securing protection against compulsory incrimination.

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A motion such as the present could be made as the law stood before the enactment of the present statute. United States v. Wilson, (C. C.) 163 Fed. 338; United States v. McHie (D. C.) 194 Fed. 894; Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177.

The situation has not been changed in this respect by the statute of June 15, 1917. The various sections giving the commissioner the power under the warrant to determine whether probable cause actually exists, and to pass upon the materiality of the articles seized, do not restrict the right of the court to consider whether the record shows a basis for the entire proceeding. If there was no probable cause for the issuance of the original search warrant, the court can still set aside the entire action. In re Veeder (C. C. A. 7th Circuit) 252 Fed. 414, —— C. C. A. ——; United States v. Friedberg (D. C.) 233 Fed. 313.

[2] Probable cause must be shown from the facts alleged. It is not sufficient to aver nothing beyond the belief of an individual that such facts could be set forth. The conclusion from the averments of facts must be that of the magistrate, and not the opinion of the affiant. United States v. Tureaud (C. C.) 20 Fed. 621; United States v. Baumert (D. C.) 179 Fed. 735, and cases therein cited.

But the averments of facts need not be by an eyewitness. Allegations on information can be stated, if the facts so referred to and the source of the information are stated. The expression of belief in those facts is customary and required, but does not of itself constitute an allegation which will take the place of the statement of the alleged facts themselves. Beavers v. Henkel, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882.

But the evidence need not be given in detail, nor need the allegations be made by all the parties who will be called to prove them at the hearing. A direct affidavit that facts exist from which probable cause is inferable is sufficient. So is a statement that information as to the facts has been obtained from named sources, if the facts are recited. Beavers v. Henkel, supra, 194 U. S. at page 86, 24 Sup. Ct. 605, 48 L. Ed. 882.

[3] In the case at bar a search warrant and a warrant of arrest were issued and executed together. The corporation could not be arrested in corpore. But some of the individual defendants were arrested at the time of executing the search warrant, and notice was then given that the corporation was a party defendant. No question arises as to the right to take corporation records, which would be evidence against the individuals. Wilson v. United States, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558; Dreier v. United States, 221 U. S. 394, 31 Sup. Ct. 550, 55 L. Ed. 784. Nor can the individuals or the corporation object that the papers taken from them might be evidence against the corporation. Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652; Wheeler v. United States, 226 U. S. 478, 33 Sup. Ct. 158, 57 L. Ed. 309.

[4] If the corporation can be charged with conspiracy, it must still produce its books on the service of lawful process. Hale v. Henkel, supra. But it can object to being unlawfully searched, or compelled

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to produce evidence against itself, by methods outside of the law. Individual defendants have the same right. Each claim of right must be considered by itself. The affidavit upon which the search warrant was asked was not the only paper before the commissioner. He had the complaint and affidavit upon which the warrant of arrest was sought. Both of these could be, and in fact were, used in determining probable cause. These papers together make out a showing of probable cause as to the existence and place of keeping of the papers sought and as to the commission of the crime charged.

[5] But the commissioner in the search warrant does not specifically recite the affidavits so used, nor does he state that he finds probable cause for the charge of conspiracy. His language is merely in the form of a conclusion, as follows:

"Whereas, complaint on oath and in writing has this day been made before me * * * by Franklin Ford, alleging that he has reason to believe and that he does believe that certain property was used as a means of committing a felony, to wit, a conspiracy to defraud the United States, a violation of section 37, C. C. of the United States," and that "the said above property is and is concealed in the quartermaster's subdepot located at Jackson avenue and Queen street, Long Island City."

But this includes the allegation that the property was used in the commission of a "conspiracy," and necessarily includes the finding of the elements of a conspiracy charge.

If the commissioner had stated that he was acting upon two complaints, one showing grounds for the issuance of the search warrant, and one showing probable cause for believing that a felony had been committed, by means of the papers and records sought, the only question would be the sufficiency of the showing made by both complaints.

Viewed in this light, the warrant of search was issued on verified statements sufficient to comply with the statute. When viewed from the allegations of the single paper, generally referred to as the complaint for the search warrant (the affidavit as to the whereabouts and existence of the papers sought), the lack of a showing of probable cause of the commission of a crime would be apparent. But under the circumstances of the issuance of both warrants in this case, the action of the commissioner was justified in law, and the government is not estopped from relying upon the entire record, by the failure of the commissioner to clearly state that his conclusions are not drawn from one complaint or one affidavit alone.

A warrant of arrest need not be as explicit or full as an indictment in setting forth the entire charge, and so a search warrant need not cover all the requisite preliminaries in its recitals, if the crime is definitely shown, and if the conclusion of the commissioner that probable cause exists is so stated that the papers upon which it is based can be identified as having been before him at the time, and if the names of the affiants are set forth (section 6):

"If the * * * commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, * * * stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken."

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These affidavits need not be served, but the warrant must be (section 12), and the originals are of course a part of the record, which must be preserved and should be filed with his return (section 17).

In this case the defendants have been misled by the use of the word "complaint," as if but one affidavit were referred to, when in fact there were three made by the same party. But no wrong has been inflicted thereby, and the general statement of the commissioner is broad enough to cover the defendants' rights, although not so worded as to make plain, upon the face of the warrant, the exact way in which the requirements of section 6 were met.

The court in the Veeder Case, supra, found that an allegation of belief as to the materiality of the papers sought was insufficient from which to find probable cause, when the list included papers of which the affiant had obtained merely a glance and which were not specifically described. The court comments upon the impossibility of determining whether a list of office books, copy of the smoke and wide tire ordinances, and Mr. Veeder's office keys were means used in the commission of the crime of controlling the price of beef by certain packers.

In the present case the affidavit is worded in much the same manner, and the Veeder decision does not seem to have been made use of to avoid the presentation of a similar objection.

[6] But it cannot be held that an affidavit for the purpose of showing probable cause must set forth the entire details for exactly passing upon the materiality of every document which the search warrant might properly produce. General allegations showing materiality to the issue would seem to be sufficiently specific, and such books and papers as have been used in the business routine are not to be thrown out as irrelevant and immaterial in the sense in which those faults were found by the court in the Veeder Case. It cannot be held that no discretion in searching (or even no search) for objects which may ultimately prove immaterial can be allowed, and that the affidavits must cover every such possibility. The language of the statute providing for the return of articles of this category indicates the proper limitations which the court found were exceeded in the Veeder Case. The papers searched for under the present warrant appear from the affidavits to be in substance material, and the warrant is not therefore fatally defective in this regard.

On the entire record the motion will be denied.

BRIGHT et al. v. VIRGINIA & GOLD HILL WATER CO.

(District Court, D. Nevada. October 17, 1918.)

1. CORPORATIONS ⟸397—AGENT OF CORPORATION.
   One is an agent, whether he is acting for a natural person or a corporation; the fact the principal is artificial not interfering with the status of the agent.
2. WITNESSES ⟸144(13)—COMPETENCY—TRANSACTION WITH PERSON SINCE DECEASED.
   Under Rev. Laws Nev. § 5419, declaring no person shall be allowed to testify when the other party to the transaction is dead, one party to an

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arrangement with a corporation cannot testify thereto after death of the corporate representative, for such representative was the other party to the transaction.

At Law. Action by Rose Bright and others against the Virginia & Gold Hill Water Company. On objection to testimony. Testimony excluded.

H. V. Morehouse, of Reno, Nev., for plaintiffs.
Cheney, Downer, Price & Hawkins, of Reno, Nev., for defendant.

FARRINGTON, District Judge (orally). It appears that in 1880, Mrs. Raffetto, her husband, and brother were living on the ranch under discussion. Mrs. Raffetto says she owned an interest in the property. I have not examined the record, but counsel have stated, and the statement has not been questioned, that this property, or a portion of it, was deeded to her in January, 1881, and that this transaction, in regard to which her testimony is offered, occurred something like 37 years ago. I assume that Mrs. Raffetto was interested in the property at the time, and therefore interested in the water. Mrs. Raffetto says the water in a ditch owned by the Water Company escaped and ran over the Raffetto ranch, doing a large amount of injury, and that Mr. Overton, the superintendent of the company, visited the premises, and there was some sort of an arrangement, conversation, or transaction among these four persons—Mrs. Raffetto, her husband, and her brother, on the one side, and Mr. Overton, on the other. Mr. Overton is dead. Defendant objects to the testimony of Mrs. Raffetto as to what occurred on that occasion, on the ground that, inasmuch as death has closed the lips of Mr. Overton, Mrs. Raffetto's lips also are closed.

There was a time when interested parties were not permitted to testify in law cases; their lips were closed, because they were interested. That was the common-law rule for 200 years. During that period a man accused of crime in England was not permitted to testify in his own behalf in a criminal trial. This law was altogether too drastic; hence Lord Denman's Act, and similar legislation in England, followed by like statutes in America, which permit interested parties to testify, save in certain cases. The difference in the statutes is the difference in the exception. At one time there was a federal statute regulating the matter, but that statute has been repealed, and now the national courts must conform to and follow the state legislation. It is not a question as to what is just or unjust; it is simply a question as to what the law is.

It is easy to see how the law as it is written can operate unjustly in certain cases. For instance, you and I enter into a contract; I die, and the law says you cannot yourself testify as to the terms of the contract. It does not say you cannot prove your contract; it simply says you cannot testify; it closes your mouth, because death has closed mine. It may thus operate to prevent you from establishing your claim.

[1, 2] The statute of Nevada reads as follows:

"No person shall be allowed to testify when the other party to the transaction is dead." 2 Rev. Laws Nev. § 5419.

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Unquestionably the Legislature intended by that language to shut out testimony in certain cases, and it is for the court now to determine whether the statute applies to the case in hand. The statute was not always in its present form. Originally it read thus:

"All persons without exception, including parties to or those interested in the suit, except where the adverse party is dead, or where the opposite party shall be the administrator, executor or legal representative of a deceased person, may be witnesses." St. 1861, c. 103, § 340, as amended by St. 1864, c. 58.

Any person could be a witness, except where the adverse party was dead, or where the opposite party was an administrator or an executor. The Legislature evidently was not satisfied, so a few years later it adopted a statute reading as follows:

"No person shall be allowed to testify * * * when the other party to the transaction, or opposite party in the action, or the party for whose immediate benefit the action or proceeding is prosecuted or defended, is the representative of a deceased person." 1 Comp. Laws 1873, § 1440.

In this statute the controlling factor is the opposite party. If he is the representative of a deceased person, the testimony will be excluded; if he is not the representative of a deceased person, the testimony will be admitted.

While this statute was in force, the case entitled Vesey v. Benton, 13 Nev. 284, was decided. The controversy arose in this county—I presume the Benton referred to is "Doc" Benton. H. M. Vesey entered into a contract with Benton, whereby Benton was to furnish board for a number of men; in making the contract E. A. Vesey acted as agent for his brother, H. M. Vesey, who soon after died. The deceased brother was the principal in the contract; the living brother, as agent, had arranged the contract with Benton. E. A. Vesey, the agent who arranged the contract, having been appointed administrator of his brother's estate, brought an action against Benton on the contract. As the representative of a deceased person, he was allowed to testify, but Benton's testimony was excluded; he could not testify, because the opposite party to the contract was dead, and the party opposite to him in the suit was the representative of a deceased person. It was a peculiar situation. Under the plain letter of the statute, one of the men actually engaged in making the contract was permitted to testify, while the testimony of the other was excluded. The case was appealed, and the Supreme Court, speaking through Judge Hawley, criticized the statute severely, but said it was the law, and there was no escape from it; if the law was wrong, the fault was the fault of the Legislature; the court was bound to follow the statute as it was written.

Reading again the present statute, "No person shall be allowed to testify when the other party to the transaction is dead," the first question is: Was Mrs. Raffetto a party to the transaction? And the next question is: Was Mr. Overton a party to the transaction?

The Legislature undoubtedly used the term "other party to the transaction" advisedly. If it had intended "when the other party to the contract," or "the other party to the suit" is a deceased person, it certainly would have said so. The word "transaction" is more comprehensive than the word "contract." It must be given a broader interpre-

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tation than would be given if the statute said "when the other party to the contract" is dead.

In this case there was a transaction, and Mrs. Raffetto was a party to it. If I understand her testimony, she was interested in the ranch at the time, owned a part of it, and therefore was interested in the water; she took an actual part in the conversation with Mr. Overton, and in arranging the contract regarding which she is asked to testify.

As to Mr. Overton, Mrs. Raffetto says he was superintendent of the company. Objection was made that this could not be so proven. If Mr. Overton was not the agent of the company, not its superintendent, it is difficult to see how he could bind the corporation; he must have had some authority to do so. He must have been a representative of the corporation; otherwise, there was no contract which could bind the company. If he was the agent of the company, then is he the other party to the transaction?

In the case to which I referred a few moments ago, Vesey v. Benton, the arrangement between Benton and the surviving brother, the agent for the dead principal, is characterized as a transaction. The court says, "The other party to the transaction is E. A. Vesey;" that is, the agent who negotiated the contract.

In Crane & Co. v. Gloster, 13 Nev. 279, Judge Beatty says:

"Under the old law, if A., by his agent, contracted with B., and his agent died, in an action on the contract after the death of the agent, B. could not have testified, because of the death of the 'other party to the transaction.'"

A man is an agent, whether he is acting for a person or for a corporation. The fact that the principal for whom he acts may be an artificial rather than a natural person does not affect his status as an agent. If, as agent, he arranges a contract for his principal, he is one of the parties to the transaction, within the meaning of the statute.

In Carroll v. United Railways of St. Louis, 157 Mo. App. 247, 137 S. W. 303, cited by defendant, there is an interpretation of a similar, but less comprehensive, statute. Doubtless, if the Supreme Court of Missouri, when passing on the question, had been obliged to apply the Nevada statute to the facts, it would have come to precisely the same conclusion it did in that case. There the statute read:

"When one of the parties to the contract, or to the cause of action, is dead, the other party to the cause of action, or to the contract, cannot testify."

In that case the transaction did not occur between the original parties to the contract. On one side was a woman who had been injured, and on the other a corporation through whose negligence the injury was supposed to have occurred. The transaction was the fact that the lawyer for the plaintiff, the injured woman, tendered certain moneys to the attorney for the company; the attorney for the company died, and the court said the lawyer for the plaintiff could not testify as to that matter; death had closed the mouth of one party to the transaction, and the law would close the mouth of the other. The word "transaction" does not occur in the Missouri statute; the term used is "parties to the contract, or to the cause of action."

Counsel puts much reliance on the decision in Burgess v. Helm, 24

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Nev. 242, 51 Pac. 1025. Burgess claimed to have entered into a contract with Mrs. William McDonald for services; Mrs. McDonald died, and Mr. Helm became her administrator. Burgess brought a suit against the estate. He sought to establish the contract between himself and Mrs. McDonald, not by his own testimony, but by the testimony of third parties as to conversations with Mrs. McDonald after the contract was supposed to have been entered into, in which she made admissions as to its terms. The administrator objected to the testimony, because the third parties who were testifying to these conversations were parties to the transaction—that is, to the conversations—and Mrs. McDonald, the other party, was dead; but the court said "No," the transaction was the contract between Burgess and Mrs. McDonald, therefore Burgess could not testify, but the testimony of his witnesses was admissible.

If the rule had been construed as broadly as Mr. Helm contended for in that case, it would practically, as counsel for plaintiffs in this case suggests, make it impossible to prove a claim against a dead man. I think the decision in the Burgess Case was correct, but it does not fit this case; therefore I am constrained to sustain the objection made to the testimony of Mrs. Raffetto.

The controlling factor in this conclusion is the language of the statute itself:

"No person shall be allowed to testify when the other party to the transaction is dead."

If the Legislature had intended "the other party to the contract," it would have said so; if it had intended "the other party to the suit," it would have said so. In view of the many changes made in the act since its first adoption, we cannot assume that the last amendment was made otherwise than deliberately and advisedly.

LANCASTER et al. v. POLICE JURY, PARISH OF AVOYELLES, STATE OF LOUISIANA, et al.

(District Court, W. D. Louisiana. December 7, 1917.)

1. APPEARANCE ⟸25—EFFECT—IRREGULARITIES—ANCILLARY BILL.
   Where all parties were properly served and appeared, it is immaterial to the jurisdiction of the court that suit was by ancillary bill.
2. STATUTES ⟸63—INVALIDITY—EFFECT.
   Where a statute providing for elections for special road taxes was invalid, those objecting to the tax were not restricted to the time allowed by statute to attack the same.
3. HIGHWAYS ⟸148—ROAD TAXES—INJUNCTION—ADEQUATE REMEDY AT LAW.
   As there is no right in Louisiana to recover a state tax paid under protest, a suit to enjoin the collection of special road taxes cannot be dismissed on the ground of an adequate remedy at law, for the remedy at law must be as practical and efficient as the remedy in equity.
4. CONSTITUTIONAL LAW ⟸290(3)—DUE PROCESS—NOTICE OF TAX ELECTION.
   Act La. No. 256 of 1910, amended by Act No. 218 of 1912, together with Act No. 183 of 1914, and Act No. 199 of 1916, all relating to the

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formation of road districts and elections for special taxes therein, though not providing for notice before creation of the taxing district, are not invalid, as violative of the Fourteenth Amendment, as denying due process, as the acts provide for notice of subsequent proceedings.

5. COURTS ⟸366(6)—FEDERAL COURTS—PRECEDENTS.
Decision of the Supreme Court of Louisiana, holding valid Act No. 199 of 1916, relating to special road districts, etc., is binding on the federal courts.

6. HIGHWAYS ⟸122—ROAD TAXES—CONSTITUTION.
Const. La. art. 291, amendment of 1912, which was incorporated in Const. La. 1913 as article 292, *held* to amend articles 232 and 281, so as to allow police juries to create a road district composed of parts of two or more wards, and submit to it a proposition for special taxes.

7. HIGHWAYS ⟸135—ROAD DISTRICTS—SPECIAL TAXES.
Const. La. art. 281, granting parishes, school districts, road districts, etc., the right, when duly authorized by election, to assess special taxes, provided such taxes for all purposes set forth shall not exceed 10 mills, etc., allows a road district, though overlapping property incorporated into school districts, to levy taxes up to the maximum allowed, etc.

8. HIGHWAYS ⟸122—STATUTE—CONSTRUCTION.
In view of the public benefit to be derived from good roads, the road laws of Louisiana relative to taxation should be construed, if possible, so as to harmonize inconsistencies.

9. HIGHWAYS ⟸90—ROAD DISTRICTS.
Under Act La. No. 256 of 1910, amended by Act No. 218 of 1912, together with Act No. 183 of 1914 and Act No. 199 of 1916, *held*, that police juries are authorized to create road districts, that a district can be changed for convenience, etc., that after the act of 1916, and prior to organization of board of supervisors, the police jury could act, and its acts might be ratified by the board when organized, etc.

10. HIGHWAYS ⟸138—ROAD DISTRICTS—TAXES.
Special road taxes, levied by the police jury in accordance with an election held in a duly created Louisiana road district, *held* valid.

11. HIGHWAYS ⟸138—ROAD DISTRICTS—TAXES.
Where a second Louisiana road district was created, embracing all the territory of another, in which an election providing special taxes had carried, levy of tax in accordance with the election was invalid.

12. HIGHWAYS ⟸148—ROAD DISTRICTS—TAXES.
Tax levied on property in a road district *held* valid, and not subject to attack; any action on ground of irregularity in calling the election being barred by prescription of 60 days prescribed by Act La. No. 256 of 1910.

13. HIGHWAYS ⟸138—ROAD DISTRICTS—TAXES.
Special road tax assessed by the assessor *held* invalid; police jury having created another district, embracing old district, after election.

14. HIGHWAYS ⟸138—ROAD DISTRICTS—SPECIAL TAXES.
A special road tax for a Louisiana road district, to be valid, must be assessed by the police jury, instead of the board of supervisors.

In Equity. Ancillary bill by J. L. Lancaster and another, receivers of the Texas & Pacific Railway Company against the Police Jury, Parish of Avoyelles, and others, filed in the receivership proceedings of B. F. Bush, receiver of the St. Louis, Iron Mountain & Southern Railway Company, against the Texas & Pacific Railway Company. Decree in part for complainants in the ancillary bill, and bill in other respects dismissed.

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This is an application for an injunction to prevent the levy and collection of certain road taxes. Article 232 of the Constitution of Louisiana of 1898 vests authority in any parish, municipal corporation (Orleans excepted), ward, or school district to levy a special tax for the purpose of erecting public buildings, schoolhouses, bridges, etc., and other works of permanent public improvement, on the approval of a majority in number and value of the property taxpayers of the subdivision voting at an election. The amount of this special tax and the number of years it is to run is fixed by the election.

Article 281, § 1, of the said Constitution, amendment of 1912 (Act No. 132 of 1912), authorizes the same subdivisions, and in addition road and subroad districts, to incur debts and issue negotiable bonds therefor, not exceeding 10 per cent. of the assessed value of the property in such subdivision, and to impose and collect taxes, not exceeding 10 mills in any one year, for the purpose of paying such bonds and interest, after an election, the same as provided for by article 232. This article provides for 30 days' publication of notice of the election.

In line with these two articles of the Constitution, the Louisiana Legislature adopted Act No. 256 of 1910, amended by Act No. 218 of 1912, which provides that parishes, wards, and road districts are political subdivisions of the state, and may levy special taxes, not exceeding the limits fixed by the Constitution, incur debt, and issue negotiable bonds therefor, not exceeding 10 per cent. of the assessed value of the property in the subdivision. The act vests the police jury with authority to call elections and levy the taxes, and goes into elaborate details as to the method of calling and holding elections and for the levying of the taxes and the issuing of the bonds. This act provides for the publication of the various steps taken, and specially provides (section 17) "that, for a period of sixty days from the date of the promulgation of the result of any such election, any person in interest shall have the right to contest the legality of such election for any cause, after which time no one shall have any cause of action to contest the regularity, formality, or legality of said election for any cause whatever."

Article 291 of said Constitution, amendment of 1912 (Act No. 236 of 1912), authorizes the police juries of the state (the governing bodies of the parishes) to form their respective parishes into road districts, and, in addition to certain specified taxes, to impose other taxes for the construction and maintenance of public roads and bridges, and to incur debt and issue bonds therefor, "in the manner and to the extent authorized under the provisions of articles 232 and 281 of the Constitution and the statutes adopted to carry them into effect." These articles are now incorporated in the Constitution of 1913. Article 291 is consolidated with old article 292, and bears the number 292. Articles 232 and 281 retain their same numbers.

Following the adoption of these laws the Louisiana Legislature enacted Act No. 183 of 1914, which authorizes the various police juries to divide their parishes into road districts on their own initiative, and requires them to do so on the petition of not less than 25 per cent of the property owners, resident and nonresident, in the proposed district, and authorizes them to divide a road district into subdistricts on the petition of 50 per cent. of the said property owners. The act constitutes the police juries the governing body of the road districts, and gives them the right to call elections and levy taxes according to the provisions of Act No. 256 of 1910.

Thereafter, by Act No. 199 of 1916, which became effective July 31, 1916, the Legislature amended certain sections of Act No. 183 of 1914, to create a new governing body for road districts, called a board of supervisors, consisting of the police juror or jurors and the member or members of the school board representing the ward or wards of which the district is made up, and one other member, to be appointed by the police jury, and creating it a public corporation, and generally vesting it with the same power as to public roads formerly in the police jury. This act, however, has no repealing clause. No part of Act No. 256 of 1910 is amended or repealed, and sections 1, 7, 9, and 10 of Act No. 183 of 1914 are not amended. By these sections the police jury still creates the road district, provides the specifications for constructing the road, and levies the tax, and the sher-

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iff collects the tax. Act No. 183 of 1914 and Act No. 199 of 1916 have been repealed by Act No. 30, Ex. Sess. 1917, but that is immaterial to this case.

The receivers of the Texas & Pacific Railway Company have filed an ancillary bill, in the receivership proceedings, against the sheriff, ex officio the tax collector, the assessor, and the police jury of Avoyelles parish, La., and against the boards of supervisors of four road districts of said parish, to wit, Nos. 11, 14, 16, and 17, by their proper designations. The pleadings are voluminous, but, briefly stated, the bill sets up the various acts of the police jury and of the said boards of supervisors relative to the levying of the taxes complained of, charges the illegality of the articles of the Constitution and legislative enactments of Louisiana enumerated above, as violative of the Fourteenth Amendment of the Constitution of the United States, as not affording due process of law, because they fail to provide for notice to plaintiffs before levy and collection of the taxes complained of, charges specially the invalidity of Act No. 199, supra, as in violation of the Constitution of Louisiana, and alleges various irregularities in the proceedings to impose the taxes, entitling plaintiffs to an injunction in any event. The prayer is that article 292 of the Constitution of Louisiana, Act No. 183 of 1914, and Act No. 199 of 1916 be declared null and void, that defendants be perpetually restrained from levying, for the year 1916 and subsequent years, any taxes under said laws and the proceedings complained of, for an injunction against the sheriff to prevent the seizure and sale of plaintiff's property to satisfy said taxes, and for an injunction pendente lite to the same effect. Various objections, to be later referred to in the opinion, and answers asserting the validity of the said laws and legality of the proceedings under them, have been filed by the defendants.

The application for a preliminary injunction was heard by three judges under the provisions of section 266, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, § 1243]). Owing to unavoidable delays in completing the records on that hearing, no decision has been rendered by the special tribunal. The case was then referred to a master to find the facts, and is now before me on the merits, on the record and the master's report.

Substantially three questions are presented: First, whether the laws above noted afford due process of law in the levying of the taxes; second, whether the said legislative acts are valid, when measured by the Constitution of Louisiana; and, third, whether the provisions of the Louisiana law have been sufficiently observed to validate the taxes levied and bonds issued. Four other suits of a similar character were argued and submitted at the same time, and will be largely controlled by the decision in this case.

Thomas J. Freeman and Howe, Fenner, Spencer & Cocke, all of New Orleans, La., and Wise, Randolph, Rendall & Freyer, of Shreveport, La., for plaintiffs in rule.

G. L. Porterie, of Marksville, La., and H. L. Favrot and Lewis R. Graham, both of New Orleans, La., for defendants in rule.

FOSTER, District Judge (after stating the facts as above). The defendants, in the form of pleas and demurrers, long since abolished by the equity rules, raise various preliminary objections, to wit, multifariousness, misjoinder, the prescription of 60 days created by the Louisiana statutes, want of jurisdiction ratione materia and ratione personæ, and that the plaintiffs have an adequate remedy at law. None of the objections are pleaded in the answers or by motion to dismiss, and all of them might be overruled without further comment. Nevertheless, though inartificially presented, in order to decide the issues squarely, the objections noted have been considered.

[1, 2] A federal question is seriously raised. The amount involved

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exceeds $3,000. All the parties defendant are domiciled in the Western district of Louisiana. The assessor and the sheriff, respectively, assess and collect all the taxes. The police jury and the board of supervisors are parties in interest. It is immaterial that the suit is by ancillary bill, as all parties are properly served and have appeared. If the laws complained of are void, the prescription of 60 days falls with them. The first five objections are clearly without merit.

[3] The last-mentioned objection has been pressed in argument, however, and it is proper to say it is not well taken, for the following reasons: It is well settled that the remedy at law, to oust the jurisdiction in equity, must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. Tyler v. Savage, 143 U. S. 95, 12 Sup. Ct. 340, 36 L. Ed. 82. It is conceded by defendants in their brief that in Louisiana, as distinguished from other states, there is no right to recover a state tax paid under protest; but a distinction is sought to be made with regard to a tax imposed by a municipal corporation or a political subdivision. A number of cases have been cited, but, except as to one, to be later noted, they tend to uphold the jurisdiction in equity, as all of them would have been equitable actions in the federal courts. The erroneous impression of defendants is created by the confusion of legal and equitable remedies in Louisiana in one system under the civil law. The case mainly relied on by defendants is Constant v. East Carroll Parish, 105 La. 286, 29 South. 728. In that case the question of the right to sue to recover back the amount of the tax was not raised. Clearly, it could be waived. On the other hand, in the later case of Sims v. Village of Mer Rouge, 141 La. 91, 74 South. 706, the question was sharply presented by an exception of no cause of action, which was sustained by the Supreme Court. The objections will be overruled.

[4] On the merits, the first point made by plaintiffs is that the laws relative to taxation for road purposes, enumerated above, do not provide for adequate notice to property owners before the taxing subdivision is created, and that the opportunity is not presented to protest, and to show that no benefit will be derived by them, this especially affecting nonresidents and corporations, who have no voice in the election; that, therefore, these laws are violative of the Fourteenth Amendment of the Constitution of the United States. This contention is without merit. It is true no notice is given before the creation of the taxing district and the calling of the election, but after that there is ample notice of every step in the proceedings, and an opportunity is afforded to test the validity of the proceedings in court. It is not essential to due process of law that the person taxed should have notice of every step in the proceedings, and notice by publication may be sufficient. McMillen v. Anderson, 95 U. S. 37, 24 L. Ed. 335; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616.

[5] Of the local questions presented, the first is that no other governing bodies than police juries and municipal corporations have authority under the Constitution to submit a proposition with reference to special road taxes, and hence Act 199 of 1916, vesting the power in boards of supervisors, is void. The Supreme Court of Louisiana has

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answered this in the negative. Lebeau v. Police Jury, 140 La. 172, 72 South. 914; Bolinger v. Police Jury of Bossier Parish, 141 La. 596, 75 South. 423. These decisions I am bound to follow.

[6] The next proposition to be considered is plaintiffs' contention that the police jury could not create a road district composed of parts of two or more wards and submit to it a proposition to levy a tax, incur debt, and issue bonds, because by article 232 of the Louisiana Constitution such a proposition can only be submitted to a parish, municipality, ward, or school district, and in creating road districts by virtue of article 292 the police jury must do so comformably to article 232. It is clear, however, from a reading of the articles, that articles 232 and 281 were only intended to be controlling as to the amount and method of levying the tax, and not as restricting the police jury in any way in the formation of road districts. Furthermore, the Supreme Court of Louisiana has held, construing article 292, that it must be considered as amending articles 232 and 281 in so far as their provisions conflict. City of Lafayette v. Bank of Lafayette, 137 La. 96, 68 South. 238. I have no hesitancy in following this decision.

[7] Further, it appears that some of the road districts overlap territorially the same property incorporated into school districts. The total special taxes assessed for school and road purposes exceed 10 mills on the dollar, and the total amount of bonds issued exceed 10 per centum of the assessed valuation of the property contained in the road district. It is contended by plaintiffs that this exceeds the limitations imposed by the Constitution of Louisiana. Article 281 of the said Constitution, after granting the right to parishes, school districts, road districts, etc., when duly authorized by an election, to issue bonds and assess special taxes, says: Provided the special taxes "for all purposes as above set forth" shall not exceed 10 mills on the property in such subdivision, and the total amount of bonds "for all purposes" shall never exceed 10 per centum of the assessed value of the property in such subdivision. It is contended the words "for all purposes" means for school and road purposes together. I think, however, the words should be held to mean for all purposes for which the particular subdivision was created. For instance, road districts are authorized to construct and maintain roads, provide a sinking fund, and pay the interest and principal of bonds. These various matters make applicable the limitation. This is the interpretation put on similar provisions of the Constitution of 1879 by the Supreme Court of Louisiana. Washington State Bank v. Baillio, 47 La. Ann. 1471, 17 South. 880.

[8, 9] Proceeding with the local questions, it is argued by plaintiffs that, if Act No. 199 of 1916 is void, anything done by the board of supervisors created by that law is the action of unauthorized individuals, and no valid tax can be predicated upon it, and, conversely, if said act is valid, anything done by the police jury after the said act became effective is void, for the same reasons. Without doubt the Legislature, by adopting Act No. 199 of 1916, very much complicated the none too clear road laws of Louisiana; but, considering the great benefit to be derived by the nation, the state, and the general public by the building of good roads, it is the duty of the court to bring order out

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of chaos, if possible. Construing the road laws of Louisiana, the Supreme Court of Louisiana, in the case of Crow v. Board of Supervisors, etc., 141 La. 1017, 76 South. 182, held: That police juries are authorized to create road districts; that a road district, once formed, may be changed for the convenience or advantage of the public; that, when a district is included in the territory of another, it ceases to exist; that the special taxes voted must be levied by the police jury; that after Act No. 199 of 1916 became effective, and prior to the organization of the board of supervisors the police jury might take the steps necessary to call elections, promulgate the returns, and issue the bonds; that the board of supervisors, when organized, is not required to do over what has been done by the police jury; that the board of supervisors may ratify and adopt the acts of the police jury; that the prescription of 60 days applies to an election called by the police jury after Act No. 199 of 1916 became effective.

It may be argued that part of the opinion in the Crow Case, supra, is obiter; but the findings above set out accord with my own views, for I know of no good reason why the board of supervisors could not adopt the valid acts of the police jury and continue the proceedings. Furthermore, considering the state of the law, giving both the right to call elections, neither the police jury nor the board of supervisors could be considered unauthorized individuals, and that an election is called by one when possibly it should have been called by the other would be at most an irregularity.

The master has found the facts as to each road district. Taking them up in the order of the bill, the facts material to a decision are as follows:

Tenth Ward Road District No. 11, Parish of Avoyelles.

[10] This road district was created by the police jury on August 4, 1915. An election was called to levy a 6-mill tax, resulted favorably, and the result was duly promulgated by the police jury on September 8, 1915. On August 2, 1916, the police jury adopted an ordinance calling an election to submit a proposition to issue bonds in the aggregate of $100,000. On September 13, 1916, the result was promulgated, declaring the election carried in favor of the proposition. On November 4, 1916, the board of supervisors met and organized, and directed the issuance of the said bonds. On November 8, 1916, the police jury levied the tax. On April 23, 1917, the board of supervisors ratified and adopted as its own all proceedings previously had by the police jury. It is conceded the various steps were published according to law. This applies to the other districts.

Applying the law set out above, it is evident the taxes assessed on the property in this road district are valid.

Burns Road District No. 12, Parish of Avoyelles.

[11] On April 5, 1916, the police jury created this district by ordinance and called an election. On June 7, 1916, the election was declared carried, and the result promulgated. No tax was ever levied by the police jury, and on August 3, 1916, the police jury created another

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road district, embracing all the territory of road district No. 12. Taxes were assessed, however, and the sheriff is endeavoring to collect them.

It is evident the tax assessed in this road district is invalid.

Avoyelles Road District No. 13.

[12] On August 3, 1916, the police jury created this road district by ordinance, appointed a board of supervisors, and called an election to incur debt and issue bonds therefor, aggregating $75,000. On September 13, 1916, the police jury issued its proclamation declaring the proposition carried. On November 8, 1916, the police jury levied the tax of 6 mills for the purpose of paying the principal and interest of the bonds. On December 30, 1916, the board of supervisors adopted an ordinance providing for the issuance of the bonds.

Conceding there was an irregularity in calling the election, under the authority of the Crow Case, supra, any action on that ground was barred by the prescription of 60 days. As this suit was not instituted until May 24, 1917, the prescription applies.

The tax levied on the property in this road district is valid.

Avoyelles Road District No. 14.

[13] On September 19, 1916, this road district was created by the police jury. On September 19, 1916, the board of supervisors called an election submitting a proposition to issue bonds aggregating $30,000. On November 2, 1916, the board of supervisors promulgated the result, declaring the proposition carried, and apparently leaving it to the assessor to assess sufficient tax to pay the bonds and interest. No tax was levied by the police jury, and on November 8, 1916, the police jury created another road district, Avoyelles road district No. 16, and included all the territory of road district 14 in it. On February 7, 1917, the police jury, by ordinance creating a second road district, road district No. 16 of Avoyelles parish, repealed, annulled, and rescinded the ordinance creating this road district. Nevertheless the assessor assessed the taxes.

It is evident the tax is invalid.

Avoyelles Road District No. 16.

On November 8, 1916, the police jury created this road district and appointed a board of supervisors. Nothing else was done until February 7, 1917, the police jury created another road district, designated as road district No. 16 of Avoyelles parish, which included the same territory, and by the same ordinance repealed, annulled, and rescinded the ordinance creating the district.

It does not appear by the master's findings any tax was assessed; therefore no action of the court is necessary.

Road District No. 16 of Avoyelles.

[14] This road district was created February 7, 1917, and all the proceedings seem to be regular, except that the tax was ordered assessed by the board of supervisors, instead of the police jury.

A valid levy is essential to the validity of any tax. The taxes assessed in this road district are invalid.

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Avoyelles Road District No. 17.

It appears that the police jury adopted two ordinances creating road districts designated Avoyelles road district No. 17, but, beyond appointing the boards of supervisors, nothing has been done; therefore no action of the court is necessary in the premises.

Considering the above facts, and applying the law as I find it, there will be a decree in favor of plaintiffs, enjoining and restraining the defendants from assessing and collecting, or attempting to assess and collect, any taxes on plaintiffs' property in road district No. 12, created August 5, 1916, road district No. 14, created September 19, 1916, and road district No. 16, created Feb. 7, 1917, but without prejudice to any valid proceedings to complete the organization, and to levy, assess, and collect the taxes in road districts No. 16 and No. 17 now existing. In all other respects the bill will be dismissed; costs to be divided.

LANCASTER et al. v. POLICE JURY, PARISH OF SABINE, STATE OF LOUISIANA, et al.

(District Court, W. D. Louisiana. December 7, 1917.)

1. HIGHWAYS ⟸138—ROAD TAXES—ASSESSMENT.
Where the ordinance calling an election for a special road tax did not comply with Act La. No. 256 of 1910, § 3, the tax is invalid, for in proceedings of that character the authorities calling and holding the election must proceed with meticulous care.

2. HIGHWAYS ⟸138—SPECIAL ROAD TAXES—ASSESSMENT.
Where a special road tax for a Louisiana road district was not assessed by the police jury, there was no valid levy.

3. HIGHWAYS ⟸90—ROAD DISTRICTS—CREATION.
Under Act La. No. 183 of 1914, § 1, providing that the police jury of the parish shall create a road district on petition of not less than 25 per cent. of the property owners, etc., *held*, in no event, whether the section is mandatory or not, could the police jury create a road district on the petition of 25 per cent. of the resident property owners, where there were nonresident owners.

4. MUNICIPAL CORPORATIONS ⟸406(2)—TAXING DISTRICTS—DELEGATION OF POWER.
It is well settled the Legislature may create taxing districts for the purpose of local improvements, such as roads, and also may delegate that authority to municipal corporations, or boards, or commissions.

5. MUNICIPAL CORPORATIONS ⟸495—IMPROVEMENTS—ASSESSMENTS—BENEFITS.
When taxing districts are created for the purpose of local improvements, the question of benefit is one of fact for the taxing authorities, subject to the rule that the delegated body may not act arbitrarily, and impose a tax in disregard of the benefit to be derived.

6. HIGHWAYS ⟸148—TAXING DISTRICTS—BENEFITS—EQUITY JURISDICTION.
A court of equity has jurisdiction to determine the question whether land included in a Louisiana road district will be benefited by the building of the road for which special taxes were levied, if the police jury acted arbitrarily, and taxed property that would not be benefited at all.

7. HIGHWAYS ⟸136—TAXES—ROAD DISTRICTS.
The inclusion of complainants' property in a Louisiana road district, and imposition of special taxes thereon, *held* arbitrary, as such property

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would receive no benefits; hence, as their bill was filed within the 60-day prescription fixed by Act La. No. 256 of 1910, complainants were entitled to relief.

In Equity. Ancillary bill by J. L. Lancaster and another, receivers of the Texas & Pacific Railway Company, against the Police Jury, Parish of Sabine, State of Louisiana, and others, filed in the receivership proceedings of B. H. Bush, receiver of the St. Louis, Iron Mountain & Southern Railway Company against the Texas & Pacific Railway Company. Decree for complainants in ancillary bill.

Thomas J. Freeman and Howe, Fenner, Spencer & Cocke, all of New Orleans, La., and Wise, Randolph, Rendall & Freyer, of Shreveport, La., for plaintiffs in rule.

Lewis R. Graham, of New Orleans, La., for defendants in rule.

FOSTER, District Judge. In this matter the issues are similar to those in the case of Lancaster and Wight, receivers, v. Police Jury of Avoyelles, 254 Fed. 179, recently decided, and the questions at law are largely controlled by that decision.

[1] The election was called by the police jury, and a proposition submitted to issue $30,000 of bonds, said bonds to be paid in such amount and in such places and at such times as the governing authority might determine, and also to authorize a tax of 6 mills annually for not more than 25 years to liquidate the bonds. Subsequently the board of supervisors of the road district declared the election carried, promulgated the result, and assessed the tax. It is evident that the ordinance calling the election does not comply with the law. Section 3, Act 256 of 1910. In proceedings of this character the authorities calling and holding the election must proceed with meticulous care. Williams v. Police Jury, 129 La. 267, 55 South. 878; Elkins v. Board of School Directors, 138 La. 207, 70 South. 99; Capps v. Board of School Directors, 138 La. 348, 70 South. 322. As this suit was filed within the 60 days provided by law, the court must consider irregularities of this kind.

[2] Furthermore the tax was not assessed by the police jury, and therefore there is no valid levy. Crow v. Board of Supervisors, 141 La. 1017, 76 South. 182.

[3] It is further shown that road district No. 6, the only district herein complained of, was created by the police jury in accordance with a petition of more than 25 per cent. of property owners residing in the proposed district.

Section 1 of Act 183 of 1914 provides:

"That the police juries of the various parishes of this state, the parish of Orleans excepted, are empowered and authorized upon their own initiative to divide their parishes into one or more road districts, * * * but the police jury of any parish shall create a road district in said parish on petition of not less than twenty-five per cent. of property owners, resident and nonresident."

It is contended by plaintiff that the police jury must create a road district when requested by more than 25 per cent. of the property owners exactly as outlined in the petition, and that as nonresidents and corporations are not entitled to any voice in the proceedings, nor any ne-

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tice of the filing of the petition, or of the creation of the road district, Act 183 of 1914, under the provisions of which the proceedings are had, deprives them of their property without due process of law. So far as I am advised, the Supreme Court of Louisiana has not construed this feature of the act. If it is to be construed so as to require the police jury to create a road district exactly as petitioned for, there is much in plaintiff's contention; but "shall" is sometimes construed as "may," and the act is susceptible of the construction that the police jury is vested with discretion in establishing the boundaries of the road district, even on a petition of property owners. If it were not so, there would be no delegation of authority to a body authorized to inquire as to the necessity of the improvement and the benefit to the property taxed. But the act requires the police jury to create a road district on the petition of 25 per cent. of the property taxpayers, resident and nonresident. Considering that nonresidents have no voice in the election a fair construction of the act would be to require the petition to be signed by more than 25 per cent. of the taxpayers in both number and amount of assessed value, the same as is required to carry the election, if it is mandatory on the police jury. In no event, however, could the police jury create a road district on the petition of 25 per cent. of the resident taxpayers, as was done here, where it is clearly shown there are nonresident taxpayers.

[4-7] In addition to the other allegations, the bill sets up that the road district was so laid out as to include all the railroad lines of the Texas & Pacific Railroad Company, not because any part of them would derive benefit, but for the sole purpose of including valuable property for the benefit of others, and so reduce the cost of the improvement to them; that the principal road proposed to be built would be adjacent to and parallel to the railroad, and the roads in the district will be of no benefit to the plaintiff, but, on the contrary, will be a detriment. The master found these facts to be as contended by plaintiff on the admission of defendant. No exception was taken to the master's findings.

The total assessed valuation of the property in the district is $371,309. At the election 84 votes, representing an assessed valuation of $42,273, were cast in favor of the proposition, and 12 votes, representing $4,210, were cast against it. It is fair to assume that all those entitled to vote did so, and therefore the burden will fall heaviest on these having no voice in the proceedings.

It is well settled that the Legislature may create taxing districts for the purpose of local improvements, such as roads, and also may delegate that authority to municipal corporations, or boards, or commissions. When this is done, the question of benefit to the land taxed is one of fact, to be finally determined by the taxing authorities, but subject, however, to the exception that the delegated body may not act arbitrarily, and impose a tax in utter disregard to the benefit to be derived by the property taxed. Myles Salt Co. v. Iberia & St. Mary Drainage District, 239 U. S. 478, 36 Sup. Ct. 204, 60 L. Ed. 392, and authorities cited. At the election in road district No. 6 less than 12 per cent. of the assessed valuation of the land in the district voted; plaintiffs had no voice in the proceedings to create the district, were

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not entitled to notice before it was created, and had no vote in the election. There were entitled to their day in court, however, within 60 days thereafter during which time the bill was filed, to contest the validity of the election for any cause. Section 17, Act 256 of 1910. Furthermore, a court of equity had jurisdiction to determine the question as to whether or not the land will be benefited by the building of the road, if the police jury has acted arbitrarily and imposed a tax on property that will not be at all benefited.

In this case the bill was filed in time; plaintiffs have not waived their rights, and are not estopped. From the facts found by the master, I am constrained to hold that the police jury, in creating road district No. 6, acted arbitrarily and without due regard to plaintiffs' rights; that plaintiffs' property will derive no benefit whatever from the building of the proposed roads, and should not have been included in the road district.

Considering the above views, there will be a decree in favor of the plaintiff as prayed for; defendants to pay all costs.

HOPKINS v. LANCASTER, State Treasurer, et al.

(District Court, N. D. Alabama, N. D. at Montgomery. July 30, 1918.)

No. 228.

1. COURTS ⟸366(7)—FEDERAL COURTS—DECISIONS OF STATE COURT.
   On suit by statutory receiver of an Illinois insurance company, the federal court is bound by the decision of the Illinois Supreme Court as to the interpretation of the receiver's statutory powers.
2. INSURANCE ⟸50—STATUTORY RECEIVERS—POWERS.
   A statutory receiver of an Illinois insurance company is, under the laws of that state, invested with the title to all the assets of the company, wherever situated.
3. RECEIVERS ⟸210—STATUTORY RECEIVERS—RIGHT TO SUE.
   A statutory receiver, invested with title to the assets of a dissolved corporation, may sue in the courts of a state foreign to the state of his appointment.
4. RECEIVERS ⟸210—POWER OF INTERVENER TO QUESTION RIGHT OF COMPLAINANT TO SUE.
   An intervener, in a suit by the statutory receiver of a foreign insurance company against the treasurer of a state, can only raise the question whether he is a creditor entitled to share in the distribution of funds deposited with the treasurer, etc.
5. PARTIES ⟸47—RIGHT OF INTERVENER—CLAIMS.
   A stranger cannot intervene for the purpose of defeating the entire suit, nor for the purpose of litigating with the complainant his right or title to any relief; and if it is desired to set up a new and independent claim, it must be done by an original bill in the nature of a cross-bill.
6. CONTRACTS ⟸212(2)—PERFORMANCE—TIME.
   Where no definite time for performance is fixed by the contract, the law implies a reasonable time.
7. LIENS ⟸7—EQUITABLE TIME—CREATION.
   Where a foreign insurance company agreed to pay interveners a fixed sum in the event they secured legislation which would enable the company to withdraw securities deposited with the state treasurer, etc.,

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Held, that interveners secured no equitable lien by implication or otherwise on such securities.

8. Liens ⟸7—Equitable Liens—Creation.

An equitable lien may arise by express agreement or implication, as where a party innocently and under mistake of title makes improvements permanently beneficial to another's property.

In Equity. Suit by James S. Hopkins, as receiver of the Illinois Surety Company, against W. L. Lancaster, as Treasurer of the State of Alabama, and others, in which Meyer & Goldman intervened. Decree for complainant.

A. J. Hopkins, of Chicago, Ill., and M. M. Ullman, of Birmingham, Ala., for plaintiff.

E. S. Thigpen, Asst. Atty. Gen., of Montgomery, Ala., for defendant.

Steiner, Crum & Weil, of Montgomery, Ala., for interveners.

HENRY D. CLAYTON, District Judge. The original bill in this cause was filed on March 13, 1918, by Hopkins, as receiver of the Illinois Surety Company, against W. L. Lancaster, as treasurer of the state of Alabama, and others. The bill shows that Hopkins is the statutory receiver of an insolvent insurance company, which was dissolved upon a bill filed in the superior court of Cook county, Ill., in conformity with the statutes of the state of Illinois; said bill having been filed to that end by a majority in number and interest of the stockholders of said company on April 19, 1916, and a decree of dissolution having been entered in said cause by the court after the appearance and answer of the Illinois Surety Company.

[1-3] This court is bound by the decisions of the highest court of the state of Illinois as to the interpretation of the powers of such receiver. As construed by the Supreme Court of Illinois, a receiver appointed in the manner shown in the bill in this cause is invested with the title to all the assets of the dissolved corporation wherever situated. Republic Life Ins. Co. v. Swigert, 135 Ill. 150, 173, 174, 25 N. E. 680, 687, 12 L. R. A. 328. A statutory receiver, invested with title to the assets of a dissolved corporation, may sue in the courts of a state foreign to the state of his appointment. Such a receiver is not a mere chancery receiver, but he derives his powers from the statute, and not from the manner of his appointment or the decree of the court. Great West. Mining Co. v. Harris, 198 U. S. 561, 574, 25 Sup. Ct. 770, 774, 49 L. Ed. 1163. In that case the Supreme Court, speaking of Booth v. Clark, 17 How. 322, 15 L. Ed. 164, said:

"In that case it was held that a receiver is an officer of the court which appoints him, and, in the absence of some conveyance or statute vesting the property of the debtor in him, he cannot sue in courts of a foreign jurisdiction, upon the order of the court which appointed him, to recover the property of the debtor."

But here there is a statute providing for the dissolution of an insolvent corporation, and that statute, as construed by the highest court of the state in which the receiver is appointed, vested the title to the

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assets of the dissolved corporation in the receiver. The law seems to be well settled that such receiver may sue as of right in the courts of a foreign jurisdiction, and such courts will in respect to such questions of title accept the construction put upon it by the highest court of the state. Bernheimer v. Converse, 206 U. S. 516, 534, 27 Sup. Ct. 755, 51 L. Ed. 1163; Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292.

Upon the hearing heretofore had in this court upon the answer filed by the defendant Lancaster, the state treasurer, a decree was entered in which the court found the allegations of the bill to be true, assumed jurisdiction of the cause, and ordered the state treasurer to turn over to the clerk of this court the securities, which are now in the possession of the court; the state treasurer having complied with the order so made.

[4, 5] The interveners, Meyer & Goldman, are in no position to question the right of the petitioner to sue. In the case of Ex parte Gray, 157 Ala. 358, 364, 47 South. 286, 288 (131 Am. St. Rep. 62), the Supreme Court said:

"Our own court has recognized the right of intervention, but held that a stranger could not intervene for the purpose of defeating the entire suit, nor for the purpose of litigating with the complainant his right or title to any relief. * * *" Renfro Bros. v. Goetter, Weil & Co., 78 Ala. 311, 313-315; Curtis v. Curtis, 180 Ala. 64, 60 South. 167, 168; Wightman v. Yaryan Co., 217 Ill. 371, 380, 75 N. E. 502, 108 Am. St. Rep. 258, 3 Ann. Cas. 1089; Cincinnati Equipment Co. v. Degnan, 184 Fed. 834, 841, 107 C. C. A. 158.

Mr. Justice Lurton in Horn v. Pere Marquette R. R. Co., (C. C.) 151 Fed. 626, 634, said:

"A most absurd result would ensue if, when the corporation has submitted to the jurisdiction of the court, either as a court of equity or to the local jurisdiction, a creditor could come in, or, when brought in, might reopen the matter of jurisdiction over the debtor corporation. If such an objection is not waived once for all, so as to close the question as to stockholders and creditors, what number of creditors would conclude the rest?" In re Metropolitan Railway Receivership, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403.

It seems to me that the interveners, Meyer & Goldman, are entitled to raise only one question, and that is whether or not they are of the class of creditors who are entitled to share in the distribution of the fund in the hands of the court. It is shown that the funds now in the hands of the court were deposited by the Illinois Surety Company with the treasurer of the state of Alabama in trust for the benefit of the holders of certain obligations thereafter to be issued by the Illinois Surety Company. The statute of Alabama, under which the deposit was made, as construed by the Supreme Court, confines those entitled to share in this fund to judgment creditors who have recovered judgments against the Illinois Surety Company upon an official bond or a judicial bond; that is to say, upon the bond of some public official of the state of Alabama, or a bond given by a party in a judicial proceeding in Alabama. It is shown by the petition of intervention that Meyer & Goldman are not judgment creditors, nor are they the holders of a judicial bond or an official bond. They are not, there-

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fore, entitled to subject the fund now in the hands of the court to the payment of any claim asserted in the petition of intervention.

But it is contended that this court, having acquired jurisdiction of this cause, and having in its possession certain funds belonging to the Illinois Surety Company, or its successors in interest, will not return these funds to a foreign jurisdiction, and compel citizens of Alabama holding a lien thereon to litigate with the receiver in a foreign state. If Meyer & Goldman were creditors of the class entitled to subject the fund to the payment of their claims, this court would certainly render such decree as would be necessary to protect their lien before permitting the receiver to take the assets located in the state of Alabama out of the jurisdiction of this court; but, since they are not of that class, it is still contended that as interveners they may assert and foreclose an equitable lien upon these securities. As said by the Supreme Court of Alabama in Curtis v. Curtis, 180 Ala. 64, 69, 60 South. 167, 168:

"Our own court has recognized the right of intervention, but held that a stranger could not intervene for the purpose of defeating the entire suit, nor for the purpose of litigating with the complainant his right or title to any relief; also that, if it is desired to set up a new and independent claim, it must be done by an original bill in the nature of a cross-bill. Renfro Bros. v. Goetter, Well & Co., 78 Ala. 311, 313-315." Ex parte Gray, 157 Ala. 358, 47 South. 286, 288, 131 Am. St. Rep. 62.

[6-8] The court has carefully read the correspondence passing between these parties, the interveners and the plaintiff, and this correspondence is the only contract out of which the claim, upon which the intervention is based, arises. The court finds from this correspondence that the Illinois Surety Company employed Meyer & Goldman to procure the delivery of the bonds in question to the Illinois Surety Company, and agreed to pay Meyer & Goldman, in the event they were successful, the sum of $1,000. This appears from the letter of the plaintiff's president, written December 30, 1914, where he said:

"I have been to considerable trouble and expense myself in making two trips to Alabama, and our company thinks that the fee you suggest is a little high; but I have decided that I will pay $1,000 to you as your fee, if you are successful in getting the bonds restored to the Illinois Surety Company without any strings. What I mean by that is that I do not want to be required to give another surety bond and pay annual premiums to the company for getting our bonds from the state treasurer. I think they should be delivered to us, and if you can procure that by legislation, or by satisfying the present official who has charge of these bonds that under the law we are entitled to the return of the bonds, and they are returned to us, I will give you a fee of $1,000. If you are not successful, I don't think we should pay you anything; and, if these terms are satisfactory to you, you can proceed with the matter."

No definite time having been fixed by the contract for its performance, the law would grant a reasonable time. It further appears from the correspondence that the Illinois Surety Company paid to Meyer & Goldman $500 for their expenses in attending the Legislature in securing the passage of the act designed to enable the company to withdraw these securities. The act of the Legislature was passed; but still the company failed to secure the return of the bonds. It is true

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that on July 6, 1915, one of the interveners wrote to the president of the company that he had succeeded in passing the bill through the Legislature, and felt that he had fairly earned the fee of $1,000; but immediately thereafter, on July 10, 1915, the president of the company wrote to Meyer & Goldman that he had no objection to the fee of $1,000 if Meyer & Goldman secured the return of the bonds, and in this letter agreed to pay the expenses, not to exceed $500, and concluded his letter by saying:

"If this is satisfactory to you, you can proceed at once to Montgomery and take up this work of securing the legislation as outlined in your letter to me of July 6th."

On August 7th, intervener Goldman advised by letter that the bill had been signed, and asked for a check for $1,000 and a check for $250, balance of expense money. On August 9th, the president of the surety company acknowledged receipt of this letter and stated:

"The $1,000 I will send you as soon as the Illinois Surety Company receives its bonds, now in the hands of the treasurer of your state, as per my letter to you of December 30, 1914."

Accepting this as satisfactory, it appears from the correspondence that on September 27, 1915, Goldman went to Montgomery for the purpose of attempting to secure the return of the bonds and calling upon the insurance company for further directions as to how to proceed. The company replied to this letter under date of October 5, 1915, and from that date forward until the Illinois Surety Company was dissolved in April, 1916, more than six months later, there does not appear to have been any efforts made by Meyer & Goldman to secure the return of these bonds. A reasonable time certainly elapsed before the receiver was appointed.

The court is of the opinion, and so holds, that the interveners are not entitled to any equitable lien upon the funds. An equitable lien may arise by express agreement or by implication. There is clearly no agreement for a lien in this case, because there is no intention expressed to appropriate as security for the debt the bonds on which the lien is claimed. 25 Cyc. 665, 666. An equitable lien may arise by implication, and such a lien arises where a party innocently and in good faith, but under a mistake as to the condition of the title, renders services, makes improvements, or incurs obligations that are permanently beneficial to another's property. 25 Cyc. 667.

There is no room in this case under the evidence to find that an equitable lien arose by implication. The case of Barnes v. Alexander, 232 U. S. 117, 34 Sup. Ct. 276, 58 L. Ed. 530, and the case of McGowan v. Parish, 237 U. S. 285, 35 Sup. Ct. 543, 59 L. Ed. 955, are not in conflict with the opinion here expressed, because in those cases there was an expressed intention to give to the creditor an interest in the property itself as security for the debt.

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NORFOLK BANK FOR SAVINGS & TRUSTS v. WHIPPLE.

(District Court, E. D. South Carolina, at Charleston. September 27, 1918.)

No. 177.

1. COURTS ⟸372(4)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.
In cases involving construction of contracts affecting interests in real estate, even where, when the rights of the parties accrued, there was no settled law of decision in the state establishing a rule of property binding on federal courts, such courts should, unless strongly convinced of their error, follow the state decisions.

2. LOGS AND LOGGING ⟸3(11)—CONSTRUCTION—CONDITION SUBSEQUENT—CONVEYANCE OF STANDING TIMBER.
A deed to standing timber, giving the grantee 10 years from the time of commencing to cut within which to cut and remove the timber, vests in the grantee a present estate in the timber trees, with the right to begin cutting within a reasonable time from the date of the deed.

3. DEEDS ⟸145—CONSTRUCTION—COVENANT OR CONDITION.
If the language in a deed is of doubtful import, the court will construe it as a covenant, for breach of which damages may be recovered, rather than a condition working a forfeiture of the estate.

4. LOGS AND LOGGING ⟸3(14)—CONSTRUCTION—CONVEYANCE OF STANDING TIMBER.
Failure of the grantee of standing timber to begin cutting the same within 14 years *held* to terminate his estate therein, where under his deed he was required to begin cutting within a reasonable time.

In Equity. Suit by the Norfolk Bank for Savings & Trusts against C. S. Whipple. Motion for injunction denied, and bill dismissed.

Bryan A. Hagood, of Charleston, S. C., and Edward P. Buford, of Lawrenceville, Va., for complainant.

L. D. Lide, of Marion, S. C., Townsend & Rogers, of Bennettsville, S. C., and W. C. Miller, of Charleston, S. C., for defendant.

CONNOR, District Judge. The bill, answer, exhibits, and testimony disclose the following case:

On January 30, 1899, H. R. Peele, being the owner of a tract of land with the timber standing and growing thereon, containing 777 acres, in consideration of the sum of $400 conveyed the timber of the dimensions named in the deed to the Cape Fear Lumber Company. The deed contains the following clause:

"The said Cape Fear Lumber Company to have ten (10) years from time they commence to cut the timber to cut and remove the same, and [if] at the end of that time they have not removed said timber, then to pay six per cent. upon the purchase price, they can have ten years longer to remove the same."

Thereafter, in August, 1904, and before the said lumber company had cut or removed any timber from said land, it conveyed to the Marion County Lumber Company all of its right, title, and interest in and to the timber, with the right to cut and remove the same, conveyed by Peele. Thereafter, on December 27, 1910, and before either of said companies had cut or removed any part of the timber, Peele con-

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veyed the land upon which the timber was standing, in consideration of $4,600, to Ansel A. Gray, who, at the time of filing the bill herein, was the owner thereof. On March 5, 1905, the Marion Lumber Company executed a deed in trust to complainant, Norfolk Bank for Savings & Trusts, conveying, among other timber rights and contracts, the timber conveyed by Peele to the Cape Fear Lumber Company, and by said company to the Marion County Lumber Company, for the purpose of securing a bond issue. On April 3, 1913, said Marion County Lumber Company executed a second deed in trust, conveying the same property, to secure an additional bond issue. There was, at the time of filing the bill, bonds secured by said deeds outstanding to the amount of $50,000.

On the 6th day of February, 1913, Ansel A. Gray instituted in the court of common pleas of Marlboro county a suit against the Marion County Lumber Company, for the purpose of removing the cloud from the title to the standing timber. alleging that, by its failure to cut and remove the timber on the land purchased by him from H. R. Peele within a reasonable time, the title had reverted to plaintiff, etc. The bill was dismissed by the circuit judge. Upon appeal to the Supreme Court the judgment was reversed, and it was adjudged that by the failure to commence to cut the timber in a reasonable time "the right to cut was ended." Gray v. Marion County Lumber Co., 102 S. C. 289, 86 S. E. 640. This decision was rendered October 15, 1915. On the 13th day of October, 1913, said Ansel A. Gray and defendant, C. S. Whipple, entered into a contract whereby Gray agreed to sell and Whipple agreed to buy the timber on the tract of land purchased from Peele, provided that in the suit brought by Gray against the Marion County Lumber Company it was adjudged that the title to the timber was in Gray. If the suit resulted adversely to Gray, the contract was to "terminate." Whipple agreed to pay $3,000 cash and execute his notes secured by mortgage on the timber for $6,000. He was to have ten years from the date of the deed to cut and remove the timber.

On November 1, 1915, upon the decision of the case by the Supreme Court, Gray executed to Whipple, pursuant to the terms of the contract, a deed for the timber, upon receipt of $6,000 cash and his notes for $3,000. Whipple began to cut the timber, whereupon complainant brought this suit. The jurisdiction of this court is based upon diversity of citizenship. All of the deeds and contracts referred to were duly recorded in Marlboro county. Defendant shows, in addition to the foregoing facts relating to the title to the timber, that the deed in trust to the complainant, trustee, includes several other lots of timber and timber contracts, the value of which is not shown; that there is outstanding $40,000 of the bonds secured by the first trust deed, and $20,000 of those secured by the second deed; that the Marion County Lumber Company has surrendered its charter and conveyed its property to the Marion County Lumber Corporation, a Virginia corporation, which has assumed the payment of the debts of the lumber company; that the officers of complainant had knowledge of the pendency of the suit by Gray against the Marion County Lumber Company, and of other suits pending in the courts of South Car-

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olina, involving the title to the timber covered by the deeds in trust, and failed to intervene therein. It appears that Gray did not have actual notice of the deeds in trust to complainant when he purchased from Peele. This is immaterial, because the deeds were recorded. He had notice of, and purchased subject to, the deed from Peele to the Cape Fear Lumber Company.

It is not seriously contended that complainant, in respect to the first deed in trust, is bound by the decree in the case of Gray v. Marion County Lumber Company. Its deed was on record, and, if plaintiff had so desired, he could, by substituted service, have brought it into the record. As to the second deed, executed after the suit was instituted, it would seem that it occupies the attitude of a purchaser pendente lite and is bound by the decree.

[1] Counsel for complainant challenge the decision of the Supreme Court of South Carolina, in the case of Gray v. Lumber Company, in respect to the extent to which it is binding upon this court, and its value as a correct adjudication of the rights of the parties claiming under the deed from Peele to the Cape Fear Lumber Company. It is conceded that the title of complainant is dependent upon the construction of that deed and the course pursued by the successors in title to the land and the timber. Counsel insist that, conceding the well-settled rule by which this court is required to follow the decision of the state courts, upon which property rights, or rules of property, are based, the remedies afforded and modes of procedure pursued in the federal courts, sitting as courts of equity, are not determined by local laws and rules of decisions, but by general principles, rules, and usages of equity having uniform operation in those courts wherever sitting. Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856. I do not understand that the decision in that case drew into question or limited the well-settled rule laid down in Burgess v. Seligman, 107 U. S. 20 (33), 2 Sup. Ct. 10, 27 L. Ed. 359, and Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228, and followed in numerous other cases.

It is uniformly held that state Codes of Procedure, abolishing the distinction between actions at law and suits in equity, with the results which follow therefrom, do not limit or affect either the jurisdiction or modes of procedure of federal courts in equity causes. The primary question to be settled in this case is whether the Supreme Court of South Carolina has, by a current of decisions, so construed deeds containing substantially the same language and provisions as to make a rule of property in that state. The latest discussion of the subject and classification of the cases coming within the rule laid down in Burgess v. Seligman is found in the opinion of Mr. Justice Harlan in Kuhn v. Fairmont Coal Co., supra. The cases are cited in the opinion in Highland Park Mfg. Co. v. Steele, 232 Fed. 10, 146 C. C. A. 202.

The questions ably discussed by the learned counsel for complainant are: Should the court, in obedience to the decisions of the Supreme Court, adopt as binding upon its judgment the decision of the Supreme Court of South Carolina in Gray v. Marion County Lum-

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ber Co., not as res judicata, but as prescribing a rule of property, which the court should apply in this case? Gray v. Marion County Lumber Co., is decided upon the authority of Minshew v. Lumber Co., 98 S. C. 8, 81 S. E. 1027 (1914), in which a writ of error was dismissed for want of jurisdiction. See 235 U. S. 685, 35 Sup. Ct. 202, 59 L. Ed. 424. While the deed construed in that case is not in the exact language used in this, the court said:

"This case cannot be distinguished in any essential particular, either of law or fact, from the particular case."

After disposing of exceptions directed to the admissibility and effect to be given to parol evidence, Mr. Justice Watts says:

"Under contracts of this character, the purchaser has only the right to have a reasonable time to get the fruits of his purchase. He has no right to enjoy, by indefinite extension, what would practically amount to a perpetuity and deprive the owner of the enjoyment of his property."

The learned justice says:

"It has been decided by this court in Flagler v. Lumber Company, 89 S. C. 328, 71 S. E. 849 (1911), McClary v. Lumber Company, 90 S. C. 153, 72 S. E. 145 (1912), and Atlantic Coast Realty Company v. Litchfield, 90 S. C. 363, 73 S. E. 182 [728], that the grantee must begin the removal of the timber within a reasonable time, and it follows, as a natural, logical, and irresistible sequence that, upon the failure to commence the removal within a reasonable time, the estate or interest granted is terminated and the interest granted reverts to the grantor or his privies."

An examination of the cases cited discloses that in each of them the grant of the timber is followed by a limitation upon the time within which the grantee may cut and remove the timber, fixed by reference to the time at which it "begins cutting and removing," followed by a clause extending the time limit upon the payment of interest on the purchase price. We thus see that, from 1911 until the decision of the Gray Case (1915), the court has uniformly held that deeds conveying standing timber, coupled with the language found in the deed from Peele to the Cape Fear Lumber Company, conveyed to the grantee a determinable or qualified fee to the timber which determined upon the expiration of the period fixed by reference to the time the grantee began to cut and remove the timber. It will be observed that, in the cases cited, the construction of the language was essential to a decision of the case. In each case it was strenuously insisted that the timber was conveyed in fee, and that, by the failure to cut and remove within the time limit, the title did not revest in the grantor. It is in evidence in this case that learned counsel so advised the complainant. Such has been, at all times, in South Carolina and other states, the contention of counsel representing the timber companies.

In Rogers v. Marion County Lumber Corporation (S. C.) 93 S. E. 1055, the court in a per curiam opinion treats the question as closed —the law settled. The decisions of the Supreme Court of South Carolina place the question clearly within the rule of stare decisis. Complainant insists that the law was not so settled at the date upon

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which its right accrued. In Kuhn v. Fairmont Coal Co., supra, it is said:

"Where, before the rights of the parties accrued, certain rules relating to real estate have been so established * * * as to become rules of property and action in the state, those rules are accepted * * * as authoritative declarations of the law of the state."

This limitation, in respect to the time at which the "rights of the parties accrued," as related to the time when the "rule of property" was "established," invites recurrence to the dates of the deeds and the South Carolina decisions. The deed from Peele to the Cape Fear Lumber Company bears date January 30, 1899. Accepting the South Carolina rule as to the reasonable time within which the grantee, or its assigns, should begin to cut at approximately 12 years, the right of complainant to demand the extension of time accrued in 1911. Gray did not bring his action against the Marion County Lumber Company until February 6, 1913. While defendant entered into an executory contract with Gray for the purchase of the timber, he did not acquire such title as Gray had, and pay the purchase price, until November 1, 1915, subsequent to the decision by the Supreme Court holding that complainant's title to the timber had determined at the date when the suit was brought, January 27, 1913.

In the Flagler Case, decided in 1911, it is said that the question presented, the construction of a timber deed containing language from which the court found that the parties intended to place a time limit to the right to cut and remove the timber, had not theretofore been before the court. It was there distinctly held that when such intention was expressed in the deed, or could be reasonably inferred, the grantee did not take an absolute fee, but that he was bound to commence the removal of the timber within a reasonable time. Judge Rucker, after reviewing the cases relied upon by defendant to sustain its contention, and decided cases in other courts, thus states the conclusion:

"Suffice it to say that we are of opinion that, both by the inherent reason of the thing, as well as by authority, the true rule is that, wherever it is apparent in a contract that the parties had in view some time for the commencement of the removal of the timber, which intent was not embodied in the * * * contract, the law will presume, and will enforce, that such commencement of the removal of the timber shall be within a reasonable time from the date of the contract."

The court reversed the decree of the trial court dismissing the bill, and remanded the case, with direction to the court to take testimony and ascertain what would be a reasonable time. The language of the extension clause in the deed before the court was, in all essential respects, the same as in this. The grantee was given 10 years from the time when it began cutting and removing, with the right to an extension upon payment of interest. The deed bore date June 10, 1899. Every subsequent decision has been consistent with that made in the Flagler Case. It will be observed that the court did not hold that the time elapsing between the date of the deed and the decision was unreasonable. It left the question open for determination of the trial court, upon testimony, as a question of fact.

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Conceding, for the present, that at the time the right of complainant to tender the interest and demand the additional time accrued the decisions of the South Carolina court had not established a rule of property applicable to complainant's deed, and that the decisions thereafter made are not to be "accepted as authoritative declarations of the law," the question is presented whether the case falls within the other classifications made by Judge Harlan, in which he says:

"It is not only the right, but the duty, of the federal court to exercise its own judgment, as when the case depends upon the principles of general jurisprudence. * * * For the sake of comity, and to avoid confusion, the federal courts should always lean to an agreement with the state court, if the question is balanced with doubt."

It is suggested that, while the timber deed conveyed real property situate in South Carolina, and in so far as the kind and quality of estate is conveyed the decisions of the court of that state are rules of property, the question presented here involves the construction of a superadded contract prescribing the terms upon which a valuable right may be enjoyed, which should be construed by this court upon principles of general jurisprudence—the intention of the parties. The distinction is stated in Kuhn v. Fairmont Coal Co., supra, and a number of illustrative cases commented upon. The learned justice says:

"There are adjudged cases involving the meaning of written contracts having more or less connection with land that were not regarded as involving a rule in the law of real estate, but as only presenting questions of general law, touching which the federal courts have always exercised their own judgment, and in respect to which they are not bound to accept the views of the state courts."

The opinion, and the dissenting opinion of Mr. Justice Holmes, contain an interesting and exhaustive discussion of the question in the light of the decided cases. Certainly, for the reasons strongly stated by Judge Dayton in Kuhn v. Fairmont Coal Co. (C. C.) 152 Fed. 1013, the federal courts should, unless strongly convinced of their error, follow the decisions of the state courts upon the questions presented, and upon the decisions of which the rights of the parties depend.

[2] In his opinion the learned District Judge has made a full and valuable collection of illustrative cases. This view of the case opens up for examination the very interesting questions presented and argued with marked ability by counsel for complainant. They challenge the decision of Gray v. Lumber Co., supra, and the cases upon which it is based. To state the contention in the language of the brief:

"A present estate in the timber vested in the Cape Fear Lumber Company, immediately on the execution of the deed from H. R. Peele, which has passed by mesne conveyances to the plaintiff, by virtue of the deed in trust."

This may be conceded. The best considered authorities so hold. From this proposition it is argued that such estate is not one which is determinable by operation of law for failure of the grantee, or its assigns, to commence the cutting and removal of the timber within a reasonable, or any other, time.

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An examination of the opinions of courts, dealing with timber deeds, containing limitations upon the time for cutting and removing, discloses a purpose to give to them a construction, effectuating what the court finds to have been the intention of the parties, and to conserve the rights of both parties resort to analogies, sometimes resulting in confusion. The early cases in states wherein the cutting of timber was conducted by corporations operating large mills, buying standing trees from the owners of the land, either with or without a provision fixing the time within which they were to be cut and removed, disclose different views and variant constructions. By some it is held that no title vests in the trees until they are cut, and that therefore only such as are cut and removed within the time fixed pass to the grantee. Strasson v. Montgomery, 32 Wis. 52. It is said:

"Such deed does not immediately pass the title to the trees, and is not a sale, or a contract for a sale or interest in land, but an executory contract for a sale of chattels, to take effect when the trees are cut and severed from the land, with a license to enter and cut during the time fixed." Fletcher v. Livingston, 153 Mass. 388, 26 N. E. 1001.

By other courts it is held that, upon failure to cut within the time limited by the deed, the title to the standing trees, or such of them as remained uncut, does not revert to the owner of the land, but remains in the grantee of the trees; that the failure to cut within the time limit did not work a forfeiture of the estate; that the license to enter and cut expired at the end of the time fixed. This construction left the owner of the trees in the position of having title to timber trees standing and growing on the lands of the grantor, with no right to enter and cut them. It was said that in such cases, by entering upon the land, the owner of the trees committed an actionable trespass; the damage recoverable was the injury to the soil, in making the entry—not the value of the trees cut and removed.

The conclusion to which other courts came was that the title to the timber vested in the grantee, with the condition annexed that if it was not cut and removed within the period fixed by the deed, or, if no time was fixed, within a reasonable time, the title to the timber not cut and removed reverted to the owner of the land or his grantee. The Supreme Court of Michigan, in Williams v. Flood, 63 Mich. 493, 30 N. W. 96, said:

"It is not very important to discuss the exact nature of plaintiff's rights under the written contract. Whatever they were, they included an absolute sale of all the timber described, subject only to such qualifications of the right of removal as the contract mentions. At most, this condition would only operate by way of forfeiture. The timber had all been paid for, and all belonged to plaintiff, unless lost by that forfeiture for nonremoval."

In Bunch v. Elizabeth City Lumber Co., 134 N. C. 121, 46 S. E. 24, the question in respect to the construction of a timber deed, with a clause limiting the time for cutting computed from the time the grantee began to cut, was first presented to the Supreme Court of North Carolina. It was argued on petition for rehearing, by eminent and learned counsel. Mr. Justice Walker reviewed the authorities, reaching the conclusion that the deed vested a present title to the timber in

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the grantee; that the right to cut and remove was limited to a reasonable time; that, upon the failure to begin to cut within such time, the title reverted to the grantor. This decision was rendered in 1903. He says:

"It is well settled on principle and by authority that the legal effect of the instrument is that the vendor thereby conveyed to the vendee all of the trees and timber on the premises which the vendee should remove therefrom within the prescribed time, and that such as remained thereon after that time should belong to the vendor or to his grantee of the premises."

In Midyette v. Grubbs, 145 N. C. 85, 58 S. E. 795, 13 L. R. A. (N. S.) 278 (1907), Mr. Justice Hoke reviews the decided cases and says:

"It may now be taken as settled that growing trees are a part of the realty, and a contract to sell and convey them, * * * must be reduced to writing. These authorities also clearly establish that, on the expiration of the time stated in such a contract within which the timber may be removed, all right in the vendee shall cease and determine, and the estate in so much of the standing timber as has not by that time been severed shall revert to the vendor; and both positions are upheld in numerous and well-considered cases in other jurisdictions."

See Hawkins v. Lumber Co., 139 N. C. 162, 51 S. E. 852; Lumber Co. v. Corey, 140 N. C. 467, 53 S. E. 300; Hornthal v. Howcott, 154 N. C. 228, 70 S. E. 171; Jenkins v. Lumber Co., 154 N. C. 357, 70 S. E. 633.

In a very able and well-considered opinion by Judge Keith, in Wright-Young v. Camp. Mfg. Co., 110 Va. 678, 66 S. E. 843 (1910), after a thorough examination of the decided cases, the court adopted the opinion of those courts which held that the deed conveyed an estate in the timber, subject to be divested, and revert to the grantor, upon failure to cut and remove within the time fixed in the deed, or a reasonable time. He thus concludes the discussion:

"Looking to the whole deed, and all of its provisions must be considered in order to arrive at its proper construction, we are of opinion that it was not the intention of the parties to give an absolute and unconditional title to the timber, but only such as was cut and removed within the time limited by the deed, and such extensions thereof as the grantee was entitled to demand upon a fair construction of the deed, or as might be agreed upon between the parties."

In that case the deed was executed January 24, 1895, with a limit of five years to cut and remove the timber, and the right to demand an extension "as long as the grantee might desire," upon payment of interest on the purchase price. At the end of five years the grantee paid the interest, and continued to do so for four years, when the grantor refused to accept further interest and sold to another person, who began to cut the timber. The lumber company brought suit to enjoin the cutting. Although the contract gave the grantee the right to demand an extension of time "as long as it might desire," such right was construed to mean "a reasonable time." Quoting with approval the language used in McIntyre v. Barnard, 1 Sandf. Ch. (N. Y.) 52, the learned president said:

"It is only by this construction that we can give full scope to the whole intention expressed by the instrument; and at the same time we relieve it

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from the irrational consequences to which the defendant's construction inevitably leads."

The effect which would follow from the contention that these deeds impose permanent burdens upon timber lands, and prevent the owner from bringing them under cultivation or other use to which they are adapted, does violence to the intention of the parties, and imposes such burdens upon the lands of the grantors as greatly to diminish, if not destroy, its value.

The court, in that case, noting that nine years had elapsed since the execution of the deed, gave the lumber company one year within which to cut, from the filing of the decree. This case was cited with approval by the same learned judge in Brown v. Surry Lumber Co., 113 Va. 503, 75 S. E. 84. There were, in that case, facts which differentiated it from the Wright-Young Case, but the court adhered to the construction of the deed announced in the first case. Quigley Furniture Co. v. Rhea, 114 Va. 271, 76 S. E. 330.

In Smith v. Ramsey, 116 Va. 530, 82 S. E. 189, Judge Buchanan refers to the great "diversity of judicial decision" in the construction of timber contracts, not only in different jurisdictions, "but the decisions of the same court have not always been uniform." He discusses the "vexed question," citing the Wright-Young and the Rhea Cases, supra. He concludes:

"Those decisions would seem, therefore, to settle, if decisions can settle a question, that the provisions in such contracts for the cutting and removal of the timber within a fixed period are not covenants, but conditions."

In Adkins v. Huff, 58 W. Va. 646, 52 S. E. 773, 3 L. R. A. (N. S.) 649, 6 Ann. Cas. 246, Huff conveyed to Adkins a tract of land, reserving and excepting the timber, giving 34 months from the date of the deed to cut and remove the timber. Eliminating conditions which came into the situation after the date of the deed, the grantor not having cut and removed the timber within the period fixed, the grantee, claiming that the title to the timber became absolute in him, began to cut. The grantor, claiming under the reservation, applied to the court for an injunction, which was granted. Upon appeal the decree was reversed and the bill dismissed. Judge Poffenbarger said:

"The authorities are practically uniform in holding that an instrument granting standing timber, and containing a clause requiring or permitting it to be removed within a specified time from the date of the grant, gives no absolute and unconditional title to the property. Some courts hold the right of the grantee to be a license, others a lease, and others a defeasible title to the timber. By the great weight of authority it is determined that no right or title exists in the grantee after the expiration of the time specified in the deed or contract."

In support of this conclusion a large number of cases from the courts of Vermont, Michigan, New York, Minnesota, Massachusetts, Wisconsin, Ohio, and Maine are cited. Holding that the same construction should be given a reservation as a conveyance of timber with a time fixed for cutting, the court enjoined the grantor claiming under the reservation from cutting after the expiration of the time limit. The judge said obiter that if no time for cutting was fixed,

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and the deed contained apt words to convey a fee, the title was "absolute and unconditional," citing cases from Alabama and Michigan.

In Keystone Lumber & Mining Co. v. Brooks, 65 W. Va. 512, 64 S. E. 614, Judge Brannon cites Adkins v. Huff, supra, but appears to reject the conclusion reached. He does not overrule it, but, with all deference to the learned judge, I am unable to reconcile much that he writes, or his conclusion, with the decision in that case. It may be that the two decisions may be reconciled by noting the construction placed on the language of the two deeds. The inference which I draw from the opinion is that the learned judge leaned to the view that the language used in timber deeds fixing a time within which the timber was to be removed is to be construed as a covenant on the part of the grantee, and not a limitation or condition subsequent. The argument of counsel for complainant in this case finds much support in Judge Brannon's opinion.

It is held by Judge Rose in Cullen v. Armstrong (D. C.) 209 Fed. 704, that according to the decision of the Maryland court a contract for the sale of standing timber, or, as he describes it, a "timber leave," is personal property; it is bought and sold as goods, wares, and merchandise.

I have, at probably unnecessary length, reviewed the decisions in the state courts in this circuit, because of my very high regard for the learning of the justices, and a careful consideration which they have given to the construction of these timber deeds, and for the additional reason that I deem it important that the decisions of the state and federal courts in this circuit shall be uniform.

If the time at which the rights of the lumber companies, purchasing timber and operating large mills in these states, be fixed at the date of the deeds, between the years 1895 and 1905, approximately, rather than at the dates at which the right to demand extension of time for cutting and removing—1905 to 1915, approximately—it will be found that in neither of the states had there been such a number of cases decided as to constitute authoritative declarations of the law controlling the federal courts. If the date of the deeds be adopted as the time when the right of the parties accrued, the question presented in this and other cases coming before the District Courts in this district must be treated as open to the independent judgment of the federal court, observing the principle announced in Kuhn v. Fairmont Coal Co., supra.

[3] In the very carefully prepared brief of counsel for complainant it is contended that the courts of South Carolina, and therefore Virginia and North Carolina, have fallen into error in holding that the clause fixing the time within which the timber shall be cut and removed is a condition subsequent, and that failure to comply with such provision works a forfeiture of the estate in the timber; that such language should be construed to be a personal covenant on the part of the purchaser to cut and remove the timber within the time prescribed. It is well settled that, if language is of doubtful import, the court will construe it to be a covenant, for breach of which damages may be recovered, rather than a condition working a forfeiture

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of the estate. King v. N. W. R. R. Co., 99 Va. 625, 39 S. E. 701; Bangert v. Roper Lumber Co., 169 N. C. 628, 86 S. E. 517. In the last-cited case, in which there were two dissents, the court held that, under the terms of the deed, payment was not required in advance. The further contention is made that, if the provision be construed as attaching to the estate a condition subsequent, the failure to comply with its terms does not work a forfeiture until action is taken by the party entitled to take advantage of the breach, as by re-entry, notice, or otherwise—that failure to do so operates as a waiver of the breach; that a court of equity will not lend its aid to enforce a forfeiture of a condition subsequent. Authorities are cited sustaining these positions.

Language is used by some of the courts indicating that they treated the clause limiting the time for cutting the timber as creating a condition subsequent. It would seem, however, that the better interpretation of the opinions leads to the conclusion that they likened the deeds, and the estate conveyed to a base or qualified fee. Bunch v. Lumber Co., supra. This estate is defined by Blackstone as:

"Such a one as has a qualification subjoined thereto and which must be determined whenever the qualification annexed to it is at an end." 2 Com. 147 (*109).

In the note to Jones' Blackstone, the case of Wiggins Ferry Co. v. Ohio & M. Ry. Co., 94 Ill. 83, is cited. It is said of this character of estate:

"It is true the estate here may not endure forever; it may be determined by the failure to use and employ the rights and easements granted in the manner prescribed in the grant; but if they shall be so used and employed the grant is forever. And this seems to meet Blackstone's definition of a qualified or base fee."

It is also said that the estate created by the conveyance is not properly an estate on condition, either precedent or subsequent, but a base or qualified fee. Kilpatrick v. Graves, 51 Miss. 432.

Chancellor Kent defines a qualified base or determinable fee as:

"An interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event circumscribing its continuance or extent." Com. IV, *9.

Mr. Justice Walker states the proposition clearly, saying:

"In no event should we give a construction to the instrument which will confer any greater right or estate than is commensurate with the object and purpose of the parties, as expressed in it." Jenkins v. Lumber Co., supra.

It is manifest that these "timber contracts" are sui generis, and in the effort to construe them by analogy to deeds, or instruments conveying land, difficulties are encountered. The courts which adopt the view of the South Carolina court, that an estate vests in the grantee upon the delivery of the deed, with a limitation upon the time for cutting and removing, hold that upon the expiration of such time the title "determines," "reverts," or use equivalent terms, excluding the idea that the clause fixing the time creates a condition subsequent.

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I have given to the well-considered argument of counsel careful consideration. They are confronted, however, with the fact that the Supreme Court of South Carolina, in accord with the large majority of other state courts, especially in this judicial circuit, has, by an unbroken line of decisions, held that the title to the timber of the Cape Fear Lumber Company, and its assignee, determined upon the failure to cut and remove within a reasonable time, and that such time had elapsed before Gray brought his suit against the Marion County Lumber Company, or it made a tender of the interest and gave notice of the additional time required. This court is asked to disregard the decision of the South Carolina court, and hold that complainant is the owner of the timber under the deeds in trust executed by the Marion County Lumber Company, and that defendant, purchasing from the owner of the land subsequent to the decision of the Gray Case, be enjoined from cutting. To so hold would do violence to the wise and salutary rule prescribed by the Supreme Court of the United States in Kuhn v. Fairmont Coal Co., supra, that—

"To avoid confusion, the federal court should always lean to an agreement with the state court, if the question is balanced with doubt."

The wisdom of this rule followed by the federal courts is illustrated by the situation presented in this case, and other timber contracts, or deeds, of the same character. It appears from the state reports that parties and corporations holding deeds for timber on extensive tracts of land, in the South Atlantic states, containing clauses limiting the time for cutting, differing in some respects, but substantially similar, have strongly pressed upon the state courts the contention made here. The opinions of the judges in the cases cited, and many others, disclose a careful, anxious effort to give to the deeds a fair, reasonable construction. As said by Judge Keith, "looking to the whole deed, and all of its provisions," and "avoiding irrational consequences," they have reached the conclusion that—

"It was not the intention of the parties to give an absolute and unconditional title to the timber, but only such as was cut * * * within the time limited by the deed, and such extensions thereof as the grantee was entitled to demand upon a fair construction of the deed, or as might be agreed upon between the parties."

While I am not inadvertent to the fact that other courts have held to the contrary, I concur in this construction.

It is urged that in Crown Orchard Co. v. Dennis, 229 Fed. 652, 144 C. C. A. 62, the Court of Appeals of this circuit rejected the construction placed upon the timber deeds by the South Carolina court in the Flagler and Minshew Cases, and adopted, as its independent judgment, the rule laid down in the Prettyman Case, 97 S. C. 247, 81 S. E. 484, resulting in the conclusion that, when the extension clause gave such additional time as the grantee "might desire," the doctrine of reasonable time could not be applied; that the right to cut and remove was unlimited. It will be noted that in the Prettyman Case the circuit judge of the state court, in his decree, said that when such time was granted as the grantee "might desire," in "unambiguous and express terms," the "reasonable time" rule did not apply; that "when

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the parties speak for themselves the court cannot imply." The learned judge fixed the additional time to cut at 10 years, because "that was the time demanded by the grantee." He says: "The plaintiff had thus, by its notice, fixed the duration of the extension." A reasonable construction of the language of the circuit judge justifies the argument that he was of the opinion that the language of the deed excluded the application of the "reasonable time" rule. The Chief Justice in a per curiam opinion says that, "for the reasons therein set forth, the judgment is affirmed." Judge Watts, in his dissenting opinion, suggests that, by adopting the decree "as the judgment of this court," it was committed "to a decision and a policy that will be far-reaching in its effect and prejudge other cases of similar character." This case was strongly pressed upon the federal court in the argument of the Crown Orchard Case. Judge Knapp says:

"It is not necessary for us to affirm that the Prettyman Case established a rule of property in South Carolina which we are bound to apply. We follow it upon the question in dispute, not merely out of deference to the court which decided it, but because the decision commends itself to our judgment as just and correct."

From this language it is argued in this, and other, cases that this court is bound, as by an authoritative declaration of the law, to hold that the Cape Fear Lumber Company and complainant, its assignee, is entitled to an unlimited and unlimitable time to cut and remove the timber. The language quoted, without limitation, is capable of that construction. It may be suggested that, in saying that the judgment in the Prettyman Case was "for the reasons given" affirmed, the Chief Justice was referring to the fact that the period of 10 years was fixed because, as stated by the circuit judge, that was the time fixed by the plaintiff, thus limiting the scope of the per curiam opinion of the court. However this may be, it is manifest that the learned judge in his opinion in the Crown Orchard Case did not intend to hold that the deed conferred an unlimited time to cut. He says that the exercise of the right conferred by the deed "must be an honest and justifiable desire, not a pretended or fantastic desire. In short, we take the phrase to mean such additional time as may be reasonably desired by the party having the right to an extension." The court remanded the case, with direction to the court below to fix the time, etc.

Referring to the Prettyman Case, supra, it is worthy of note that the decision was rendered on April 23, 1917, and the decision in the Minshew Case on April 27, 1917. Judge Watts, who wrote in the Minshew Case, makes no reference to the decision in the other case, although he reviews all of the other decisions of the court relating to the construction of timber deeds. There were differentiating facts in the cases. As we have seen, the Minshew Case is cited as the authoritative declaration of the law in the Gray Case.

I have given to the language used by the court in the Crown Orchard Case careful consideration, and said this much to exclude the suggestion that I did not regard it as controlling authority in like cases. I shall indulge the hope that my decree in this may be reviewed, so that, without regard to the conclusion reached, the District Judges in this

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circuit, and the parties who have large interests involved in such contracts, may be advised what construction the federal courts will place upon these deeds.

[4] I conclude that the deed from Peele to the Cape Fear Lumber Company vested in the grantee a present estate in the timber trees, with the right to begin cutting and removing them within a reasonable time computed from the date of the deed; that, upon failure to begin cutting within such time, the title to, and estate in, the timber determined and reverted to the owner of the land or his grantee, Gray; that, by the failure to begin cutting the timber within the time elapsing between the date of the deed and the institution of the suit by Gray against the Marion County Lumber Company—14 years—the right, title, and estate to the timber vested in the lumber company, and such rights as vested in complainant by virtue of the deeds in trust determined and reverted to Gray, the owner of the land; that by the deed from Gray to defendant he became the owner of the timber, with the right to cut and remove it, according to the terms and provisions of the deed under which he claims.

This construction of the deed disposes of several interesting questions discussed by counsel, upon the theory that defendant's title was dependent upon a forfeiture wrought by breach of a condition subsequent. It also renders unnecessary the discussion of questions presented by defendant.

The motion for an injunction is denied, and the bill dismissed, at the cost of complainant.

AMMON & PERSON v. NARRAGANSETT DAIRY CO., Limited.

(District Court, D. Rhode Island. December 12, 1918.)

No. 74.

TRADE-MARKS AND TRADE-NAMES ⊜98—SUIT FOR INFRINGEMENT—RECOVERY OF DAMAGES AND PROFITS.

The right to an injunction against the future use of a single word forming part of complainants' trade-mark, and which it afterward used alone, does not carry the right to an accounting, covering time when such word alone was only used by defendant in good faith, and on packages clearly identified as its own.

In Equity. Suit by Ammon & Person against the Narragansett Dairy Company, Limited. On complainants' motion for entry of decree.

See, also, 252 Fed. 276.

Edwards & Angell, of Providence, R. I., for plaintiffs.

Wilson, Gardner & Churchill, of Providence, R. I., for defendant.

BROWN, District Judge. Though the opinion already filed (252 Fed. 276) holds that the plaintiffs are entitled to an injunction, and that the defendant's cross-bill must be dismissed, yet it appears that the former Narragansett Dairy Company had used as a trade-mark

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applied to goods the word "Queen" alone for about three years prior to any use of the word alone by the plaintiffs as a trade-mark applied to goods. This use by that company or by the defendant had been very substantial and continuous in New England and elsewhere from 1909 to September 29, 1915, the date of plaintiffs' notice to defendant; such use being without fraudulent intent to imitate plaintiffs' goods, and so far as appears without actual deception of purchasers. This has a most important bearing on plaintiffs' right to an accounting of profits and assessment of damages.

The goods of both these manufacturers were sold as their own product to persons who ordered of them as manufacturers. While plaintiffs' cartons for one-pound packages, bearing the word "Queen," first used in 1912, bore no marks indicating that Ammon & Person, the plaintiffs, who were wholesalers and not manufacturers, were connected in any way with the goods, the cartons of the two corporations were so conspicuously marked with their names as manufacturers that it is impossible to believe that any purchaser of these either at wholesale or retail, could have supposed he was getting goods of the plaintiffs. Were it not for the earlier use of plaintiffs' trade-mark, "Queen of the West," and evidence showing that this had been abbreviated to the trade-name "Queen," not used as a trade-mark before 1912, the plaintiffs would be entitled to no relief.

By reason of differences in the facts, Hanover Milling Co. v. Metcalf, 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713, seems insufficient to support defendant's cross-bill. Yet that case is important for the recognition that it gives to the rights of one who, in good faith and without notice, has built up a trade in a special territory, and to the principle that the earlier adopter may not monopolize marks where his trade has never reached, and where the mark signifies, not his goods, but those of another.

The plaintiffs' contention that the word "Queen" alone had become so associated with plaintiffs' goods, that it meant to the public plaintiffs' goods, and that therefore defendant's profits are presumably due to that meaning, finds little support in the evidence. The contention is based rather upon a theoretical presumption than upon any substantial testimony.

To apply in this case a presumption that purchasers who ordered goods from the defendant's factory, or who purchased goods packed in defendant's cartons (which could not be mistaken for plaintiffs'), did so because of any knowledge of plaintiffs' reputation or connection with the goods, would be highly unreasonable. Presumptions are never allowed against ascertained and established facts; when these appear, presumptions disappear. Lincoln v. French, 105 U. S. 617, 26 L. Ed. 1189.

Hamilton-Brown Shoe Co. v. Wolf Bros. Co., 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629, has slight application to the facts of the present case. In that case of fraudulent imitation the court applied the principle applicable in cases of tortious confusion of goods. 240 U. S. 262, 36 Sup. Ct. 269, 60 L. Ed. 629. It is to be noted that the exclusion from an accounting of sales, where the infringing mark was accom-

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panied by matter clearly indicating that the goods were of the defendant's manufacture, was affirmed. 240 U. S. 255, 260, 36 Sup. Ct. 269, 60 L. Ed. 629. See, also, Wolf Bros. Co. v. Hamilton-Brown Shoe Co., 206 Fed. 611, 619, 124 C. C. A. 409. The rule applicable in cases of confusion of goods extends no further than necessity requires. See cases cited in Bouvier's Law Dict. (Rawle's 3d Ed.) vol. 1, pp. 605, 606.

In Westinghouse Co. v. Wagner Mfg. Co., 225 U. S. 604, 618, 619, 32 Sup. Ct. 691, 696 (56 L. Ed. 1222), it was said:

"The inseparable profit must be given to the patentee or infringer. The loss had to fall on the innocent or the guilty. In such an alternative the law places the loss on the wrongdoer."

But only in such alternative is the rule applicable. Whether such alternative exists is a matter of fact, and not of law. It would be altogether too sweeping a proposition to say that, irrespective of particular circumstances, a court should hold that a sale of goods bearing a trade-mark was due to such trade-mark; for it is familiar knowledge that in the sales of many goods bearing trade-marks the trade-mark is a negligible factor, and this would seem especially true of many ordinary articles of consumption. Whether or not things which are mixed can be separated cannot be determined as a matter of law. On the contrary, in many cases it may be quite obvious that marks affixed to goods could have played but an insignificant part in the sale. As was said (225 U. S. on page 620, 32 Sup. Ct. 696 [56 L. Ed. 1222]) in the opinion last cited:

"The rule, however, is not intended to penalize the infringer, nor to give the patentee profits to which he is clearly not entitled. So that where, by general evidence, expert testimony, or otherwise, it is shown that his patent is of relatively small value, it will often be possible to prove that, at the utmost, it could not have contributed to more than a given amount of the profits. Lupton v. White, 15 Vesey, Jr., 432–440. In such cases, except possibly against one who had concealed or destroyed evidence or been guilty of gross wrong, the plaintiff's recovery cannot exceed the amount thus proved, even though it be impossible otherwise more precisely to apportion the profits."

The burden is upon the plaintiffs to prove the existence of profits attributable to their trade-mark and to demonstrate that they are impossible of accurate or approximate apportionment. 225 U. S. 622, 32 Sup. Ct. 691, 56 L. Ed. 1222.

The plaintiffs in this case are met by the fact that their trade-mark "Queen of The West" and the trade-mark "Queen" are not the same, but the resemblance is partial. That the word "Queen" alone, when applied as a trade-mark, did not mean to the public generally the goods of the plaintiff, but did mean for a period of about three years before the use of the trade-mark "Queen" the goods of manufacturers who sold the goods as their own product, and who had associated their own name with the word "Queen" so conspicuously as to exclude any reasonable presumption that the purchaser of cartons so marked, or the purchaser from salesmen representing the manufacturers, or who ordered their goods from the factory, could have been mistaken.

Under this state of things, it is evident that to call upon the defendant to produce a specific account of the goods sold upon orders sent to its factory, or taken by salesmen from purchasers who knew they

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were getting the defendant's goods, would be inequitable, and that the expense and burden of such an accounting would be wholly disproportionate to any possible advantage that could result to the plaintiffs. The plaintiffs must establish their right to the assistance of a court of equity, not through the abstract propositions of law enunciated in cases of a different character, but upon the facts of the present case. There is no testimony that any mistake was ever made by purchasers. There is affirmative evidence that no mistake was made to the knowledge of the officials of the two Narragansett Dairy Companies.

The plaintiffs' equity rests upon its showing of a prior use of the trade-mark "Queen of The West" and of the trade-name "Queen." It is a hardship to the defendant that it should be deprived of the benefits of a trade-mark corresponding to the trade-name earlier used in connection with plaintiffs' business. The plaintiffs' right to an injunction is not free from doubt, but seems justified in order to prevent confusion likely to arise in the natural expansion of trade. 240 U. S. 420, 36 Sup. Ct. 357, 60 L. Ed. 713. In view of the peculiar circumstances of this case, it seems both impracticable and inequitable to impose upon the defendant the burden of an accounting or assessment of damages. Ludington Novelty Co. v. Leonard, 127 Fed. 155, 62 C. C. A. 269; Rushmore v. Badger Brass Mfg. Co., 198 Fed. 379, 117 C. C. A. 255; G. & C. Merriam Co. v. Saalfield, 198 Fed. 369, 377, 378, 117 C. C. A. 245; Worcester Brewing Corp. v. Reter & Co., 157 Fed. 217, 84 C. C. A. 665; G. & C. Merriam Co. v. Ogilvie, 170 Fed. 167, 95 C. C. A. 423; Keystone Type Fdy. Co. v. Portland Pub. Co. (C. C.) 180 Fed. 301, and cases cited.

While some of these cases relate to unfair competition rather than to trade-mark infringement, yet they discuss principles which seem equally applicable to both classes of cases in respect to the question of an accounting, since the common law of trade-marks is but a part of the broader law of unfair competition. See Hanover Milling Co. v. Metcalf, 240 U. S. 413, 36 Sup. Ct. 357, 60 L. Ed. 713.

The plaintiffs' draft decree is not in all respects in conformity with equity rule 71 (198 Fed. xxxviii, 115 C. C. A. xxxviii). The defendant's proposed draft seems both to conform to the rule and to cover all that plaintiffs are entitled to under this and the former opinion.

A decree in the form proposed by the defendant will be entered by the clerk as of this date.

UNITED STATES v. SIXTY-FIVE CASES OF GLOVE LEATHER (KARPLUS & HERZBERGER, Claimants).

(District Court, N. D. New York. December 27, 1918.)

1. JUDGMENT ⟸299(1)—FINAL JUDGMENT—EXPIRATION OF TERM.
A District Court loses power over its own final judgments at the close of the term at which rendered, if such term is not continued for the purpose of the particular case.

2. DISMISSAL AND NONSUIT ⟸81(3)—"FINAL JUDGMENT"—REINSTATEMENT.
A docket entry of dismissal, made pursuant to an order of the District Court intended to clear its docket of stale cases, *held* not a "final judg-

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ment," depriving the court of power to reinstate the cause, though the term had expired.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Final Judgment.]

3. DISMISSAL AND NONSUIT ⊂⊃81(3)—REINSTATING CAUSE—LACHES.

Where, after a docket entry of dismissal was made under a general order, the United States attorney put the case on the calendar at two different terms, and it was postponed at the instance of defendant, or by agreement, *held*, that restoration of the case to the docket cannot be denied, on the theory that the United States was guilty of laches.

At Law. Proceeding by the United States for the forfeiture of Sixty-Five Cases of Glove Leather, claimed by Karplus & Herzberger. Application by the United States to revive and restore to the calendar such cause, opposed by the claimants. Dismissal vacated, and cause restored to docket.

This is an application to revive and restore to the calendar of this court the above-entitled cause, to the end that the prosecution and trial thereof may be proceeded with. The claimants oppose the motion or application mainly on the ground that the case has been dismissed by this court, and that, as the term at which dismissed had passed and ended before the application was made, the court is now without jurisdiction or power to open and restore the case to the calendar, or take any action in the case. Laches is also urged, and it is further claimed that this court never acquired jurisdiction.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y.

Brown & Gerry, of New York City (Walter H. Dodd, of New York City, of counsel), for claimants.

RAY, District Judge. In 1912, a special agent of the Treasury Department of the United States actually seized 65 cases of glove leather which had been imported into the United States from Germany on the ground same had been fraudulently undervalued. The goods before such seizure were in the actual possession of one Joseph Bondy at Gloversville, N. Y., in the Northern district, who was the acting agent of Karplus & Herzberger, of Germany, and who were the owners, consignors, and importers.

An agreement was entered into between such importers, represented by Mr. Bondy and the United States, acting through the Treasury Department, by which $6,000 was to be and was deposited by such importers with the collector of customs at Albany, N. Y., Northern district of New York, as representing such goods and in place of same and as representing their maximum value, and which agreement contained the following:

"In event of any judgment of forfeiture or otherwise being obtained, or in event that any liability arising from the importation of said merchandise shall accrue to the United States, in so far as the said sum of $6,000 may be applicable, it shall be applied to the satisfaction in settlement of such liability or judgment."

The United States, acting by the agent of the Treasury, thereupon relinquished and surrendered possession of the said glove leather to

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said Bondy, representing Karplus & Herzberger, who disposed of such property. The said $6,000 so deposited was subsequently paid over to the collector of customs in the city of New York and is now in his hands awaiting the final disposition of this case.

On the 16th day of January, 1914, this action was commenced for the forfeiture of such glove leather on the grounds same had been undervalued and a writ was issued. Same was returned with the following return indorsed thereon by the United States marshal:

"Not executed by direction of United States attorney. The claimant has filed a bond for $6,000 to cover any damages which the government might recover, and the defendants' property was returned to them."

The said $6,000 was then in the hands of the United States under the agreement referred to. From November 10, 1914, when issue was joined, until about February, 1918, no further action was taken. In the meantime another case had been pending, involving some of the question involved in this case, and there had been a change in the office of the United States attorney for the Northern district of New York.

On the 14th day of November, 1917, this court, on its own motion, made and entered a general order during the continuance of the October term held at Auburn, N. Y., wherein and whereby it was—

"Ordered, that in all cases at law now pending in the Northern district of New York, or hereafter docketed and pending, and where action is not stayed or enjoined by a court or a judge of competent jurisdiction, in which no action has been or is taken by the attorneys or parties, or either of them, within the two years last past, or following such docketing in cases hereafter docketed, the same be dismissed for want of prosecution, without prejudice, and that the clerk enter in the docket of such cases the words 'Dismissed W. P.,' which shall mean dismissed without prejudice: Provided, however, that on application and motion of either party, and for cause shown, such cause so dismissed may be revived, and its prosecution resumed or continued; and provided, further, that such 'dismissal W. P.' in such cases shall not make the clerk of this court responsible" for certain fees, etc.; "it appearing that such docket fee is not taxable until the case is finally disposed of," etc.

The reason for this order and the action of the clerk under it was to clear the docket of the court of old and stale cases many of which had been settled or otherwise disposed of, but which appeared on the docket of the court to be live cases. It is apparent from the order itself that it was not the purpose to finally dispose of the cases, or to enter any final judgment or order of dismissal, but to leave such cases open to be proceeded with on a proper showing. It is true no provision was inserted in the order continuing the term or terms at or during which such entries on the docket of the court might be made. No formal orders of dismissal were made.

[1, 2] The main question is: Has the court lost jurisdiction and control of such cases, so that it is powerless to proceed with a case, if "on application and motion of either party, and for cause shown," the court sees fit to revive and continue the prosecution of the case as provided in the order itself. The terms of court in the Northern district are fixed by statute, and one term continues until the beginning of another; but the court may and often for certain purposes continues

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a term into and even far beyond another and succeeding term. In this case the entry on the docket of the court, "Dismissed W. P.," was made during the October, 1917, term which ended with the beginning of the December, 1917, term. But in January or February, 1918, notice of trial in this case was served, and not returned for the February, 1918, term, and the cause was put over that term by consent, and it was again noticed for the April, 1918, term, and again adjourned to the subsequent or October, 1918, term of this court. The order of this court, above referred to and quoted in part, was not made on notice to parties or their attorneys, and the attorneys for the claimants herein state, what is undoubtedly true, that until during the October, 1918, term they were not aware of such order. It is quite true, I think, that a United States District Court may lose its power over its own "final" judgments at the close of the term at which rendered, if such term is not continued for the purposes of the particular case, or of particular cases including the one in question. In Bronson v. Schulten, 104 U. S. 410, 26 L. Ed. 797, the court said:

"But it is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control," etc.

In United States v. Mayer, 235 U. S. 55–67, 35 Sup. Ct. 16, 19, 59 L. Ed. 129, the court said:

"In the absence of a statute providing otherwise, the general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered," etc.

The docket entry of dismissal in the instant case as fully appears by the order pursuant to which made was not a "final" dismissal or judgment or disposition of the case, nor was it intended to be. On the other hand, it was expressly provided in the order that the action might be revived, and its prosecution proceeded with and continued, on application and showing made. The purpose was to clear the docket of stale cases, but not to deprive the parties of the right to be heard and to proceed with their cases, if the court so ordered. The power of the court to deprive the parties of such right may well be questioned. I think it a strained construction to hold that such dismissal was a final judgment in the case, and that such is not the effect of the action taken. The other questions raised on this motion should not be now disposed of, except that of laches.

[3] The record shows, as stated, that after such order was made the United States attorney put the case on the calendar at two different terms, and that the trial was postponed at the instance of the defendant, or, at least, by agreement. The United States was not guilty of laches certainly. The other questions should be raised and presented at the trial. I express no opinion whether or not the court was without jurisdiction by reason of the fact that by agreement of the parties money was substituted for the property itself, and held by the United States in place thereof; the importer, on the faith and basis of the stipulation and substitution, taking and disposing of the property itself.

There will be an order vacating the dismissal and restoring the case to the docket for trial in due course on due notice.

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BROWN v. SPELMAN et al.

(District Court, E. D. New York. June 3, 1918.)

1. ARMY AND NAVY ⟹20—SELECTIVE SERVICE ACT—PROCEEDINGS BEFORE LOCAL AND DISTRICT BOARDS.
In view of the regulations promulgated by the President under the Selective Service Act, local boards provided for by the act have the widest possible latitude for the purpose of informing themselves of the truth or falsity of statements made by registrants, and such boards are not in any way restricted to what would be competent legal evidence in any judicial proceeding.

2. ARMY AND NAVY ⟹20—SELECTIVE SERVICE ACT—RELIEF IN COURTS.
The civil courts can grant relief from orders of local and district boards provided for by the Selective Draft Act only where such boards have acted without or in excess of their jurisdiction, or the proceedings have been unfair, or show an abuse of discretion; hence, where the boards, in disposing of registrant's claim that he was over the age prescribed in the act and that his name should be stricken from the list, followed the regulations, etc., no relief could be granted by the courts.

At Law. Application by Sam Brown for writ of certiorari, or writ of mandamus, directed to James J. Spelman and others, as members of the Local Board for Division No. 35 of the Borough of Brooklyn, City of New York, and Charles J. Pflug, as Adjutant General of the State of New York. Application denied.

Solomon S. Schwartz, of Brooklyn, N. Y., for plaintiff.
Melville J. France, U. S. Atty., of Brooklyn, N. Y., for defendants.

GARVIN, District Judge. This is an application for a writ of certiorari, or a writ of mandamus, directing the defendants, who are members of a local board in the city of New York, created under the provisions of the act of Congress, known as the Selective Service Law, approved May 18, 1917 (40 Stat. 76, c. 15), and the adjutant general of the state of New York, to strike the plaintiff's name from the list of persons registered under the Selective Service Law, and asking that a writ of prohibition be issued, restraining the defendants from inducting the plaintiff into military service.

The petition sets forth that on June 5, 1917, the petitioner was over the age of 31 years; that on that day he appeared before the registration board of the 158th precinct of the county of Kings, city and state of New York, and stated to said board that he was born April 17, 1886; that three members of the board said that he would not have to register, as he was past the age of 31 years; that one member, who appeared to be the chairman of the board, after a telephone conversation with some one, informed the petitioner that he would have to register on a doubt, but that, if it appeared subsequently that he was not subject to registration, his name would be stricken from the roll; that the petitioner, believing at the same time that he was not liable to military duty under the Selective Service Law, so registered; that he subsequently discovered that he was not liable to military duty under the law, and made application in writing to local board for division 35, of which the defendants Spelman, Walsh, and Pflug are mem-

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bers, to cancel his registration and to strike his name from the list of persons certified for military duty, which the defendants refused to do; that the petitioner then offered to produce witnesses to prove that he was over the age of 31 years on June 5, 1917, but said defendants refused to grant a hearing, at the same time stating to petitioner that he would have to submit his claim and proof in writing; that the petitioner has submitted his claim in writing to the said local board, and also affidavits, made by himself and other persons, stating that he was born on April 17, 1886; that said local board members subsequently informed petitioner that they had forwarded his claim and affidavits to the adjutant general of the state of New York; that thereafter the petitioner received a communication from the adjutant general of the state of New York requiring him to produce further proof of his age, including a requirement to produce his birth certificate; that the petitioner thereupon forwarded to the adjutant general his (petitioner's) affidavit, stating that he was not in possession of a birth certificate and could not obtain one, as the province in which he was born is now under German occupation. In addition to this affidavit the petitioner also forwarded to the adjutant general affidavits of other persons who knew petitioner's age; that with petitioner's claim and proof forwarded to the adjutant general as above set forth the local board forwarded its finding of fact and its recommendation; that petitioner was subsequently informed by the local board (which is made up of three of the defendants as aforesaid) that the petitioner's claim that he was registered through error and not subject to military service has been denied.

[1] A careful reading of the regulations promulgated by the President under the Selective Service Law indicates a clear intention on the part of Congress that the proceedings before the local and district boards shall not be conducted with the same regard for rules of evidence as must be observed by the courts in determining issues presented. Section 95 of the selective service regulations reads in part:

"All affidavits and other written proof (not an integral part of the questionnaire) filed by the registrant, or by any other person in support of any claim for exemption or discharge, whether of his or their own motion, or in response to the requirement of the local or district board, must be legibly written or typewritten on one side only of white paper of the approximate length, but no longer than a page of the questionnaire."

From this it appears that Congress did not intend that the boards should consider only affidavits as proof. Section 101 of the selective service regulations provides:

"In classifying registrants, local boards shall first examine the registrant's entries on the first page of the questionnaire, and also the answers to the questionnaire and all other proof in the case, and shall proceed to classify the registrant in accordance with the following rules."

From this it is evident that Congress intended to give the local boards the widest possible latitude for the purpose of informing themselves concerning the truth or falsity of the statements made under oath by registrants, and that the boards are not to be in any way restricted to what would be competent legal evidence in any judicial proceeding.

[2] In the case at bar the three defendants who comprised local

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board 35 followed section 61 of the selective service regulations carefully. The adjutant general acted in accordance with the law, after a careful investigation, as is indicated from the papers presented by petitioner himself. With its conclusions this court cannot interfere, unless the case is brought within the provisions of Angelus v. Sullivan, 246 Fed. 54, 150 C. C. A. 280, which holds that:

"The civil courts can afford relief from orders made by such boards in any case where it is shown that their proceedings have been without or in excess of their jurisdiction, or have been so manifestly unfair as to prevent a fair investigation, or that there has been a manifest abuse of the discretion with which they are invested under the act."

The members of the local board acted strictly in accordance with the law, and the adjutant general, after a careful investigation, directed that the registrant be held for military service.

The application must be denied.

SRERE et al. v. GOTTESMAN et al.

(District Court, S. D. New York. November 18, 1918.)

JUDGMENT ⟹585(4)—MATTERS CONCLUDED—MATTERS WITHHELD.

Where a seller of pulp, to be delivered monthly, by letter expressly repudiated and canceled the contract for defaults in payments, and the purchaser afterward, in an action between them, unsuccessfully counterclaimed for wrongful breach on grounds other than the letter, which was not pleaded nor in issue, the judgment was a bar to a subsequent action by him for failure to make further deliveries.

At Law. Action by Alfred A. Srere and Harry Srere against Mendel Gottesman and David S. Gottesman. On motion by both parties for direction of verdict. Verdict directed for defendants.

This action is upon a contract between the parties by which the defendant agreed to deliver 4,800 tons of pulp to the plaintiff at $1.95 per 100 pounds, deliveries to be monthly at 150 tons a month, beginning May, 1915, and ending December, 1917. The contract contained the following provisions, which are the only ones of importance: "Each shipment under this contract to be considered as a separate contract, and default of one or more shipments not to invalidate the rest of the contract." Again: "If the buyer makes default in any payment, * * * seller may at his option cancel future deliveries."

In October of 1915 the parties had a difference as to the execution of the contract, and correspondence passed between them, which it is not necessary here to detail. The controversy resulted in a claim by the defendants against the plaintiff in the sum of $3,482, for which they made claim. On February 3, 1916, the defendants wrote as follows to the plaintiffs: "We have repeatedly written you within the last few months regarding your account, which is in a deplorably overdue condition. We now wish to serve notice on you that unless settlement is in our hands not later than February 8th we will cancel the balance of the contract in accordance with claim 10." The account referred to was for the sum mentioned, and was made up of three items. Clause 10 is the clause already quoted, for cancellation.

As the controversy still continued, the defendants sued the plaintiff in the Supreme Court of New York, and the cause was afterwards removed to this court, claiming in the sum of $3,482.19 as the amount due under the contract. To this the present plaintiffs (the defendants therein) counterclaimed upon the contract in question. They laid the breach in the sixth article of their counterclaim as follows: "That in or about the month of October, 1915,

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the defendants not being in default under the terms of said agreement, the plaintiffs notified defendants that they declined and refused to continue the delivery of pulp under said agreement, and that they considered the same terminated, and the said plaintiffs have ever since declined and refused to perform said agreement, to the defendants' damage of $200,000." The defendants here required a bill of particulars of the default alleged in the said sixth article, which was accorded by the plaintiffs here, and which consisted of the correspondence which passed between the parties during the months of October, November, and December, but did not set up the letter of February 3, 1916.

That cause came on for trial in this court before Judge Mayer, and resulted in a verdict for the defendants here upon their complaint, but not for the whole sum; their recovery being $2,209.29, two of the three items of their claim being disallowed. The counterclaim was left to the jury, who found against the plaintiffs here. It appears from the charge of Judge Mayer, as indeed necessarily would have been so, that no question arose in that cause of the letter of February 3, 1916. The defendants' complaint in that suit was filed on March 16, 1916, and the counterclaim in July, 1916, each of them, consequently, after the letter of February 3d. On January 8, 1917, judgment was entered in the former action for the sum of $2,029.29, without mention of the counterclaim.

The present complaint sets up the contract and alleges the breach as follows in article fifth: "Said agreement being in full force and effect, and the plaintiffs being entitled to deliveries of the said pulp during the year 1917 as therein provided, plaintiffs have neglected and refused to deliver the monthly installments of 150 tons each of pulp due under said contract for the months of January, February, March, April, and May, 1917, although repeatedly requested so to do, and on or about the 27th day of February, 1917, defendants notified plaintiffs that they considered said agreement terminated, and that no further pulp would be shipped thereunder, to the defendants' damage in $200,000."

The plaintiffs here introduce in evidence a letter of February 27, 1917, of which the important part is as follows: "We have heretofore advised you that, owing to your default under the contract, no further pulp would be shipped to you, and as all matters in connection with said contract, default thereunder, and termination thereof were litigated in the action recently tried in the United States District Court of this city, we do not see that there is anything further to be said in the matter, as our relations have been completely terminated." It is agreed that no deliveries were made during the year 1917.

Delevan A. Holmes, of New York City, for plaintiffs.
Harold Nathan, of New York City, for defendants.

LEARNED HAND, District Judge (after stating the facts as above). The plaintiffs attempted in the former action to recover upon a repudiation of the contract through the October correspondence, and failed. They necessarily exercised their putative option, arising by virtue of that correspondence, to declare the contract at an end through the defendants' breach. This they might have done, had there been such a breach. Central Trust Co. v. Chicago Auditorium, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580; Johnstone v. Milling, L. R. 16 Q. B. D. 460; Landes v. Klopstock, 252 Fed. 89, — C. C. A. —. But I shall assume, for the purposes of argument, that they failed because the defendants had not repudiated the contract at all by the October correspondence. If so, the effect of the judgment in that action would not put an end to the contract; the plaintiffs had missed their blow and struck in the air.

In fact, nevertheless, the defendants had already expressly repudiated the contract, not by the October correspondence, but by the let-

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ter of February 3, 1916. This, if wrongful, gave the plaintiffs a second option, and, I may also assume, the only real one, to treat the contract as terminated by a breach, or as continuing. Had the counterclaim been filed before February 3, 1916, it would not have affected their rights under that letter, but it was not so filed. The second option, the only real one, had arisen before the counterclaim.

Now, it must be admitted that the plaintiffs never actually elected to treat the letter of February 3, 1916, as a repudiation; they confined themselves to the October correspondence. If, therefore, they were free to reserve their rights under the letter, the contract was not at an end on February 27, 1917. I think they were not so free, but that, having elected to declare the contract at an end in July, 1916, by filing the counterclaim, that election included, not only the grounds for it which they asserted, but all grounds which they had. The position of treating the contract as wrongfully repudiated was not determined by any wish to establish a fact but a legal relation. If they might reserve from consideration any of the grounds upon which that relation might stand, they could litigate twice the same "cause of action"; that is, the same legal position towards the mutual obligations of the parties. This they may not do; the judgment in the first action would be a bar. United States v. California & Oregon L. Co., 192 U. S. 355, 24 Sup. Ct. 266, 48 L. Ed. 476; Watts v. Weston, 238 Fed. 149, 151 C. C. A. 225.

The judgment, therefore, concluded the plaintiffs from asserting that the defendants were wrong in repudiating the contract. Only in case they were wrong could the contract endure, because a rightful repudiation put an end to it and a repudiation there had been. The contract could not persist after the judgment, and no future deliveries were due under it. Therefore this action will not lie.

I direct a verdict for the defendants.

O. & W. THUM CO. v. DICKINSON.

(District Court, W. D. Michigan, S. D. January 29, 1918.)

TRADE-MARKS AND TRADE-NAMES ⇐98—SUITS FOR INFRINGEMENT—ACCOUNTING BY INFRINGER.

On an accounting for damages and profits by an infringer of a trademark, defendant may, in the discretion of the court, be required to file an account showing the names and addresses of all purchasers of infringing goods.

In Equity. Suit by the O. & W. Thum Company against Albert G. Dickinson. On review of master's order. Affirmed.

See, also, 245 Fed. 609, 158 C. C. A. 37.

Chappell & Earl, of Kalamazoo, Mich., for complainant.

Butterfield & Keeney, of Grand Rapids, Mich., for defendant.

SESSIONS, District Judge. The master's order, requiring defendant to file his account and to include therein the names and addresses of all purchasers of goods bearing the infringing trade-mark, is in the form used and employed for many years in this district in

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accountings of like nature, and should be approved, unless it invades some substantial right of defendant, or violates some established rule of practice, and thus constitutes an abuse of discretion. Equity rule 63 (198 Fed. xxxvii, 115 C. C. A. xxxvii) prescribes the form and not the contents of the account. An account is none the less "in the form of debtor and creditor" because it is complete and contains such matters of detail as are essential to the determination of the rights of the parties. Independently of the rule, it lies within the discretion of the court to require the defendant to disclose in his account such facts as are necessary to show, not only his own profits from his wrongdoing, but also the extent of the injury otherwise done by him to the plaintiff.

The finding of the Circuit Court of Appeals that defendant has been a willful and persistent trespasser upon plaintiff's rights is binding upon this court, and constitutes the controlling rule of decision in this case. At best, defendant occupies the position of a trustee ex maleficio and must account as such. The primary object of requiring an unfaithful trustee "to bring in his account is to compel discovery from him as to the details of the transaction under investigation." Defendant is not entitled to protection against the consequences of his own malfeasance, and if the full and fair disclosure, which the law requires him to make, incidentally involves some personal loss or business disadvantage, the blame therefor rests upon himself alone. Courts should not be so tender of his claimed rights as to destroy the very purpose which the rule was designed to accomplish, or to jeopardize or sacrifice the adjudicated rights of plaintiff.

The claim of defendant that he ought not to be required to disclose the names and addresses of his customers might rest upon a somewhat more substantial foundation, if the profits made by him in the manufacture and sale of the infringing goods alone were involved; but the accounting is ordered to ascertain both his gains and profits and the damages suffered by plaintiff. In a recent petition defendant has averred that he has made no profits. If this averment is true, and he cannot now gainsay its truth, plaintiff will be limited in its recovery to the damages (as distinguished from the infringer's profits) it has sustained. An important element of such damages, if any, may be sales of goods bearing the infringing trade-mark, which have prevented sales by plaintiff of its own goods to its own customers. Whether any such sales have been made cannot be learned until after the discovery of the names of the purchasers of infringing goods from defendant. An account merely stating dates, amounts, and prices would afford little, if any, assistance in the determination of this important question. To hold that plaintiff is not entitled to such information until after the filing of his account and exceptions thereto, and not even then unless, possibly, it can be obtained from an examination of the defendant either viva voce or upon interrogatories, would be to create and to invite the delays which the rule was intended to prevent.

Decisions of District Courts, which seem to rule differently, have not been overlooked. In some vital respects the cases cited differ materially from the present one. Those cases, in themselves, when

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carefully examined, particularly as to dates, furnish glaring examples of the delays caused in some measure by following the rule of practice therein approved. In a mandamus proceeding in one of the cases, the opinion of the Court of Appeals is in harmony with the views herein expressed. In re Beckwith, 203 Fed. 45, 121 C. C. A. 381. The whole trend of modern decisions and rules of procedure is to eliminate delays wherever possible, and courts ought not to permit the use of equity rule 63 as an instrument to produce the serious evil which it was intended to remedy.

The order of the master is approved and affirmed.

In re MADIGAN.

(District Court, S. D. New York. August 1, 1918.)

1. BANKRUPTCY ⟸421(1)—DISCHARGEABLE LIABILITIES—JUDGMENT FOR NEGLIGENCE.
   A judgment for damages caused by negligence is dischargeable in bankruptcy.
2. BANKRUPTCY ⟸393—RELEASE FROM IMPRISONMENT.
   Where bankrupt, having recklessly driven an automobile, was arrested under order of the state court made prior to filing of his voluntary petition in bankruptcy, and judgment was recovered against him, he could be released by the bankruptcy court having jurisdiction pending his application for discharge; the judgment being dischargeable in bankruptcy.
3. BANKRUPTCY ⟸293(1)—DISCHARGE OF BANKRUPT FROM ARREST—POWER OF COURT IN ANCILLARY PROCEEDINGS.
   A bankruptcy court in ancillary proceedings has power to discharge a bankrupt from an arrest made prior to the bankruptcy proceedings, where he has the substantive right to relief.

In Bankruptcy. In the matter of Andrew M. Madigan, bankrupt. On motion by bankrupt for discharge from arrest. Granted.

Edward F. Lindsay, of New York City, for judgment creditor.
Barney & Schuldenfrei, of New York City, for bankrupt.

AUGUSTUS N. HAND, District Judge. [1-3] The judgment here was for negligence, due to the reckless driving of an automobile, and is in my opinion dischargeable in bankruptcy. The bankrupt was arrested under an order of the state court made prior to the filing of his voluntary petition in bankruptcy in the Eastern district, and is now on the jail limits. That proceeding has now gone to adjudication, and, under my decision in Matter of Margiasso, 38 Am. Bankr. Rep. 524, 242 Fed. 990, the bankrupt may be released pending his application for a discharge, unless the court is without jurisdiction because the bankruptcy proceedings are not in this district. Under the decision in Re Von Hartz, 142 Fed. 726, 74 C. C. A. 58, I would be without jurisdiction, and the amendment of 1910 (Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act June 25, 1910, c. 412, 36 Stat. 838), which only extended ancillary jurisdiction "in aid of a receiver or trustee," would not avail. But that decision has been expressly disapproved by the Supreme Court in Babbitt v. Dutcher, 216 U. S. at page 114, 30 Sup.

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Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969. I think, if a bankrupt has the substantive right to relief, there is, under the doctrine of Babbitt v. Dutcher, supra, a remedy in this court ancillary to the proceeding in the Eastern district.

The motion is granted.

Ex parte TINKOFF.

(District Court, N. D. Illinois, E. D. February 13, 1918.)

Nos. 32786–32788, 32815.

1. HABEAS CORPUS ⟸54—SUFFICIENCY OF PETITION.
Where unlawfulness of detention alleged in petition consists in order of an inferior tribunal, legally constituted and having jurisdiction over subject-matter and person detained, petition must state facts constituting arbitrary or capricious action.

2. ARMY AND NAVY ⟸20—SELECTIVE DRAFT ACT—ACTION OF DISTRICT BOARD.
The denial of a rehearing on a claim for draft exemption by a district board is not arbitrary action.

3. ARMY AND NAVY ⟸20—SELECTIVE DRAFT ACT—EFFECT OF MARRIAGE OF REGISTRANT.
The marriage of a person subject to Selective Draft Act May 18, 1917, after his registration, cannot defeat the government's right to his services.

4. HABEAS CORPUS ⟸16—SELECTIVE DRAFT ACT.
The court in a habeas corpus proceeding cannot relieve against a merely erroneous decision of a draft board.

5. ARMY AND NAVY ⟸20—SELECTIVE DRAFT ACT—EXEMPTION OF ALIENS.
A nondeclarant alien is not ineligible to service under Selective Draft Act May 18, 1917, and, while he may not be compelled to serve, provided he claims exemption as the law requires, if he fails to do so, the draft boards are without authority to exempt him, and their action in treating such failure as a waiver is not reviewable in habeas corpus proceedings.

6. ARMY AND NAVY ⟸20—SELECTIVE DRAFT ACT—EXEMPTION OF ALIENS.
Neither the draft board nor the court in habeas corpus proceedings can base action in favor of alien claimants to exemption on alleged ignorance of facts or law.

7. HABEAS CORPUS ⟸3—SELECTIVE DRAFT ACT—HABEAS CORPUS TO OBTAIN EXEMPTIONS.
The failure of a registrant denied exemption by the local board to appeal to the district board is a bar to relief by habeas corpus.

Separate petitions by Ella Hutchinson Tinkoff, on behalf of Paysoff Tinkoff, by Steve Zozaski, by Hugo Carlson, and by Victor Zukowski, for writs of habeas corpus, to secure release from military service, into which they were drafted under Selective Service Act May 18, 1917. Writs denied.

Orders affirmed 254 Fed. 912.

Stedman & Soelke, of Chicago, Ill. (Swan M. Johnson, of Chicago, Ill., of counsel), for petitioners.

Charles F. Clyne, U. S. Atty., Robert T. Neill, Sp. Asst. U. S. Atty., and Lieut. Col. Nathan William MacChesney, Judge Advocate, U. S. Army, all of Chicago, Ill. (Lieut. Col. Nathan William MacChesney and Leslie M. O'Connor, Department Judge Advocate's Office, Cent. Dept., U. S. Army, both of Chicago, Ill., of counsel), for respondents.

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LANDIS, District Judge. These applications are for writs of habeas corpus to release or exempt persons from service in the National Army created by Act May 18, 1917, c. 15, 40 Stat. 76.

The Tinkoff application asserts that he registered on June 5, and that three weeks thereafter he married. Later he asked the local board to exempt him from service, his ground of exemption being the dependency of his wife; the local board granted his claim and denied an application which he made to file additional affidavits in support of his allowed claim. From the local board's order in Tinkoff's favor the United States appealed to the district board, and on the hearing of that appeal the district board reversed the local board's decision, and ordered Tinkoff into the eligible list; thereafter Tinkoff applied to the district board for a rehearing; this application was denied by the district board, and it is on this denial by the district board that the Tinkoff application here is based, it being charged that the denial was arbitrary action by that board. Tinkoff is in the army, stationed at Camp Grant.

The Zukowski application avers that he is of Russian birth; that he has never declared his intention to become a citizen of the United States; that he registered on June 5, and claimed exemption because of his status as an alien; that the local board denied him exemption; and that he appealed to the district board, which board affirmed the decision of the local board.

The Carlson and Zozaski applications assert that these men are of alien birth, and that neither had declared his intention to become a citizen; that they lived in the United States on May 18 and June 5, 1917; that each registered as required by law, and neither one of them attempted to claim exemption from military service. They both assert, however, that they were ignorant of their political status and their right to exemption until after the time, fixed by the regulations issued by the President under the authority of the statute, in which to claim such exemption, had expired. They further assert that they learned of their right after they were examined and found qualified for military service; that they then applied to the local board for exemption, which applications were denied by the local board on the ground that the applicants' failure to make the claim within the statutory time operated as a waiver of their exemption rights. Neither Carlson nor Zozaski appealed to the district board, and each was certified into service by the local board.

[1] The function of the writ of habeas corpus is to release a person unlawfully restrained of his liberty, and this unlawfulness, or probable cause for the belief that it exists, must affirmatively appear in the petition. Where the unlawfulness claimed is the order of an inferior tribunal, legally constituted and clothed with jurisdiction over the subject-matter and the person detained, the petition must charge facts constituting arbitrary or capricious action by such inferior tribunal. In the pending applications, neither the legal existence nor the jurisdiction of the draft boards, local and district, is challenged, nor is there any averment of arbitrary or capricious action by either of them.

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[2] I must qualify this as to Tinkoff. For him there is the bare assertion, a general charge, that the refusal of the district board to grant him a rehearing was arbitrary. But under well-recognized general rules that govern such matters, that refusal was not arbitrary action. The same rule applies to that refusal as to the denial of a petition for rehearing by a reviewing court.

[3] Although it is not necessary, it appears appropriate to observe that, as stated above, Tinkoff married after registering on June 5, and claims that such subsequent marriage discharged his liability to serve as it existed when the law was passed and the registration occurred. Of course, such voluntary subsequent action on his part cannot operate to defeat the government's right to his services, and it is perfectly clear that the board's action was not arbitrary.

[4] The Zukowski petition amounts only to a claim that the board reached an erroneous conclusion. Habeas corpus cannot relieve against mere error. And this is the rule, even though the court might have reached a conclusion on the facts different from that expressed in the order complained of.

[5] In the Carlson and Zozaski applications the question presented is one of waiver. For the applicants the representation is that they were aliens, had not declared their intention to become citizens, did not know their political status and consequent rights to exemption, and therefore had failed to make the claim before the board within the prescribed time.

Nondeclarant aliens are not ineligible to service under the act, nor are they, by the act, automatically exempted from service. They are eligible, but they may not be compelled to serve against their will to the contrary, provided that will be expressed as the law requires. Ex parte Hutflis (D. C.) 245 Fed. 798; U. S. ex rel. Koopowitz v. Finley (D. C.) 245 Fed. 871; U. S. ex rel. Cubyluck v. Bell (D. C.) 248 Fed. 995; Summertime v. Local Board (D. C.) 248 Fed. 832.

The applicants having totally failed so to express their will not to serve within the time fixed by law, the draft boards were without authority to exempt them. Those boards were bound to regard this failure of the applicants as a waiver, and it follows that the boards' action is not reviewable. Angelus v. Sullivan, 246 Fed. 54, 158 C. C. A. 280; U. S. ex rel. Troiani v. Heyburn (D. C.) 245 Fed. 360; and cases supra.

[6, 7] Neither the boards, after the time expired, nor this court, by habeas corpus, can base actions in the applicants' favor because of alleged ignorance of facts or law. They are conclusively held to knowledge of both. Furthermore it will be observed that neither Carlson nor Zozaski appealed to the district board, as they might have done. Section 4. This failure on their part, in and of itself, is a bar to relief here. Summertime v. Local Board (D. C.) 248 Fed. 832; U. S. ex rel. Cubyluck v. Bell (D. C.) 248 Fed. 995; United States v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917; In re Lancaster, 137 U. S. 393, 11 Sup. Ct. 117, 34 L. Ed. 713; The Japenese Immigrant Case, 189 U. S. 86, 102, 23 Sup. Ct. 611, 47 L. Ed. 721.

Writs denied.

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Ex parte TINKOFF.

(Circuit Court of Appeals, Seventh Circuit. June 11, 1918.)

Nos. 2621–2624.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

From orders (254 Fed. 222) denying writs of habeas corpus to Paysoff Tinkoff, Steve Zozaski, Hugo Carlson, and Victor Zukowski, petitioners separately appeal. Affirmed.

Paysoff Tinkoff and Stedman & Soelke, all of Chicago, Ill. (Swan M. Johnson, of Chicago, Ill., of counsel), for appellant Tinkoff.

Stedman & Soelke, of Chicago, Ill. (Swan M. Johnson, of Chicago, Ill. of counsel), for appellants Zozaski, Carlson, and Zukowski.

Charles F. Clyne, U. S. Atty., Robert T. Neill, Sp. Asst. U. S. Atty., and Lieut. Col. Nathan William MacChesney, Judge Advocate, U. S. Army, all of Chicago, Ill. (Lieut. Col. Nathan William MacChesney and Leslie M. O'Connor, Department Judge Advocate's Office, Central Department, U. S. Army, both of Chicago, Ill., of counsel), for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

PER CURIAM. The orders heretofore entered by the District Court in these cases, refusing to issue writs of habeas corpus for discharge from military service of the United States under Selective Service Law May 18, 1917, c. 15, 40 Stat. 76, will be affirmed, as the petitions do not set forth facts justifying their issuance.

FYKE v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 10, 1918.)

No. 3217.

1. INTERNAL REVENUE ⊂⊃2—HARRISON NARCOTIC ACT.
   Harrison Narcotic Act, § 2 (Comp. St. 1916, § 6287h) is not invalid on the ground that its provisions are in no sense provisions of a revenue measure, but are purely police restrictions.

2. POISONS ⊂⊃2—DRUG ACT—SALES.
   Harrison Narcotic Act, § 2 (Comp. St. 1916, § 6287h) declaring that it shall be unlawful for any person to sell named narcotic drugs, except on a written order of the person to whom the drug is sold, applies not only to registered dealers, but to all sellers, for revenue is raised from the sale of prohibited drugs.

3. POISONS ⊂⊃9—DRUG ACT—VIOLATIONS—INDICTMENT.
   An indictment charging that defendant sold narcotic drugs in violation of the Harrison Narcotic Act *held* sufficient to charge a violation of the act, and show defendant to be subject to the penalty prescribed by section 9 (Comp. St. 1916, § 6287*o*), regardless of whether it was alleged defendant was required to register.

4. INDICTMENT AND INFORMATION ⊂⊃111(1)—STATUTORY EXCEPTIONS.
   Const. Amend. 6, does not preclude Congress from exacting, as it has in Harrison Narcotic Act, § 8 (Comp. St. 1916, § 6287n), that it shall not be necessary to negative in any indictment any of the statutory exemptions or exceptions therein.

5. INDICTMENT AND INFORMATION ⊂⊃111(4)—EXCEPTIONS—NEGATIVING.
   An indictment charging a violation of the Harrison Narcotic Act (Comp. St. 1916, §§ 6287g–6287q) *held* to sufficiently negative any of the exemptions and exceptions therein contained.

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In Error to the District Court of the United States for the Northern District of Texas; William R. Smith, Judge.

E. D. Fyke was convicted of violation of Act Dec. 17, 1914, known as the Harrison Narcotic Act, and he brings error. Affirmed.

Chas. Mays, of Ft. Worth, Tex., and A. S. Baskett, of Dallas, Tex., for plaintiff in error.

Wilmot M. Odell, U. S. Atty., of Ft. Worth, Tex.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. The plaintiff in error was convicted of a violation of an act of Congress approved December 17, 1914, and commonly known as the Harrison Narcotic Act (Act Dec. 17, 1914, c. 1, 38 Stat. 785 [Comp. St. 1916, §§ 6287g–6287q]). All the 11 counts of the indictment are based upon an alleged violation of section 2 of that act (section 6287h), which, so far as pertinent to this case, is as follows:

"That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue."

The counts of the indictment charged the plaintiff in error with having made various distinct sales of morphine, at different times, of different amounts, and to different persons, but were otherwise identical. Each charged the sale to have been made, "not in pursuance of a written order such as is required by an act of Congress approved December 17, A. D. 1914, and then and there under such circumstances that neither the said Billie Brown (the purchaser) nor the sale as aforesaid came under any of the exceptions and exemptions provided for in the said act of Congress." The defendant was convicted under counts 1, 6, 9, and 11, and sentenced to two years in the federal penitentiary at Leavenworth, Kan.

The sole ground of error assigned is based upon the action of the District Court in overruling the motion to quash (demurrer) to the indictment.

[1] 1. The plaintiff in error supports his demurrer upon three distinct grounds. In the first place, he asserts the unconstitutionality of section 2 of the act upon the idea that its provisions are, in no sense, provisions of a revenue measure, but are purely police restrictions. The case of Baldwin v. United States, 238 Fed. 793, 151 C. C. A. 643, recently decided by this court, per curiam opinion, determines this question against the contention of plaintiff in error.

[2, 3] 2. The second ground upon which the indictment is assailed by the demurrer is that it charges an offense under section 2 of the act, which the plaintiff in error contends is only applicable to the class of registered dealers, and the indictment fails to allege that the defendant was registered. Reliance is placed upon the case of United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, which held that section 8 of the act, which made it

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unlawful for any person not registered under the act, and who had not paid the tax provided for by the act, to have in his possession any of the prohibited drugs, applied only to the classes who were required to register and pay the tax under section 1 of the act (section 6287g), and that it was not unlawful for one, not embraced in these classes, to have possession of the prohibited drugs. The ground of the decision was that the act, being a revenue and not a police measure, the competency of Congress to make the possession of persons, not required to register and pay the tax, unlawful, was doubtful, and, to preserve its constitutionality, the court would construe this prohibition of the act as not embracing those not required by it to register and pay the tax.

The distinction between that case and this prevents its use, even by way of analogy. No tax is imposed by the act upon the having possession of the prohibited drugs, but only their production, importation, manufacture, compounding, dealing in, dispensing, selling, or giving away. As no revenue could be derived from a mere possession, not in any one of the mentioned capacities, it was thought Congress was without power to regulate such mere possession. However, revenue is to be derived from the sale of the prohibited drugs. It was, therefore, clearly competent for Congress to punish the unlawful sale of the prohibited drugs by all classes of persons, those actually registered and those not. All sellers were members of the class required to register and pay the tax, under section 1, and the revenue derived from sellers, as provided for by that section, could manifestly not be collected unless Congress had the power to, and did in fact, punish the sale of the prohibited drugs by all persons except when made in conformity to the act. The necessity of prohibiting sales by unregistered persons and of sales by registered persons, not complying with the act, were of equal importance. If only the latter class were subject to its penalties, all persons, by failing to register, could sell with impunity, without paying the tax or complying with the other requirements of the act.

Section 1 punishes sales by persons who have neither registered nor paid the tax. Section 2 punishes persons who sell, not in pursuance of a written order of the person to whom the sale is made. The language of section 2 is general, and does not restrict the prohibition to registered sellers in terms. Indeed, the exception, lettered "d," applies to a class expressly excepted from registry and payment of the tax by section 1. This exception would seem to be superfluous, if section 2 applied only to registered persons, since the excepted class would not then be included in the class against whom the penalties of the section are directed. There are some provisions in section 2 that may be persuasive of the correctness of defendant's contention, viz. those applying alone to the conduct of the business by those who have registered. We think, however, its terms broad enough to include all persons, whether actually registered or not, who sell the prohibited drugs.

Taking the law in its entirety, no person, whether registered or unregistered, can lawfully sell the prohibited drugs, "except in pursuance

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of a written order of the person to whom such article is sold," and an indictment which charged even an unregistered person with selling, not in pursuance of such a written order, would charge him with all the elements of a sale prohibited by the act. It would, we think, be unnecessary, in this view, for the indictment to allege that the defendant was actually registered and had paid the tax, and, as the law itself imposes the duty of registry and payment of the tax on all persons who sell, it would be unnecessary for the indictment to allege that the defendant, being charged with making a sale, was in the class required to register and pay the tax.

The plaintiff in error contends that section 1 and section 2 create distinct offenses, the former directed alone against unregistered persons, who have failed to pay the tax, and the latter directed alone against registered persons, who have paid the tax, but have failed to conduct the business in other respects in accordance with the act. The act in different sections defines what sales are unlawful. It does not, however, affix separate penalties to each class of prohibited sales. Section 9 (section 6287*o*) provides a penalty to be imposed upon any person who violates or fails to comply with any of the requirements of the act. Sales of the prohibited drugs may be unlawful (a) when made by an unregistered person, who has not paid the tax, or (b) when made by any person, except in pursuance of an order blank. The offense punished is the making a sale in violation of the act. If the sale is prohibited by the act, it is not important that the indictment should be framed under any particular section of the act, provided its averments sufficiently show a sale made unlawful by the act in its entirety. An indictment which charges a sale to have been made in a way that no person, registered or unregistered, could lawfully make it by the terms of the act, sufficiently shows that the defendant, in making it, violated the act in a way that subjects him to the penalties prescribed for its violation by section 9.

[4, 5] 3. The third proposition presented by the demurrer is that the indictment does not sufficiently aver that the defendant did not come within one or more of the statutory exceptions or exemptions.

Section 8 of the act (Comp. St. 1916, § 6287n) contains this language at the end of it:

"Provided further, that it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this Act; and the burden of proof of any such exemption shall be upon the defendant."

There are exceptions and exemptions in section 8, to which the language of the proviso might be referred. The Court of Appeals for the Seventh Circuit has, however, construed it to apply to all exceptions and exemptions, theretofore mentioned in the act, including those in section 2. We cannot agree with the contention that Amend. art. 6 of the federal Constitution would prevent Congress from so enacting. An indictment, though it failed to exclude defendant from the excepted classes, would sufficiently inform him of the nature of the accusation against him. If, in the light of the proviso of section 8 and the construction given it, there was any necessity resting upon the

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government to negative the fact that defendant was a member of one of the excluded classes, we think the indictment sufficiently does so. Each count alleges that—

"Neither the said Billie Brown [the buyer of the drug] nor the sale as aforesaid came under any of the exceptions and exemptions provided for in the act of Congress aforesaid."

The criticism is that, while it covers an exemption in favor of the buyer and the sale, it does not exclude the possibility of the exemption of the seller. If the sale was not excepted from the prohibition of the act, as alleged in the indictment, then the seller was necessarily punishable for making it, since the act imposes upon the seller penalties for making any sale made unlawful by its terms. We think the averments of the indictment sufficient in their exclusion of the statutory exceptions and exemptions, which we construe to be synonymous terms, even if a necessity for said averment were held to exist.

There being no error in the record, the judgment is affirmed.

Affirmed.

WESTERN UNION TELEGRAPH CO. v. PRESTON.

(Circuit Court of Appeals, Third Circuit. November 27, 1918.)

No. 2396.

1. DEATH ⟸15—ACTION FOR WRONGFUL DEATH—PENNSYLVANIA STATUTE.
Under Act Pa. April 15, 1851 (P. L. 674) § 19, and Act Pa. April 26, 1855 (P. L. 309), providing that, when no suit for damages is brought by the person injured during life, his widow may maintain an action for the death within one year thereafter, the widow may sue, although at the time of death decedent's right of action was barred by limitation.

2. DEATH ⟸11—ACTION FOR WRONGFUL DEATH—CONSTRUCTION OF STATUTES.
Under statutes modeled upon Lord Campbell's Act, giving a right of action for wrongful death, such right of action is different from and independent of the right of action of the deceased for the injury, although the cause of action, which is the tort, is the same.

3. DEATH ⟸16—ACTION FOR WRONGFUL DEATH—REMOTENESS OF INJURY.
That a person injured lived for 10 years after his injury does not, as matter of law, preclude recovery for his death.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action at law by Mary E. Preston against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 250 Fed. 480.

W. B. Linn, of Philadelphia, Pa., for plaintiff in error.

Hugh Roberts, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. Preston, a telegraph lineman in the employ of the defendant below, was injured in September, 1905. He died in October, 1915.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Preston brought no suit for damages during his life. His widow brought this action within one year after his death. She alleged, and the jury found, that her husband's injuries were due to negligence of the defendant and that his death was occasioned by the injuries he had sustained.

[1] The action is brought under statutes of the commonwealth of Pennsylvania, which read:

"Whenever death shall be occasioned by unlawful violence or negligence, *and no suit for damages be brought by the party injured during his or her life*, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages *for the death* thus occasioned." Act of April 15, 1851 (P. L. 674) § 19.

"The declaration shall state who are the parties entitled to such action; the action shall be brought within one year after the death, and not thereafter." Act of April 26, 1855 (P. L. 309).

Preston's right of action at the time of his death was barred by a statute of limitation.

We have been referred to no decision by a court of Pennsylvania construing the Act of April 15, 1851, with reference to a situation similar to the one presented by the facts in this case. Reluctant as we are to impose upon a state statute the interpretation of a Federal court, we find ourselves called upon nevertheless to construe the statute on which this action is based, in order to decide the first question raised by the defendant on this writ of error. This question is: Whether the statute affords a widow a right of action for the death of her husband occasioned by negligence, where, at the time of his death, his right of action for the same negligence was barred by a statute of limitation.

The evident purpose of the Pennsylvania statute, in giving a right of action after death occasioned by negligence, was to remove the hardship of the common-law rule—"actio personalis moritur cum persona." This rule was changed in England by the Act of 9 and 10 Vict. chapter 93, section 1, known as "Lord Campbell's Act," which gave such an action to certain designated persons injured by the death. The relevant parts of the act are set out in the margin.[1]

The distinguishing features of Lord Campbell's Act have been re-enacted by many states in statutes which preserve, though in varying forms of expression, its original purpose. Among the states that have used the English Act as a model in changing the common-law rule is the Commonwealth of Pennsylvania. Hill v. Penna. R. R.

[1] Section 1. "* * * That whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

Section 2 designates the person who may maintain the action.

Section 3. "* * * Provided, always, and be it enacted, that not more than one action shall lie for and in respect of the same subject matter of complaint; * * * and that every such action shall be commenced within twelve calendar months after the death of such deceased person."

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Co., 178 Pa. 223, 231, 35 Atl. 997, 35 L. R. A. 196, 56 Am. St. Rep. 754.

Differences in the language of the American and English statutes have in many instances caused differences in their interpretation, not with reference to the main object of giving a new action after death, but with reference to the nature of the action and the circumstances under which it can be enforced.

[2] While at first there was much judicial dispute as to the precise nature of the action conferred by Lord Campbell's Act and by American statutes modeled upon it—whether it was a new action or the continuance of the action of the person injured, whether it was cumulative upon the action of the person injured, thereby imposing a double liability in the sense of permitting double recoveries for the tort, whether the action was on the death or on the tort—the courts in England and America have now decided beyond profitable controversy that the new action given by such statutes is not a continuance of any right of action which the injured person would have had except for his death, but is "a new or independent cause of action," founded on a new grievance, and is awarded "for the purpose of compensating certain dependent members of the family (of the injured person) for the deprivation, pecuniarily, resulting to them from his wrongful death," Michigan Central R. R. Co. v. Vreeland, 227 U. S. 59, 69, 33 Sup. Ct. 192, 195 (57 L. Ed. 417, Ann. Cas. 1914C, 176); or, stated substantially in the language of the English decisions, the act does not transfer the right of action of the injured person to his widow or other designated person, but gives to such person a totally new right of action, on different principles, Blake v. Midland Ry. Co., 18 Q. B. 93, 109; Seward v. The Vera Cruz, 110 App. Cases, 59. While it is thus decided that the new action is for the death and is independent of the husband's common-law action for his injury, the courts have gone further and have decided with equal finality, that "*the cause of action* contemplated by the statute is the tort which produces death and not the death caused by the tort." Centofanti v. R. R. Co., 244 Pa. 255, 262, 90 Atl. 558, 561; Michigan Central R. R. Co. v. Vreeland, supra. In arriving at these decisions, we discern a clear distinction made by the courts between the *right of action* after death given by the statutes and the *cause of action* on which such right of action may be enforced. This distinction has, we believe, a controlling bearing on the question before us for decision.

Referring for convenience to the two rights of action respectively as the widow's right of action and the husband's right of action, it is now the law, that, although the widow's right of action is wholly independent of that of her husband, it is dependent on the original wrongful injury inflicted upon him. Both rights of action spring from the same tort, therefore the same tort is the cause of action for both. The tort being the basis of both actions, the courts have held with entire consistency that the widow's right to recover in her action for the wrong done her by occasioning her husband's death depends primarily on the liability of the wrongdoer to her husband for

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the wrong done him. Liability for the tort is affected of course by the character of the tort, and it may even be destroyed by the injured husband in a way that will altogether deprive his widow of a cause of action to sue upon. The tort, as a cause of action enuring to the widow, is affected by considerations of the husband's assumption of risk and contributory negligence, and of negligence of a fellow servant. Liability for the tort may be released by the husband before its commission, as under a contract involving a release to a carrier from liability for future negligence of its servants, Perry v. P. W. & B. R. R., 24 Del. 399, 77 Atl. 725; and by his acceptance of a free pass similarly releasing liability, Northern Pacific Ry. Co. v. Adams, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513, reversing C. C. A. Ninth Circuit, 116 Fed. 324, 54 C. C. A. 196. Liability for the tort may also be released by the husband after its commission by his acceptance of compensation for the injury he has sustained. Hill v. Penna. R. R. Co., 178 Pa. 223, 35 Atl. 997, 35 L. R. A. 196, 56 Am. St. Rep. 754.

If the wrongdoer has never been legally liable for the wrong or if he has in any way been acquitted of the wrong, then the tort is no longer a cause of action on which the widow can prosecute her statutory right of action, and this is for the reason that the widow succeeds to her husband's cause of action—the tort—with all its infirmities, those that are inherent, and those that have been imposed upon it by her husband.

What infirmity is there in the tort in this case, considered purely as a cause of action, that precludes the widow from asserting her right of action? The defendant says that the husband had lost his right of action on the tort prior to his death because of the bar of the Statute of Limitations, and for that reason the widow also has lost her right of action. But the Statute of Limitations operated against the husband's right of action, not against the tort, the cause of action. That admittedly stood unaffected by any act of his. When he died without suing, the husband left the tort just as it was when it was committed, though he left the wrong done him unredressed. But upon his death a new injury was occasioned by the same tort, this time to the widow. For redress of this injury, the statute gave her a new and altogether independent right of action, if the cause of action, the tort that occasioned the death, still existed. The question is, Did it still exist? We think it did. The husband had done nothing to it, and had done nothing that affected it; he simply permitted a statute of limitation to deprive *him* of *his* right to sue upon it. The statute that deprived him of his right of action was not applicable to the widow's right of action. Being inoperative against her, it deprived her of nothing. In this situation the husband died.

We are of opinion, that the right of action afforded the widow by the Pennsylvania statute, though dependent on the original wrongful injury to the husband, is not dependent by implication on her husband's right of action not being barred by a statute of limitation at the time of his death, and that, in consequence, the plaintiff in this case was not barred of her action. Opposed to this opinion, counsel for the defendant cited with confidence decisions of courts in a num-

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ber of states in harmony with a view expressed by the Supreme Court of the United States with reference to the right of action afforded by various statutes modeled after Lord Campbell's Act, in Michigan Central R. R. Co. v. Vreeland, 227 U. S. 59, 70, 33 Sup. Ct. 192, 196 (57 L. Ed. 417, Ann. Cas. 1914C, 176), where the matter was not involved in the decision. It is as follows:

"But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the *new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.* Tiffany, Death by Wrongful Act, § 124; Louisville, E. & St. L. R. R. Co. v. Clark, 152 U. S. 230 [14 Sup. Ct. 579, 38 L. Ed. 422]; Read v. G. E. Ry., L. R. 3 Q. B. 555; Hecht v. O. & M. Ry., 132 Indiana, 507 [32 N. E. 302]; Fowlkes v. Nashville & Decatur R. R. Co., 9 Heisk. [Tenn.] 829; Littlewood v. Mayor, 89 N. Y. 24 [42 Am. Dec. 271]; Southern Bell Tel. Co. v. Cassin, 111 Georgia, 575 [36 S. E. 881, 50 L. R. A. 694]."

This, indeed, is the general rule, but an examination of the statutes under which the cited decisions were made and the rule was announced shows that in each instance the statute was radically different from that of Pennsylvania in the important particular that the right of action given the widow by these statutes *is in terms made to depend upon* the existence of the husband's right of action at his death and upon his ability immediately theretofore to maintain his action. Some of these statutes are cited in the margin together with cases in which their interpretation was involved.[2]

Under statutes like these the courts have held with reason that the widow's right of action is made dependent on the husband's right of action and on his liability to *maintain an action* before his death, and that the test of his ability to maintain an action is that he shall be able to prevail over all defences which may be interposed to it, including, of course, the defence of the Statute of Limitations. But the Supreme Court of Pennsylvania, in discussing the statute now under consideration has said:

"The English statute is somewhat broader than ours, because it is not limited to cases in which an action had been brought by the injured party and he had died pending the action, nor yet to cases in which no action has been

[2] In Lord Campbell's Act, the condition which qualifies the new right of action is where "the act, neglect or default is such as would, if death had not ensued, *have entitled the party injured to maintain an action* and recover damages in respect thereof." Read v. G. E. Ry. Co., L. R. 3 Q. B. 555; Blake v. Midland Ry. Co., 18 Q. B. 93, 109; Seward v. The Vera Cruz, 10 App. Cases, 59.

By the Alabama statute it is provided that "a personal representative may maintain an action * * * for * * * negligence * * * whereby the death of his testator or intestate was caused, *if the testator or intestate could have maintained an action* for such wrongful act * * * if it had not caused death. * * *" Suell v. Derricott, 161 Ala. 259, 49 South. 895, 23 L. R. A. (N. S.) 996, 18 Ann. Cas. 636; Buckalew v. T. C. & T. Co., 112 Ala. 146, 20 South. 606; L. & N. R. R. Co. v. Robinson, 141 Ala. 325, 37 South. 431; Williams v. Ry. Co., 150 Ala. 324, 43 South. 576, 10 L. R. A. (N. S.) 413; Seaboard Air Line Ry. Co. v. Allen (C. C. A. 2d) 192 Fed. 480, 112 C. C. A. 642.

The New York statute provides that "the executor or administrator of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person

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brought by the injured party in his lifetime, *and the remedy is given without qualification in all cases.*" Hill v. Penna. R. R. Co., 178 Pa. 223, 232, 35 Atl. 997, 999 (35 L. R. A. 196, 56 Am. St. Rep. 754).

This intimation of what would be the view of the Supreme Court of Pennsylvania were the precise question in this case before it, supports our construction, that the Pennsylvania statute does not make the widow's right of action dependent wholly on the husband's ability to maintain an action immediately before his death; but, on the contrary, it makes it (in terms) dependent only on the fact that his death was caused by the original wrongful act and on the fact that before his death he had brought no suit for damages, and (by implication, as in other statutes) on the liability of the wrongdoer for the tort. The statute imposes no other condition upon the widow's right to sue save that she bring her action within one year after her husband's death. As these are all the conditions imposed by the General Assembly of Pennsylvania, we feel that this court has no authority to impose additional or different ones. Louisville & St. L. R. R. v. Clarke, 152 U. S. 230, 238, 239, 14 Sup. Ct. 579, 38 L. Ed. 422.

We find no error in the ruling of the trial court sustaining the plaintiff's right of action.

The remaining matter assigned as error was the court's refusal to direct a verdict for the defendant. This assignment is based on two aspects of the case, as viewed by the defendant; one, that Preston's death was not caused by his injuries; the other, that his injuries were not occasioned by the defendant's negligence.

[3] With respect to the first, the defendant says it is obvious that Preston's death in 1915 cannot in any legal sense be traced to the accident in 1905, and maintains, accordingly, that the trial court erred in not declaring that conclusion as a matter of law. This contention rests on the principle, that the law, in its practical administration, regards only proximate or immediate and not remote causes, Railway Co. v. Calhoun, 213 U. S. 7, 29 Sup. Ct. 321, 53 L. Ed. 671, and that only an injury which is the natural and probable result of an act of negligence, as distinguished from an injury that could not have been

*who * * * would have been liable to an action in favor of the decedent by reason thereof if death* had not ensued." Littlewood v. Mayor, 89 N. Y. 24, 42 Am. Dec. 271; Kelliher v. N. Y. C. & H. R. R. Co., 212 N. Y. 207, 210, 105 N. E. 824, L. R. A. 1915E, 1178.

The Indiana statute provides that "when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, *if the former [the party injured] might have maintained an action*, had he lived, *against the latter* for an injury for the same act or omission." Jeffersonville R. R. v. Swayne's Adm'r, 26 Ind. 477; Pittsburgh, etc., Ry. v. Vining's Adm'r, 27 Ind. 513, 92 Am. Dec. 269; Hecht v. Ohio & Mississippi Ry. Co., 132 Ind. 507, 509, 32 N. E. 302.

The Tennessee Act provides that "the right of action, *which a person * * * whose death is caused by the wrongful act or omission of another, would have had against the wrongdoer in case death had not ensued*, shall not abate or be extinguished by his death, but shall pass to his personal representative for the benefit of his widow and next of kin." Fowlkes v. Nashville & Decatur R. R. Co., 56 Tenn. (9 Heisk.) 829, 830.

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reasonably anticipated as the probable result, is actionable, Armour & Co. v. Harcrow, 217 Fed. 224, 227, 133 C. C. A. 218. Applying this principle to the case, the defendant urges that the span of ten years between the accident and death—a period of time, which, admittedly, is startling—shows that death which followed the injury was too remote to be its natural or probable consequence, and, therefore, there is in the case no evidence of proximate or immediate cause.

We also would apply this principle to the case, if, in the sequence of events between the injury and death, there had intervened nothing which indicated a proximate connection between the two. But the plaintiff produced evidence of Preston's condition throughout the period, showing that his ill health began with the injury and increased slowly but progressively until epilepsy developed and death ensued. This evidence, in amount and character, is quite sufficient, if believed, to show that Preston's death was due directly and proximately to his injuries.

The other question—whether there was sufficient evidence of negligence to submit to the jury—involves no question of law. It may be decided, therefore, without stating the case and discussing the evidence. We are of opinion that the evidence is sufficient to sustain the verdict, and find that the court did not err in submitting the case to the jury.

The judgment below is affirmed.

CHICAGO, R. I. & P. RY. CO. v. UNION PAC. R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1918.)

No. 5022.

1. COURTS ⟹492—EFFECT OF RECEIVERSHIP—JURISDICTION OF COURT OTHER THAN ONE APPOINTING RECEIVER.
That one defendant was under receivership in another federal court at the time the trial court heard the bill of complaint against it and others to enforce an award of arbitrators appointed pursuant to contract, etc., *held* not to deprive the trial court of jurisdiction; it not appearing when complainant filed its claim in the receivership suit.

2. ARBITRATION AND AWARD ⟹12—VALIDITY OF AWARD—WAIVER OF DEFECTS.
Where arbitration was begun under a mutual mistake as to which contract governed, etc., and the parties on discovery furnished the arbitrators the true contract and proceeded, there was a waiver of the defect, and the award was valid.

3. ARBITRATION AND AWARD ⟹4—PARTIES—VALIDITY OF AWARD—RIGHT TO OBJECT.
Where others interested in the result of an arbitration, though not parties, insisted on its validity, defendant, against whom the award was made, cannot attack it because they were not made parties and might have been injured.

4. ARBITRATION AND AWARD ⟹46—DISQUALIFICATION OF ARBITRATOR—WAIVER.
Where defendant proceeded with an arbitration after discovery of facts which showed one of the arbitrators was disqualified, it waived the disqualification, and cannot attack the award on that ground.

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5. ARBITRATION AND AWARD ⇐46—HEARINGS—NOTICE.
Where defendant participated in sending arbitrators the true contract, on discovery of the mistake as to the contract applicable, etc., and submitted other evidence, *held*, the award was not open to attack on the ground the arbitrators failed to give notice and refused to hold further hearing after discovery of the mistake, etc.

Appeal from the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Bill by the Union Pacific Railroad Company against the Chicago, Rock Island & Pacific Railway Company and others. From a decree against it, the named defendant appeals. Affirmed.

E. P. Holmes, of Lincoln, Neb. (M. L. Bell, of Chicago, Ill., on the brief), for appellant.

Edson Rich, of Omaha, Neb. (N. H. Loomis, of Omaha, Neb., on the brief), for appellee Union Pac. R. Co.

A. A. McLaughlin, of Omaha, Neb. (Lyle Hubbard and Wymer Dressler, both of Omaha, Neb., on the brief), for appellee Chicago & N. W. Ry. Co.

F. H. Helsell, of Ft. Dodge, Iowa, and William Baird, Edgar A. Baird, and Claire J. Baird, all of Omaha, Neb., for appellee Illinois Cent. R. Co.

Ralph M. Shaw, of Chicago, Ill., and William Baird, of Omaha, Neb., for appellee Chicago Great Western Ry. Co.

B. P. Waggener, of Atchison, Kan., and J. A. C. Kennedy and Yale Holland, both of Omaha, Neb., for appellee Missouri Pac. Ry. Co.

H. H. Field, of Chicago, Ill., and L. F. Crofoot, E. H. Scott, and W. C. Fraser, all of Omaha, Neb., for appellee Chicago, M. & St. P. Ry. Co.

Before HOOK, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. The Union Pacific Railroad Company owns the depot and attaching terminals at Omaha. The Rock Island, with other roads, are its tenants under a so-called "Union Station contract." The contract provisions governing the liability between the roads for accidents within these terminals are that each road shall pay for damage arising out of the "conduct or negligence of its own employés," and that such damages as arise from the "conduct or neglect of employés paid in common" shall be charged to current expenses of operation and maintenance and paid by all in common or on an agreed basis. A collision occurred between Union Pacific and Rock Island engines on these terminal tracks, and the question is whether the Rock Island, or all of the roads, should pay for the damages.

A few months after the accident, on complaint by the Union Pacific to the Rock Island that the latter should assume the damage, the two roads finally agreed to arbitrate the question. The Union Station contract provided for arbitration. The arbitrators were chosen and proceeded to consider the matter. Through mistake, instead of sending the arbitrators the station contract as governing the controversy, another agreement between the roads, governing the use of different trackage near Omaha, was delivered to them. This latter

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contract provided, in case of collision between trains of the roads, the one at fault should pay all damages, and "when either is at fault, or both are in fault, each shall bear its own loss"; also that, if the fault was of an employé "whose duties are directly connected with the movement of trains of both parties," the road shall bear all loss suffered by it. Shortly before the arbitration concluded the error was discovered, when the arbitrators were notified, and the proper contract sent to them. The arbitration resulted in a finding that the Rock Island was entirely to blame and should assume the entire loss.

Shortly after this award the Rock Island wrote the Union Pacific that it would not be bound by the award, whereupon the Union Pacific filed this bill against the Rock Island and the other tenant roads, praying that the court determine the validity of the award, and, if invalid, determine whether under the facts the Rock Island alone or all the roads in common should assume the loss, and for a decree against such parties as under the arbitration or facts the court should find liable. A special master was appointed. The master heard all of the testimony, both such as related to the arbitration, and such as related to the accident. The result of his findings and conclusions was that the Rock Island was solely liable, both because the arbitration was binding, and because the sole proximate negligence was the negligence of the Rock Island engine crew. To this report the Rock Island filed exceptions, which were by the court overruled, and decree entered in accordance with the report. From that decree the Rock Island appeals.

[1] At the threshold of the case the appellant insists that, at the time the trial court heard and determined the master's report, it was without jurisdiction to act thereon. This is based on the situation that at that time the Rock Island was under receivership in another federal court, and the Union Pacific had filed before the special master therein a claim covering the subject of this suit under a general order of the court, barring claims not filed within a certain period. This contention is not well founded for several reasons. This suit was not against the receiver, but the railroad; other parties to this suit were interested in its result; the first jurisdiction of this subject and parties was in this trial court; there was not necessarily any conflict of jurisdiction. It may also have a bearing that the Union Pacific had not become a party to the receivership suit, by intervention or otherwise. The record is silent as to when it filed its claims.

The case on its merits naturally divides into two main considerations: (a) The validity of the arbitration; and (b) the seat of the negligence which caused the collision. If the arbitration is valid, and appellant bound thereby, the award therein made measures the rights of the parties. If the arbitration is invalid, then the question is the location of the blame, and in conformity with that determination a settlement of the rights of the parties as defined in the Union Station contract.

The Arbitration.

Appellant attacks the arbitration for the following reasons:

(1) That is was agreed to under a mutual mistake and proceeded thereunder.

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(2) That all interested parties did not join therein.

(3) That it was denied an opportunity for a hearing before the arbitrators.

(4) That one of the arbitrators signing the majority award was disqualified because of interest in the controversy.

(5) That the testimony before the arbitrators does not support their findings.

(6) That the arbitrators failed to give notice and refused to have a further hearing when mutual mistake as to contract was discovered.

These will be considered seriatim.

[2] 1. It is true that the arbitration was begun under a mutual misapprehension as to which contract controlled, and this mistake was not discovered for some time, until about a month before the award. It is clear, however, that the manner of selection and the number of arbitrators happened to accord with the requirement of the true contract; also, that when both parties discovered the mistake, instead of questioning the arbitration, they at once furnished to the arbitrators copies of the true contract, and no objection was heard upon that score until after the award. This was a recognition and a waiver of this defect.

[3] 2. It is true that the other tenant lines did not join in the arbitration, and that they were interested in its result. But the interest of each of them was, without exception, opposed to appellant, and they are in this suit insisting upon the validity of the award. Obviously appellant was not injured, or his rights affected by their absence from the arbitration. He cannot register an objection that they were injured, or might have been injured, when they are here asking to be bound by that award.

3. A careful examination of the evidence convinces that there is no foundation for the claim that appellant was denied a full hearing before the arbitrators.

[4] 4. That one of the arbitrators (De Bernardi) signing the majority award was disqualified because of interest is true. He was general superintendent of one of the tenant roads, which appellant at all times knew. Almost a month before the award it discovered the mistake in contract, and from that time knew that his road was interested in the award, and therefore that the disqualification existed. Not only did it make no objection thereafter, but it proceeded with the arbitration and made no objection of this kind until after the award. This was a waiver.

5. In our judgment, the evidence supported the findings of the arbitrators.

[5] 6. The claim that the arbitrators failed to give notice and refused to hold further hearings after discovery of the mistake as to contract is not well taken. As to the notice, it was not only not necessary, but the appellant actively participated thereafter by sending the contract and some further information to the arbitrator chosen by it, who communicated that information to the other arbitrators. The facts had long been before the arbitrators as fully as the parties desired, except for the above one piece of information relating to the

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common employment of the engine herder, which was communicated as soon as discovered by appellant. While the parties did not have another meeting, they did hold correspondence, which had the same practical effect. In fact, it was during this correspondence that De Bernardi first called to the attention of the other two the controlling force of the Union Station contract. In our judgment, the arbitration is not subject to attack, and its award is binding upon appellant.

The judgment is affirmed.

GLEN INV. CO. v. ROMERO, County Treasurer.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1918.)

No. 5032.

1. COURTS ⟸328(9)—FEDERAL COURTS—JURISDICTIONAL AMOUNT—"COSTS."
Where a purchaser from a New Mexico county of state tax certificates sued to enjoin the treasurer from issuing redemption certificates, without payment of certain costs and penalties which had accrued up to the date of purchase, such costs, etc., which exceeded the amount necessary to give the federal court jurisdiction, under Judicial Code, § 24,[1] were not "costs," as used in the provision declaring that such accessory demands cannot be counted in computing the jurisdictional amount.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Costs.]

2. CONSTITUTIONAL LAW ⟸139—TAXATION ⟸696—OBLIGATION OF CONTRACT—TAX SALES—REDEMPTION.
One purchasing from a county tax sale certificates after the amendment of 1915 (Laws 1915, c. 78) to Code N. M. 1915, § 5502, which allowed sale of certificates for sum less than total amount of the taxes, interest, etc., must trace all title through the amendment, and, as such sale was optional with county, there was no impairment of contract.

3. TAXATION ⟸709(1)—CERTIFICATE—REDEMPTION—AMOUNT.
A purchaser from a county of tax sale certificates sold under Code N. M. 1915, § 5502, as amended by Laws 1915, c. 78, for less than total amount of the taxes, interest, etc., *held* entitled on redemption to collect only his expenditure plus interest, instead of the sums called for by the certificate.

Appeal from the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Bill by the Glen Investment Company against Eugenio Romero, as Treasurer and ex officio Collector of the County of San Miguel, State of New Mexico. From a decree dismissing the bill for want of jurisdiction, complainant appeals. Reversed, with directions to dismiss bill on merits.

Edwin H. Park, of Denver, Colo. (Thomas H. Gibson, of Denver, Colo., on the brief), for appellant.

Chester A. Hunker, of Las Vegas, N. M. (S. B. Davis, Jr., of East Las Vegas, N. M., on the brief), for appellee.

Before HOOK, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. Appellant is purchaser from the county and holder of tax sale certificates issued by the proper authorities of

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[1] Comp. St. § 991.

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the county of San Miguel, N. M. These certificates had been originally issued to the county at the time it bought in the land for nonpayment of taxes. Under a state statute, when the county had bought in land for two or more successive years, it might under certain circumstances here present, sell such sale certificates at public auction to the highest cash bidder for not less than the minimum sum fixed by the county commissioners. At such an auction sale appellant bought a large number of such sale certificates held by the county. The appellee is the treasurer and ex officio collector of that county. Under the statutes of New Mexico the land covered by the above sale certificates is subject to redemption by the owner. At the time of redemption the county treasurer, to whom the redemption money is paid for the use of the sale certificate holder, is required to issue to the owner a redemption certificate, which is made conclusive proof of such redemption. The appellee treasurer was threatening to issue redemption certificates against the above several sale certificates upon payment by the respective owners of the amount paid by appellant for each of such sale certificates, plus interest at the rate of 12 per centum annually since the date of purchase. Appellant contended that the amount required for such redemption was the amount of taxes originally levied upon each of the several parcels of property, together with penalties, costs, and interest as set forth in the several sale certificates. To prevent the issue of the redemption certificates as threatened, appellant sought an injunction.

[1] After answer, the jurisdiction of the court below was there successfully assailed by motion upon two grounds: First, that, although a diversity of citizenship, the controversial amount was less than $3,000; and, second, that no federal question was involved. Plaintiff claimed the right to receive, at redemption of the certificates held by him, the original amount of the taxes, costs, penalties, and interest from the date of the certificate. Defendant claimed that such recovery should be confined to the purchase price paid by plaintiff for the certificates, with interest thereon from date of purchase. The purchase price equaled the original tax. Therefore the amount in dispute was the costs (in connection with the taxation), penalties, and interest which had accrued to date of purchase. The costs here intended are not the costs of this present suit, but such as arose in connection with the tax sale proceedings. The interest is not merely that incidental or auxiliary to the amount in dispute, but is one of the main elements or items making up that amount. Such costs and interest are not within the meaning of those terms as used in the section (Judicial Code, § 24; Comp. St. 1916, § 991) which excludes such from inclusion in the jurisdictional amount. As said in Edwards v. Bates County, 163 U. S. 269, 273, 16 Sup. Ct. 967, 41 L. Ed. 155, the distinction is between "a principal and accessory demand." The matter in dispute here is not the amount of taxes, but what amount beyond the taxes (such as costs, penalties, and interest) must be paid. Admittedly this sum exceeded $3,000. The jurisdictional amount having been shown; with an undisputed diversity of citizenship, the court should have retained jurisdiction of the cause.

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Strictly speaking, determination of the existence of jurisdiction as above would cover all matters really before us upon this appeal. However, the parties have expressed their desire that a decision be made upon the merits. A refusal of this request would have the sole result of sending the cause to the trial court, whence it would return here. The facts are fully agreed in the pleadings, and the differences are purely as to the law. We see no good reason to impose upon these litigants the delay and expense of again presenting to the trial court and to this court the precise legal questions upon the same agreed facts which were put before us in briefs and arguments. Nor should the time of these courts be wasted in such useless repetition. We will not consider whether there is in this case a federal question which could cast the jurisdiction of the national courts. Having assumed jurisdiction because of diversity of citizenship, we will treat the merits of the case.

The Supreme Court of New Mexico (State ex rel. Cunningham et al. v. Romero, 22 N. M. 325, 161 Pac. 1103) has decided, in a case involving some of these same certificates and others of like character, that the proper redemption amount upon such certificates is the purchase price, with interest thereon at 1 per centum monthly from date of purchase, to which should be added the amount of any subsequent taxes paid by the purchaser after purchase, with the same interest thereon from payment. Appellee claims that this decision by the highest state court is conclusive upon this court. If this be true, then that decision rules this case. Appellant, however, contends, first, that the result reached in that case would impair the obligation of the contract represented in the certificates; and, second, that this court is not bound by that decision, but should examine the matter for itself, in which event its construction of the statutes would prevail.

[2] As to the impairment of the contract: The contract intended is that contained in the certificate of sale. We waive, without decision, the suggestions that such a certificate is not a contract within the constitutional provision, and that the political and legal character of a county would prevent the application of that provision. Conceding, but not deciding, that the certificates are fully protected by the Constitution as contracts so long as they remain the property of the county, and conceding, but not deciding, that such contracts are in terms as contended by appellant, yet it does not follow that the appellant stands in the place of the county. It is true it bought the certificates from the county, and acquired such title as the county could convey. This, however, it did under the following circumstances: Up to 1915 the laws of New Mexico (section 5498) provided that the collector should make sale of land for delinquent taxes; that at such sale the land should go to the highest cash bidder whose bid equaled the full amount of taxes, penalties and interest due thereon; that in default of such bid the land should be "struck off to the county for such total amount"; that in no case should such interest be released, abated, rebated, or reduced, but should have the force of and become part of the original tax; that one-half of the interest so collected as penalty should be paid into the state interest fund and one-half credited to the county

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interest fund; that the county should not by such sale acquire title to such real estate, "but shall sell and assign the duplicate tax certificate, as provided in section 5500." Section 5500 provided that the county treasurer should "sell and assign the duplicate certificate of such sale" to any one who would at any time pay the full face value thereof with accrued interest; if not so sold before time for the next regular tax sale, such certificate shall be sold at public auction to the highest cash bidder, whose bid should equal the full amount of the taxes and interest; that it would be thereafter redeemable in repayment of the amount so paid. Section 5502 was:

"Upon payment of the amount for which any real estate is sold, the treasurer shall give to the purchaser a certificate of sale containing a description of the property sold, stating the name of the person or persons to whom the same was assessed or that it was assessed to unknown owners, as the case may be, the amount paid therefor, and that it was sold for taxes, with the date of sale, and that the sale is subject to the right of the owner to redeem the property within three years by paying the amount paid at such sale with interest thereon at the rate of one per cent. per month, which certificate must be recorded in the office of the county clerk in a book kept for the purpose of recording such certificates. Such former owner may at any time, within three years from the date of recording such certificate, or duplicate certificate, provided for in section 5500, redeem the property by paying to the county treasurer for the use of the purchaser, or his assigns, the amount of purchase money with interest, as aforesaid, together with any taxes which may have been paid upon the property by the purchaser or his assigns, with interest at the same rate, and such former owner may retain possession of the property until the time of redemption has expired.

"Real estate sold for taxes, whether struck off to the county or sold to others, shall continue to be assessed in the name of the original owner, or to unknown owners, as the case may be, until the title shall pass by tax deed or otherwise, and taxes thereon for the time during which said certificate or duplicate shall be held by the county or a purchaser shall be a lien upon said property until paid."

It is evident from the foregoing that, if the land was redeemed, the purchaser at a tax sale or of a duplicate certificate from the county was entitled to receive the amount he had invested in the purchase or expended in later taxes against the land, with interest thereon at 1 per centum monthly from date of such payment. There could be no uncertainty as to the amount required for redemption.

As the county could not sell the land at the tax sales, nor the certificates purchased by it, for less than the total amount due, there were instances where the county could realize no cash return as to such taxes. The county was denied the right, which belonged to the ordinary purchaser, of becoming the owner of land covered by its sale certificates. Thus it was helpless when no one could be found who would pay the minimum purchase price. We may infer that this contingency was realized to a serious extent, as the Legislature in 1915 added to section 5502, with a view of relieving counties which had on hand such immovable certificates, the following amendment:

"Whenever any lot, parcel or tract of land, or any interest therein, or any improvement thereon, shall have been bid in prior to April 1, 1915, by or for any county at tax sales made pursuant to law for two or more years, and the treasurer of such county has been unable to sell the certificates or duplicate certificates therefor so as to realize the total amount of the taxes, interest, penalty and costs due upon such property, said treasurer may sell

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the same at public auction to the highest bidder for cash, who shall bid not less than the minimum sum therefor which the county commissioners of said county, by order duly entered upon their records at any regular meeting, may have decided to accept. And at any time prior to the date fixed for such sale in the notice given by the treasurer the owner of such property may redeem the same from such tax sales by paying to the treasurer the minimum amount so fixed by the county commissioners, such sale of said certificates or duplicate certificates, or such redemption by the owner, shall release said property from the lien of all delinquent taxes, penalties, interest and costs standing against the same at the date of such sale or redemption." Laws 1915, c. 78.

The certificates here involved come within the description of the amendment. They were held by the county at the time the amendment became effective and were subsequently sold thereunder to appellant.

The amendment of 1915 was not intended to and did not change the existing law as to tax sales and redemptions with their incidents and requirements. It was designed to meet a temporary, particular and special situation. It dealt only with a definite and determined lot of then existing sale certificates. Its effect was to permit counties to deal with those certificates in a way theretofore forbidden; that is, to sell them at a price below the amount called for by the certificate. Before this change the two provisions of the statute, that the interest on the taxes should not be abated and that the redemption should be for the purchase price plus interest thereon, could not conflict, because the purchase price must equal the total amount of taxes, penalties, costs, and interest. Under the amendment, when the certificates sold below that figure, this divergence would occur. The Legislature could grant the counties a new right affecting the certificates upon any conditions it deemed proper. So long as the county was left free to exercise its choice of maintaining the existing status or of changing it under the conditions prescribed, no question of abrogation or change of its contract rights could arise. The amendment put no compulsion upon the counties. It left them free to sell or not to sell under it. Therefore it might contain any conditions or terms the Legislature desired qualifying an exercise of the privilege thus extended. The Legislature might make it a condition that the purchaser should receive only his expenditure, plus interest thereon at 1 per centum monthly. If the county seeks to sell and appellant to purchase through the authority of this amendment, each must accept the full terms thereof. Appellant must trace its entire title and rights through that amendment. It must therefore accept the certificates with such conditions or alterations, if any, as the amendment prescribes. Hence we conclude that no contract obligation can be invaded unlawfully by any condition the amendment may impose upon the exercise of this new privilege given the counties.

[3] The remaining question is: Was it one of these conditions that the purchaser should collect only his expenditure, plus interest at 1 per centum monthly, instead of the sums called for by the face of the certificate? The state Supreme Court in the above case has said that such a condition exists. That case has been carefully examined. Irrespective of the question as to whether we are bound by that decision, we approve the reasoning and conclusion thereof.

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The case is reversed, with directions to set aside the order sustaining the motion of appellee to dismiss the bill for want of jurisdiction, to deny such motion, and to dismiss the bill upon the merits, at the costs of appellant.

SMITH v. DOUGLAS COUNTY, NEB.*

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5132.

1. REMOVAL OF CAUSES ⟸4—CAUSES REMOVABLE—CONTEST INTER PARTES.
Under Rev. St. Neb. 1913, §§ 6632, 6634, 6635, and in view of sections 1205 and 1212, and Const. art. 6, §§ 1, 16, a proceeding by a Nebraska county to assess inheritance taxes against real and personal property as the property of a decedent which another claimed as surviving joint tenant, is, when it reaches the county court, a contest inter partes, and so is a suit, within the removal statutes.

2. TAXATION ⟸878(1)—INHERITANCE TAXES—CONSTRUCTION OF STATUTES.
The Nebraska inheritance tax statute imposes a tax covering only gifts in contemplation of death, legacies, and inheritances; this being particularly true, as Const. art. 3, § 11, confines the provisions of the act to the title, which is "An act to tax gifts, legacies, etc.," and does not include property passing to surviving joint tenant.

3. JOINT TENANCY ⟸3—CREATION—INHERITANCE TAXES.
A contract between two brothers, who had carried on their affairs jointly at first, without any partnership agreement, *held* to make them joint tenants of real and personal property, under Rev. St. Neb. 1913, §§ 8244, 8285, recognizing joint tenancy.

4. JOINT TENANCY ⟸6—HOLDER OF LEGAL TITLE.
Where owners of property, with no intention to abandon contracts creating a joint tenancy, permitted, for temporary reasons, for convenient handling, property to be taken and held by either of them or some agent, such property was in no wise removed from the control of the contract, and the holders were trustees for the owners as joint tenants, and upon the death of either of owners the complete equitable title and right to the entire legal title would vest in the survivor, and could be judicially enforced.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Proceedings by the County of Douglas in the State of Nebraska, under the Nebraska inheritance tax statute, against real and personal property claimed by the county to have been the property of Francis Smith, deceased, and claimed by George Warren Smith to belong to him as a surviving joint tenant, which were removed from the state to the federal court. There was a judgment for the County of Douglas, and George Warren Smith brings error. Reversed.

See, also, 242 Fed. 894, 155 C. C. A. 482.

Francis A. Brogan, of Omaha, Neb. (Anan Raymond and A. G. Ellick, both of Omaha, Neb., on the brief), for plaintiff in error.

George E. Bertrand and John H. Grossman, both of Omaha, Neb. (George A. Magney, of Omaha, Neb., on the brief), for defendant in error.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

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*Rehearing denied March 4, 1919.

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STONE, Circuit Judge. Writ of error from proceeding under the inheritance tax statute of Nebraska, assessing such a tax against real and personal property within that state claimed by the county of Douglas to have been the property of Francis Smith, deceased, and claimed by plaintiff in error to have been the property of him and Francis Smith as joint tenants. The case presents two propositions: The jurisdiction of the court, and the existence or nonexistence of the claimed joint tenancy.

[1] The county challenges the jurisdiction of the court, claiming that the tax proceeding was not removable from the county court to the United States District Court, because not a "suit," within the meaning of the removal statutes. If the tax proceeding, at the time the petition for removal was filed, was a contest inter partes over property or the payment of money, before a judicial or quasi judicial body empowered to hear and determine the rights of the contestants, it was then removable. Boom Company v. Patterson, 98 U. S. 403, 25 L. Ed. 206; Hess v. Reynolds, 113 U. S. 73, 80, 5 Sup. Ct. 377, 28 L. Ed. 927; Pacific Removal Cases, 115 U. S. 1, 18, 5 Sup. Ct. 1113, 29 L. Ed. 319; Searl v. School District No. 2, 124 U. S. 197, 199, 8 Sup. Ct. 460, 31 L. Ed. 415; Delaware County Commissioners v. Diebold Safe Co., 133 U. S. 473, 486, 10 Sup. Ct. 399, 33 L. Ed. 674; Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462. The tax involved the payment of money. The Constitution and statutes of Nebraska establish that this proceeding, when it reached the county court, became a contest inter partes, which that court, acting judicially, was empowered to hear and determine. The method prescribed of levying this tax is for a county judge to appoint an appraiser, who investigates values and reports to the judge. The judge then "forthwith" fixes the value of the property and the amount of the tax, after which he "immediately" gives notice thereof to all known interested parties. Any one dissatisfied with his finding may, within 60 days, appeal to the county court, upon filing bond covering costs and "all taxes that may be fixed by the court." R. S. Nebraska 1913, § 6632. Section 6634 provides that the county courts "shall have jurisdiction to hear and determine all questions in relation to all taxes arising under this article." Section 6635 provides a method by which the county court can take the initiative, if the tax remains unpaid after assessment. It is:

"If it shall appear to the county court that any tax accruing under this article has not been paid according to law, it shall issue a summons commanding the persons or corporation liable to pay such tax or interested in such property to appear before the court on a certain day, not more than three months after the date of such summons, to show cause why such tax should not be paid. The process, practice and pleadings, and the hearing and determination thereof, and the judgment in said court in such cases shall be the same as those now provided or those which may be hereafter provided in probate cases in the county courts of this state and the fees and costs in such cases shall be the same as in probate cases in the county courts of this state."

From the above sections, which are emphasized by other sections of the act, it is clear that the proceeding was ex parte until it reached

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the county court; that it became there a controversy inter partes; that the county court was given jurisdiction to hear and determine "all questions in relation" to such taxes, not being confined to the accuracy of the amount assessed; that such action by the court was not merely administrative, but judicial. It should also be noted that county courts in Nebraska are a part of the judicial power of the state (Constitution of 1875, art. 6, § 1), courts of record with certain constitutional original jurisdiction, and such other jurisdiction as given by statute (Constitution of 1875, art. 6, § 16), with a prescribed judicial procedure (R. S. 1913, §§ 1205, 1212).

The conclusion that jurisdiction was properly acquired by removal is not affected by the case of Upshur County v. Rich, 135 U. S. 467, 10 Sup. Ct. 651, 34 L. Ed. 196. Under the statutes and decisions of the state there involved, the county court was purely an administrative body, with no judicial powers, except probate. The court there held that an appeal from a tax assessment to such an administrative body upon the amount of a tax fixed by an assessor was not a "suit"; but Justice Bradley, after carefully saying that such a proceeding approached "very near to the line of demarcation," defined a distinction which here exists when he said:

"Even an appeal from an assessment, if referred to a court and jury, or merely to a court, to be proceeded on according to judicial methods, may become a suit within the act of Congress."

Also here the amount of the tax was admittedly just, but the legal right to levy any such tax on this property was contested—a controversy in its character suggesting the necessity of judicial settlement. Nor has the decision on the appeal to this court of a companion proceeding (242 Fed. 894, 155 C. C. A. 482) any bearing here. In that case Smith sought to enjoin the Douglas county officials from collecting this inheritance tax. That bill was dismissed for want of equity, because there was a remedy at law. The remedy there in mind was that given by section 10 of the act (Rev. St. Neb. 1913, § 6631), which gave a right to repayment of any such tax erroneously paid. It was not there decided that section 10 provided a remedy which was exclusive of other legal remedies or methods of challenging the validity of the tax.

[2, 3] The sole proposition going to the merits of the case is whether this property is within the purview of the Nebraska inheritance tax statute. This necessitates an examination of the scope of that enactment and of the legal manner in which this property came to plaintiff in error. The title of the statute is "An act to tax gifts, legacies and inheritances in certain cases and to provide for the collection of the same." Section 1 (R. S. Neb. 1913, § 6622) defines the property subject to the tax as follows:

"All property, real, personal and mixed which shall pass by will or by the intestate laws of this state from any person who may die seised or possessed of the same while a resident of this state, or, if decedent was not a resident of this state at the time of his death, which property or any part thereof shall be within this state, or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift made in contemplation of the death of the grantor, or bargainer or intended to take

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effect, in possession or enjoyment after such death, to any person or persons or to any body politic or corporate in trust or otherwise, or by reason thereof any person or body corporate shall become beneficially entitled in possession or expectation to any property or income thereof, shall be and is subject to a tax, at the rate hereinafter specified, to be paid to the treasurer of the proper county for the use of the state, and all heirs, legatees and devisees, administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed."

Section 2 (R. S. Neb. 1913, § 6623) outlines the method of assessment and payment when the bequeathed or devised estate involves a life estate. From the above it is clear that the Legislature intended to enact a tax, as its title sets forth, covering only gifts (in contemplation of death), legacies, and inheritances. Besides the scope of the title to an act in Nebraska confines the provisions of the act. Const. of 1875, art. 3, § 11; State v. B. & M. R. R. Co., 60 Neb. 741, 84 N. W. 254; State ex rel. Adair v. Drexel, 74 Neb. 776, 105 N. W. 174.

Did the property here involved pass by such gift, legacy, or inheritance? Smith claims that it came to him in the nature of a joint tenant survivorship, springing from certain contracts between him and the deceased, his brother. The essential facts are fixed. The legal meaning and results of the facts make up the controversy. The outstanding facts necessary to a decision are as hereafter set forth. In 1845, the two brothers, then 19 and 21 years old, started out to make their fortunes together. This united effort accumulated more than $1,000,000 by 1880. During this time there was no formal partnership or agreement, though they worked together under the business style of F. & G. W. Smith, took investments and loans, and kept their bank account in that name. At that time deceased was about 56 years old and married, with no children, while plaintiff in error had remained unmarried. They then became concerned, especially the deceased, with the disposition of this large fortune after death. Fearing that the collateral heirs might be spendthrifts and dissipate the money, and preferring it should go to charities, if such tendencies of these heirs seemed to develop, they decided to arrange matters so that the survivor of the two would take all of the property and assume the burden of its ultimate disposition after his death. To carry out this plan they executed mutual wills covering the property, excepting certain annuities to be paid the wife of the deceased. This arrangement continued until 1902. At that time they were advised by counsel that this plan was cumbersome and would necessitate the estate going through probate. To avoid this, and, as they thought, better carry out their plan, they executed the paper following:

"New York, March 3, 1902.

"The following agreement exists and has existed for more than twenty years between Francis Smith and George Warren Smith for the purpose of making investments for the mutual benefit of us both as joint tenants and not as tenants in common, and have used the style name of F. & G. W. Smith. And in the event of the death of either of us we agree that the survivor may use the name of F. & G. W. Smith and continue to buy and sell securities of all kinds, real and personal, in all manner of ways as has been done heretofore, and do every and all acts whatsoever as fully as when we were both alive. We hold and own all the property which we now possess, both real and personal as joint tenants and not tenants as common with

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right of survivorship, and all the property of all kinds whatsoever which we may hereafter acquire is to be held and owned in like manner. And to all whom it may concern we state the foregoing agreement and statements continue in full force and hereby ratify and confirm the same in every particular.

"[Signed] Francis Smith.
"George Warren Smith."

The wills were then destroyed. A year later they executed another instrument as follows:

"Warrenton, Rockport, Maine, May 16, 1903.

"We, the undersigned, Francis Smith and George Warren Smith, do state and affirm hereby that the agreement now existing between us whereby we hold all our property as joint tenants with right of survivorship and not as tenants in common that it is intended to include all real estate of every kind and nature. All personal property, stocks and bonds, and in fact all real estate and personal property of all kind or kinds whatsoever, which we or either of us now hold, own or possess or may hereafter acquire. The object of the foregoing is to state more implicitly if need be the agreement between us as to the property which we hold or own as joint tenants with right of survivorship and not as tenants in common or that we may hereafter own or acquire. [Signed] Francis Smith.
"George Warren Smith."

Under this new plan their stocks, bonds, accounts, and bank account, for the most part, stood in the name of "Francis Smith & George Warren Smith as joint tenants with right of survivorship, and not as tenants in common." In some instances, including the Nebraska property, for reasons of convenience affecting conveyancing or the like, the title was held in the name of one or the other, or of an agent. For a while a third brother had been in business with them, but this connection had terminated prior to 1902; also the wife of deceased had died some time prior to his death, at which time he was a widower, with no direct descendants.

There is no ground for any claim that the arrangement between the brothers concerning their business and property was fraudulent, with the object of escaping the payment of inheritance taxes. The good faith of their actions is not attacked. The controversy is over the legal status established by those acts. The county contends that this status was a partnership; the plaintiff in error asserts it was a joint tenancy. If the former, there is no question but that one-half of the partnership property (after payment of debts) would be the property of the estate of the deceased, and as such be liable to this inheritance tax. If a joint tenancy, while the property would pass to the survivor upon the death of the other, it would not so pass because of death, but because of the contract for joint tenancy or because of the actual joint tenancy title. It is clear from the testimony that from 1845 the efforts of the brothers were united, and that they earned and held their property together. Whether during that period they contemplated that the survivor should have all of the property is not entirely clear. The circumstances connected with making the wills in 1880 would argue against such a conclusion. However the statement in the testimony of plaintiff in error that the 1902 and 1903 contracts were in line with their original plans, and that those plans never changed, would seem to the contrary. The county accentuates these statements as

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meaning that they had no intention of changing from the first relation, which it says was a partnership. This view of that evidence is not accepted. Whatever the brothers may have had in mind, if anything, before 1880 as to a survivorship, it is certain that at that time they determined upon such, and that such determination was never departed from thereafter, although the method of accomplishing that result was changed. The first method used was mutual wills; the last was the contracts of 1902 and 1903.

It is significant that the sole object of those contracts was to change the method of reaching the same result they had intended from 1880, at least. Not only is this intention to change the method crystal clear, but the new method is defined with care, clearness, and accuracy. The contracts contemplated that the entire property should be held in joint tenancy, with its incident right of survivorship. In fact, that incident was the sole motive of the two contracts. From the date of those contracts, if not before, either brother had the right to have every piece of property placed under that character of title if the laws of the state to which any such property was subject permitted such. The state of Nebraska recognizes joint tenancy. R. S. Neb. 1913, §§ 8244, 8285. The rights of the parties under such a contract would have been and are there enforceable.

[4] When, with no intention to abandon the contracts, they permitted, for temporary reasons of convenient handling, property subject to the laws of Nebraska to be taken and held by either of them, or by some agent, that property was in no wise removed from the control of the contracts. Such holders were trustees for the brothers as joint tenants. Upon the death of either brother the complete equitable title and a right to the entire legal title would vest in the survivor, and could be judicially enforced. The rights and title of plaintiff in error rest upon the solid basis of the contracts. Plaintiff in error secured nothing by gift, legacy, or inheritance. The property did not come within the terms of the Nebraska inheritance tax statute.

The judgment is reversed.

AMERICAN NAT. BANK OF MACON v. COMMERCIAL NAT. BANK OF MACON et al.

(Circuit Court of Appeals, Fifth Circuit. November 15, 1918.)

No. 3240.

BANKS AND BANKING ⟸283—LIQUIDATION OF NATIONAL BANK—SUIT AGAINST STOCKHOLDERS.

Contract for consolidation between two national banks, by which one agreed to voluntarily liquidate and transfer all its assets to the other, which agreed to act as its liquidating agent and to pay all claims against it, construed, and, as acted upon by the parties, *held* to create the relation of debtor and creditor between them, which would support a suit against the stockholders of the liquidating bank on the insufficiency of its assets to pay its debts.

Appeal from the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

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Suit in equity by the American National Bank of Macon against the Commercial National Bank of Macon and others. Decree for defendants, and complainant appeals. Reversed.

For opinion below, see 248 Fed. 187.

This is an appeal from a decree sustaining motions to dismiss an amended bill in equity filed in the District Court by the appellant, the American National Bank of Macon, against the Commercial National Bank of Macon and its shareholders. The bill as amended showed that it was filed by the plaintiff as a bill in the nature of a creditors' bill on behalf of the plaintiff and all other creditors of the defendant bank against the latter and its shareholders for the purpose of enforcing the statutory liability of said shareholders for the payment of the indebtedness of the defendant bank. The averments of the bill as amended disclosed the following facts (the plaintiff and the defendant banks, each of which was located in the city of Macon, Ga., being hereinafter referred to as the American Bank and the Commercial Bank, respectively):

On the 31st day of July, 1914, the Commercial Bank applied to the American Bank for a loan of money to enable it to meet its obligations and to pay and satisfy its depositors. After some negotiations between the two banks, they, on August 3, 1914, entered into a written contract, of which the following is a copy:

"Georgia, Bibb County.

"Articles of agreement for the liquidation of the Commercial National Bank of Macon, Georgia, by the American National Bank of Macon, Georgia, both being national banking associations, made and entered into between said banks as the contracting parties.

"Whereas, on the 1st day of August, 1914, the board of directors of the Commercial National Bank, at a meeting of said board duly and regularly called, adopted a resolution which authorized the officers of said association to commence proceedings for the liquidation of said association under sections 5220 and 5223 of the U. S. Revised Statutes, for consolidation with said American National Bank, and to transfer to said American National Bank all the assets of said Commercial National Bank, which assets were by said resolution so transferred and assigned, in order to fully protect and secure said American National Bank for all moneys advanced or to be advanced by said association in the assumption and payment of the liabilities of said Commercial National Bank shown by a list of said liabilities hereto attached and identified as Exhibit A, and by the signature of the parties hereto, and which said resolution further provided that said American National Bank should take over the business of said Commercial National Bank, liquidate said assets, and account to the shareholders of said Commercial National Bank for any overplus which might remain after paying the depositors and other indebtedness of said Commercial National Bank in full, and the expense of realizing on the assets so transferred, the said American National Bank to charge nothing for its services in so doing, and which resolution further authorized and directed the officers of said Commercial National Bank to make such contract with the American National Bank as might be necessary or appropriate in order to carry out the general purposes of said resolution, the details of said contract to be left to the discretion of said officers; and

"Whereas, on the same date, the board of directors of the American National Bank, at a meeting of said board duly and regularly called, adopted a resolution whereby said American National Bank assumed the payment of said depositors and other liabilities of said Commercial National Bank, shown by the list of liabilities set out in Exhibit A hereto attached and hereinbefore referred to, upon condition that the assets of said Commercial National Bank should be transferred to said American National Bank sufficient in amount and in value in the estimation of the officers of the American National Bank to fully protect and secure said association for any and all amounts payment of which was assumed under said resolution, and which resolution authorized the officers of said association to make such contract as might be

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necessary to carry out the purposes of said resolution, the details to be left to the discretion of said officers; and

"Whereas, the preliminaries and conditions in said resolution mentioned have been complied with, and the assets of the Commercial National Bank have been delivered to said the American National Bank;

"Now, therefore, these articles of agreement witness:

"I. That said Commercial National Bank has transferred, assigned, conveyed, and confirmed, and does by these presents transfer, assign, convey, and confirm, unto the American National Bank of Macon, Georgia, its successors and assigns all of the assets of every kind and description, including cash and cash items on hand at the close of business on August 1, 1914, bills receivable, bonds, real estate, and personal property and interests therein, and choses in action of all kinds, including all of the United States bonds now on deposit with the treasurer of the United States as security for the circulation of the Commercial National Bank of Macon and for deposits of United States deposits, to have and to hold the same unto it, said the American National Bank of Macon, its successors and assigns, in fee simple forever; and the title to said assets and each and all thereof said the Commercial National Bank of Macon, for itself and its successors, hereby warrants unto said the American National Bank, its successors and assigns, against the claims of all persons whatsoever.

"II. That in contemplation of the liquidation of said Commercial National Bank under sections 5220, 5221, and 5223, U. S. Revised Statutes, said Commercial National Bank, by its officers and directors, will call a meeting of the shareholders of said association to be held at Macon, Georgia, on August 12, 1914, and on the date or dates to which said meeting may be from time to time adjourned, and will procure proper resolutions by said shareholders and a sufficient majority thereof to comply with the law in such cases made and provided, liquidating said association and consolidating same with the American National Bank of Macon by the purchase of the assets of said Commercial National Bank by the American National Bank, but without providing for stock in the American National Bank to be issued to the shareholders of the Commercial National Bank, and ratifying and confirming the action of the board of directors of said Commercial National Bank as herein recited, and ratifying and confirming this contract.

"III. That said Commercial National Bank will also procure proper resolutions to be passed by said shareholders, appointing said American National Bank as liquidating agent for said Commercial National Bank in said liquidation for consolidation as aforesaid, said liquidation to be conducted in accordance with law and under the supervision of the board of directors of said Commercial National Bank.

"IV. That said Commercial National Bank, until the final liquidation of its affairs and final settlement with its shareholders, agrees to maintain its corporate existence, and that its directors and officers will at all times when called upon so to do by said American National Bank execute and deliver in the name of said association all other and further writings of all kinds which may be necessary to fully effectuate the transfer of said assets, the liquidation of said association, and this contract.

"V. That in consideration of the foregoing acts and agreements by the Commercial National Bank, said American National Bank hereby agrees that it will, and it does hereby, assume and promises to pay the same when and as the same are presented for payment, the depositors and other liabilities of said Commercial National Bank of Macon shown in Exhibit A hereto attached, and that in addition thereto it will and does hereby assume the redemption of the circulating notes of said Commercial National Bank, and that it will procure such resolution to be passed by its board of directors as may be neccessary for it to assume the redemption of said circulating notes.

"VI. That said American National Bank will accept the appointment as liquidating agent of said Commercial National Bank, and will proceed with all due and reasonable diligence to liquidate said association and to collect and reduce to cash all the assets of said association, all of said assets to be held as security by said American National Bank for all advances made by it in paying the depositors and other liabilities of said Commercial National

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Bank and the actual expenses incurred by said American National Bank in realizing on said assets, and that after deducting from the proceeds of said assets the actual expenses incurred by said American National Bank in liquidating said association and acting as liquidating agent and in collecting said assets and realizing upon the same, it will apply said proceeds, first, in repaying to itself all amounts advanced by it hereunder, with interest thereon at the rate of seven (7%) per cent. per annum; next, in discharging the liabilities of said Commercial National Bank which shall not have been paid by advances made by said American National Bank, and that when all of said liabilities have been fully discharged it will account to the shareholders of said Commercial National Bank and from time to time pay over to said shareholders pro rata the surplus remaining in its hands from the proceeds of said assets, said American National Bank to act as such liquidating agent without compensation for its own services.

"It being distinctly agreed and understood that, in the event the said liquidation should be interrupted or discontinued for any reason beyond the control of said American National Bank, then and in that event said American National Bank shall and does hold all of the assets of said Commercial National Bank as security for the advances which may have been made by it, up to the time such liquidation may be so discontinued.

"And it being further distinctly agreed and understood that neither the resolutions of said boards of directors of said associations nor this contract shall relieve the shareholders of the Commercial National Bank from their legal liability as shareholders to respond, in the event it may be necessary to have recourse upon such shareholders' liability, for any deficit which may remain after exhausting the other assets of said association in the payment of its liabilities.

"In witness whereof, the parties hereto have caused these presents to be signed and delivered in duplicate by their proper corporate officers, and their corporate seals to be hereto affixed, this 11th day of August, 1914. Commercial National Bank of Macon, Georgia, by E. Y. Mallary, President. [Seal of Bank.] Attest: E. N. Lewis, Cashier. American National Bank of Macon, Georgia, by R. J. Taylor, President. [Seal of Bank.] Attest: E. C. Scott, Cashier."

The following is a copy of the resolution of the board of directors of the Commercial Bank adopted on August 1, 1914, and referred to in the contract above set out:

"Resolved, that in the opinion of the board of directors of this association it is expedient for this association to go into voluntary liquidation under sections 5220 and 5223 of the United States Revised Statutes, and that the officers of this association be and they are hereby directed to proceed under the by-laws to call a meeting of its stockholders to consider this question and the consolidation of this association with the American National Bank of Macon, Georgia, by the sale of its assets to the said bank.

"Resolved, further, that the exigencies of the situation are such that in contemplation of the liquidation of this association as aforesaid, the board of directors of this association hereby authorize the officers of this association to transfer to the American National Bank of Macon, Georgia, as cash, or as collateral for the notes of this association, all of the assets of this association, including cash, cash items, bills receivable, bonds, real estate, and personal property and choses in action, of all kinds, which said assets are hereby transferred, assigned and delivered to the American National Bank of Macon, Georgia, in order to fully protect and secure said bank for all moneys advanced or to be advanced by that bank under the assumption and payment of its deposits, bills payable, and other liabilities of this association shown by the list of liabilities this day furnished by this association to said bank—said American National Bank of Macon, Georgia, to take over the business of this association and to account to the shareholders of this association for any overplus which may remain after paying the indebtedness of this association in full and the expense of realizing on the assets so transferred, said bank to charge nothing for its services in so doing.

"The officers and finance committee are hereby given full power and authority to carry out the general purpose of this resolution, and the details to be

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left to the discretion of said officers and committee, and the said officers and committee are further authorized to make such contracts with said bank as may be necessary or appropriate hereunder."

The following is a copy of the resolution of the directors of the American Bank adopted on August 1, 1914, and referred to in the above copied contract:

"Resolved, that this association assume the payment of the deposits, bills payable, and other liabilities of The Commercial National Bank of Macon, shown by the list of liabilities furnished by said bank to this bank, and agree to pay the same when and as the same are presented for payment, upon condition that said association transfer to this association as cash or collateral for its notes, cash, cash items, bills receivable, bonds, real estate, and other assets, sufficient in amount and in value in the estimation of the officers of this association to fully protect and secure this association for any and all amounts so assumed, or shall otherwise satisfactorily secure this association for all amounts paid or assumed; this association to take over the business of said association in the manner aforesaid, accounting to the shareholders of said association for any overplus which may remain after paying the indebtedness of said association in full, and the expenses of realizing on the assets transferred to this association as aforesaid; this association to charge nothing for its services in so doing. The officers of this association are hereby given full power and authority to carry out the general purpose of this resolution, the details to be left to the discretion of said officers, and said officers are further authorized to make such contract with the directors of said association or with such liquidating agent as may be appointed for said association: Provided, however, that this resolution shall not become effective until the other banks of the Macon Clearing House Association shall, by proper resolutions, agree to supply, in proportion to their respective capital and surplus, their proportionate share of cash and exchange that may be necessary to meet withdrawals by depositors not immediately redeposited in this association, and other cash demands to which this association may be required to respond: Provided, further, that in the event the officers of this association shall, upon a further investigation of the affairs of The Commercial National Bank, deem it unsafe to proceed under this resolution, they shall not do so."

Pursuant to the agreement and resolutions above set out, the American Bank, on August 3, 1914, took charge of all assets of the Commercial Bank so transferred to the former, and from and after that date paid in due course and as called upon all of the depositors of the Commercial Bank, its bills payable, and other liabilities, and proceeded to reduce the transferred assets to cash and to apply the amounts received to reimburse itself for the amounts it had disbursed in the payment of the liabilities of the Commercial Bank pursuant to said agreement. For some two weeks after the above copied agreement between the two banks was entered into, the Commercial Bank continued in active operation, paying off its depositors, cashing checks drawn on it, receiving deposits from its customers, clearing checks on the other Macon banks through the Macon Clearing House, checking on its deposits with other banks, and transacting other business as an active banking institution, its business being handled through its own officers and clerks. Funds to enable it to pay its depositors and meet its other obligations were obtained by it on checks drawn by its proper officers on the American Bank, which checks were cashed by the latter and charged to the account of the Commercial Bank as overdrafts. The amount claimed by the American Bank to be due to it was largely incurred during the period just mentioned.

After the depositors of the Commercial Bank were in large part paid, it continued to draw checks on the American Bank, and these checks were cashed by the latter and charged to the account of the former as above stated. It was found to be impracticable to take notes, as the above-copied resolutions showed had been contemplated, for the amounts disbursed by the one bank in the payment of the liabilities of the other one, and it was agreed by the officers and finance committee of the Commercial Bank with the officers of the American Bank that the amounts so advanced by the latter should be carried by it as an overdraft, and that the overdraft should be secured by the

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assets transferred; and this was accordingly done. As collections were made on the notes and other receivables transferred to the American Bank, the amounts so collected were deposited in the American Bank and by it applied to the reduction of the overdraft of the Commercial Bank. In reports made by the Commercial Bank to the Comptroller of the Currency the amount of its overdraft on the American Bank was listed as a liability under the head "Due American National Bank."

While the Commercial Bank was in process of liquidation pursuant to the resolution of its shareholders, by agreement with the liquidating committee appointed by its shareholders the American Bank as liquidating agent offered the Commercial Bank's banking house, with the furniture and fixtures therein, for sale at public outcry after proper advertisement, but, a fair price not being realized at said sale, the American Bank offered to purchase said building at $40,000, said sum to be applied to reducing the indebtedness of the Commercial Bank to it, and this proposition was accepted, and said property was conveyed to the American Bank by the officers of the Commercial Bank pursuant to a resolution adopted by the latter's directors on July 1, 1916, of which the following is a copy:

"Resolved, that the offer of the American National Bank of Macon, as contained in the letter from R. J. Taylor, president, to E. Y. Mallary, president Commercial National Bank, dated July 1, 1916, which said letter has been submitted and read at this meeting, to purchase the Commercial Bank Building, including the vault, safety deposit boxes, bank and other fixtures, and furniture, at and for the sum of forty thousand dollars ($40,000.00), to be credited on the indebtedness of the Commercial National Bank to the American National Bank, be and the same is hereby accepted, and the president or vice president and cashier of this bank are hereby authorized and directed to execute on behalf of this bank and under its seal good and sufficient conveyance of the property to the said American National Bank."

On September 30, 1914, the following resolutions were adopted by votes of more than two-thirds of the shareholders of the Commercial Bank:

"Resolved, that the Commercial National Bank be placed in voluntary liquidation under the provisions of sections 5220 and 5221 of the United States Revised Statutes, to take effect upon this date, and that the American National Bank of Macon, Georgia, be appointed liquidating agent of said bank; that liquidation shall be conducted in accordance with law and under the supervision of the board of directors, who shall require a suitable bond to be given by the said agent in an amount to be fixed by the board of directors; that the said liquidating agent shall render quarterly reports to the Comptroller of the Currency on the 1st of January, April, July, and October of each year showing the progress of said liquidation until said liquidation is completed; that said liquidating agent or committee shall render an annual report to the shareholders on the date fixed in the articles of association for said annual meeting, at which meeting the shareholders may, if they see fit, by a vote representing a majority of the entire stock of the bank, remove the liquidating agent and appoint another in place thereof; that a special meeting of the shareholders may be called at any time in the same manner as if the bank continued an active bank, and at said meeting the shareholders may, by a vote of the majority of the stock, remove the liquidating agent; that the Comptroller of the Currency is authorized to have an examination made at any time into the affairs of the liquidating bank until the claims of all creditors have been satisfied and that the National Bank Examiner will be compensated for his time and expense in making the examination in question."

"Whereas, the board of directors of this association by resolution adopted on August 1, 1914, transferred and assigned to the American National Bank of Macon all of the assets of this association as security for the liabilities of this association which were assumed by the said American National Bank, said resolution being passed in contemplation of the voluntary liquidation of this association under the provisions of sections 5220 and 5221 of United States Revised Statutes; and

"Whereas, on August 11, 1914, a contract between this association and the said American National Bank, signed by the respective officers of said

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association, was duly entered into, said contract being made pursuant to the resolution of the board of directors aforesaid; and

"Whereas, on August 12, 1914, a special meeting of the shareholders of this association was held at the banking house of the association in the city of Macon, at which meeting stockholders representing 2616 shares were present in person and by proxy, at which said meeting a resolution was unanimously passed, ratifying and approving the action of the board of directors in transferring the assets of this association to the American National Bank as aforesaid, and ratifying and approving the contract between the two associations dated August 11, 1914; and

"Whereas, said meeting of stockholders was not called and held in accordance with the articles of association, in that only ten days' notice of said meeting was given instead of thirty days, as required by said articles of association; and

"Whereas, this meeting of stockholders has been called in accordance with the articles of association and after thirty days' notice as provided in said articles of association, for the purpose of ratifying the action of the previous meeting and of taking appropriate action looking to the voluntary liquidation of this association:

"Therefore, resolved, that the action of the board of directors of this association as contained and set forth in the resolution adopted by said board on August 1, 1914, transferring and assigning the assets of this association to the American National Bank of Macon, said resolution appearing on the minutes of said board of directors on August 1, 1914, be and the same is hereby in all respects ratified and approved by the shareholders of this association.

"Resolved, further, that the contract between this association and the American National Bank of Macon, signed by their respective officers and dated August 11, 1914, said contract having been made pursuant to the resolution of the board of directors aforesaid, be and the same is hereby in all respects ratified and approved.

"Resolved, further, that the action of the special meeting of stockholders, approving said resolution of the board of directors and the contract aforesaid and providing for the voluntary liquidation of this association, under sections 5220 and 5221 of the United States Statutes, be and the same is hereby in all respects ratified and approved."

Pursuant to those resolutions the Commercial Bank was placed in voluntary liquidation, the liquidation being practically completed at the time the suit was brought. In satisfying the liabilities of the Commercal Bank the American Bank has paid out more than $320,000 in excess of the amounts realized from the transferred assets. The assets of the Commercial Bank still remaining uncollected and undisposed of are of little value, and there will not be realized from them an amount sufficient to reduce below $300,000 the excess of the American Bank's said payments over the amounts realized from the transferred assets.

Geo. S. Jones and Orville A. Park, both of Macon, Ga., and Alex C. King, of Atlanta, Ga. (King & Spaulding, of Atlanta, Ga., and Hardeman, Jones, Park & Johnston, of Macon, Ga., on the brief), for appellant.

Robert L. Berner, Robert L. Anderson, T. E. Ryals, R. C. Jordan, R. Douglas Feagin, Oliver C. Hancock, W. D. McNeil, J. E. Hall, Warren Grice, and C. L. Bartlett, all of Macon, Ga., and W. A. Dodson, of Americus, Ga. (Minter Wimberly, Jesse Harris, and E. P. Mallary, all of Macon, Ga., and Greene F. Johnson, of Monticello, Ga., on the brief), for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge (after stating the facts as above). The dismissal of the amended bill is sought to be sustained on the ground

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that its averments do not show that the plaintiff bank has a claim or demand against the defendant bank for which the statute (Act Dec. 23, 1913, c. 6, § 23, 38 Stat. 273 [Comp. St. 1916, § 9689]) makes the latter's shareholders individually responsible. In behalf of the appellees it is contended that the alleged transaction between the two banks was a sale of assets by one of them to the other, or a consolidation of the two, and that the contract entered into and performance under it did not result in the creation of the relation of creditor and debtor between them. Provisions contained in the contract give some color to this contention if they are considered by themselves without due regard to the remainder of the contract, the situation with which it dealt, and the conduct of the parties to the contract while performance under it was in progress evidencing what each of them understood was the effect of a compliance by the American Bank with the obligations imposed upon it by the contract. The provisions referred to—namely, the one as to the transfer of the assets, the one in regard to liquidating the Commercial Bank and consolidating it with the American Bank by the purchase by the latter of the assets of the former, and the one in regard to making one of the banks liquidating agent for the other—lose the significance sought to be attributed to them when they are considered in connection with other provisions contained in the contract and in the light of the situation existing when the contract was made and for some time afterwards, and of the construction of the contract by both parties to it as disclosed by what was done under it.

The averments of the bill show that at the time the contract was entered into, and for some time thereafter, the Commercial Bank continued in active operation, performing all the ordinary functions of a bank through its own officers and clerks. Its status then was not that of a liquidating bank. While its board of directors contemplated and made provision for its future liquidation, if and when duly authorized by the required vote of its shareholders, the process of liquidation provided for by the statute (Rev. St. § 5220 [Comp. St. 1916, § 9806]) had not begun, and could not have begun prior to its going into liquidation and being closed by the required vote of its shareholders owning two-thirds of its stock. While the bank was in active operation, its liquidation not having been determined upon by its shareholders, it was capable of incurring obligations for which its shareholders would be responsible under the statute. Schrader v. Manufacturers' National Bank of Chicago, 133 U. S. 67, 10 Sup. Ct. 238, 33 L. Ed. 564; Wyman v. Wallace, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738. The American Bank's obligation to pay the Commercial Bank's depositors and other liabilities when and as the same were presented for payment was effective from the time the contract was made, not being dependent or contingent upon the contemplated closing and liquidation of the Commercial Bank being determined upon by the required two-thirds vote of its shareholders.

Performance was begun by the American Bank while the Commercial Bank remained open, continuing to carry on in the customary way the banking business in which it was engaged. By the terms of the contract the American Bank also obligated itself to continue

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to pay the Commercial Bank's depositors and other liabilities when and as the same were presented after the latter went into liquidation and was closed, in the event that happened, the American Bank agreeing to accept the appointment as liquidating agent of the Commercial Bank. In so far as the contract obligated the American Bank to take care of the liabilities of the Commercial Bank prior to the latter being duly closed and put into liquidation, it was one capable of being made by the two banks, acting through their respective boards of directors and managing officers, without being authorized or ratified by a vote of the shareholders of either. Making arrangements for funds needed to meet its liabilities as they accrue is not out of the ordinary course of a banking business. While the Commercial Bank was open, receiving deposits and otherwise continuing the business in which it had been engaged, its directors and managing officers were empowered to incur debts in its behalf to secure funds required to enable it to meet its obligations as they accrued. The creation of debts under such circumstances and for such a purpose is not more out of the ordinary course of a banking business than the incurring of liabilities by the acceptance of deposits.

In determining the meaning and effect of that part of the contract which obligated the American Bank to supply the funds required to take care of the liabilities of the Commercial Bank as they accrued before the question of its closing and going into liquidation should be determined by its shareholders, our consideration is not confined to the language used in the written instrument evidencing the agreement of the parties, but where the terms employed are in any respect equivocal or of doubtful meaning, the construction given to the contract by both parties to it, evidenced by their dealings with each other in the course of carrying out the contract, may be looked to.

The contract contains expressions and provisions which do not seem to us to be reconcilable with the existence of an intention other than that the making by the American Bank of the agreed disbursements in taking care of the liabilities of the Commercial Bank was to have the effect of creating a debt or debts owing by the latter to the former. Those disbursements were called "advances," and it was provided that the amounts realized by the American Bank from the assigned assets was to be applied by it—

"first, in repaying to itself all amounts advanced by it hereunder, with interest thereon at the rate of seven (7%) per cent. per annum; next, in discharging the liabilities of the Commercial National Bank which shall not have been paid by advances made by the American National Bank; and that when all of said liabilities have been fully discharged, it will account to the shareholders of said Commercial Bank and from time to time pay over to said shareholders pro rata the surplus remaining in its hands from the proceeds of said assets."

This plainly indicates that the parties intended that performance by the American Bank of the obligations it incurred was to have the effect of creating an interest-bearing debt owing to it, and that the transferred assets were received and held by it, not as property bought by it, but as a pledge or security for the payment of that debt. If

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the stipulated outlays by the American Bank had been understood to be payments on the price of the assets transferred, it is not to be supposed that they would have been called "advances," or that interest on them would have been provided for. Laflin & Rand Powder Co. v. Burkhardt, 97 U. S. 110, 24 L. Ed. 973. The concluding provision of the contract was to the effect that neither the contract nor the resolutions authorizing it—

"shall relieve the shareholders of the Commercial National Bank from their legal liability as shareholders to respond, in the event it may be necessary to have recourse upon such shareholders' liability, for any deficit which may remain after exhausting the other assets of said association in the payment of its liabilities."

It hardly is conceivable that this provision would have been inserted in the absence of an intention that the making by the American Bank of the disbursements it obligated itself to make would result in creating a liability of the Commercial Bank for which the latter's shareholders would be individually responsible.

But it may be assumed or conceded that the language of the contract fails to show unambiguously that performance by the American Bank of the obligations it incurred was to have the effect of making it a creditor of the Commercial Bank. The averments of the bill show that both parties to the contract, from the commencement of performance under it, treated the payments made by the American Bank as having the effect of making it a creditor of the Commercial Bank. The American Bank entered the payments on its books as overdrafts. This was in pursuance of an agreement to which the officers and the finance committee of the Commercial Bank were parties. On the books of the latter these transactions were entered under the head "Due American National Bank." Each of the entries indicated the existence of the relation of creditor and debtor, not that of purchaser and seller. The agreement between the two banks in pursuance of which the disbursements made by the one to discharge the liabilities of the other were entered as overdrafts of the one on the other was as clear a recognition that debts were thereby created as if the one bank had given its notes to the other for the amounts of such disbursements. The incidents mentioned, as well as others disclosed, show that those in charge of the business of each of the banks understood that what was done under the contract had the effect of creating a debt owing by the Commercial Bank to the American Bank. It fairly appears from the averments of the bill as amended that neither party to the contract during the period of performance understood that it had the meaning now attributed to it in behalf of the appellees, and that the conduct of each of them from the time performance under the contract commenced was inconsistent with the contract having that meaning or effect.

We think the averments of the bill as amended show that the American Bank, while the Commercial Bank in the customary way was transacting business as an active banking institution, so made payments for it and at its instance or request that a claim or demand was created against the last-named bank for which its shareholders

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are by the statute made individually responsible to the extent of the amount of their stock. It follows that the dismissal of the bill as amended was erroneous.

The decree to that effect is reversed.

DEASON v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 15, 1918.)

No. 3246.

1. CRIMINAL LAW ⟸371(1)—OBSTRUCTING ENLISTMENT—EVIDENCE—OTHER OFFENSES.

On trial of a defendant, under Espionage Act June 15, 1917, for willfully obstructing the recruiting or enlistment service, statements made by him before the passage of the act may be admissible, as tending to show the intent and purpose of statements subsequently made, on which the charge is based.

2. ARMY AND NAVY ⟸40—ESPIONAGE ACT—CONSTRUCTION—"OBSTRUCT" ENLISTMENTS.

In Espionage Act June 15, 1917, § 3, making it an offense to "willfully obstruct the recruiting or enlistment service," the word "obstruct" is not used as the equivalent of "prevent," but rather of "to make difficult," and, to warrant conviction for its violation, it need not be shown that defendant's words or acts actually prevented recruiting or enlistment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Obstruct.]

In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge.

Criminal prosecution by the United States against Troy Deason. Judgment of conviction, and defendant brings error. Affirmed.

Levi Herring, of Glen Rose, Tex., for plaintiff in error.

Hugh R. Robertson, U. S. Atty., of San Antonio, Tex.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. The plaintiff in error was convicted of a violation of section 3, title 1, chapter 30, of the Act of June 15, 1917 (40 Stat. 219), commonly called the Espionage Act. The germane part of that section is as follows:

"Whoever, when the United States is at war, shall willfully * * * obstruct the recruiting or enlistment service of the United States to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

The evidence showed, sufficiently to justify the jury's verdict, that the defendant had made threats against, and in the presence of, a member or members of his local exemption board, because of his not receiving a different classification, and for the purpose of bringing about a change in his classification. Certain technical errors are relied upon for reversal, based upon the admission of alleged incompetent evi-

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dence, and certain exceptions to the general charge of the court, involving, among other things, the proper construction of the part of the section of the Espionage Act under which the conviction was obtained.

The first error assigned is based upon the action of the court below in permitting the government's witness, Hubert Thomas, to testify that he was warned by parties to keep a watch out for defendant. The only ground of objection interposed by the defendant was that—

"Said statements, if any, were made to said witness after the defendant was arrested upon the charges complained of in the bill of indictment against the defendant."

The bill of exceptions contains this statement of the evidence excepted to, viz.:

"Witness testified further that some parties, whom he could not now recall, came to me and told me that I had better watch the defendant. I do not recall that they detailed any statements that defendant had made, but warned me to be on my guard."

The record fails to show that the warning was given after the arrest of the defendant, and, as the objection is based solely on that ground, it is unnecessary for us to consider whether it was otherwise admissible.

[1] The second error relied upon is based upon the action of the court below in permitting the government's witness, J. B. Fox, to testify that in April, 1917, before the Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 76) was approved, he heard the defendant say:

"If Congress passes the draft act, we will have no more liberties in this country, and I think I will go to Mexico. They have a better form of government over there, anyway, than we have here."

The objection was placed upon the sole ground that—

"It was a statement made by the defendant prior to the enactment of the law which he is charged with violating."

If the government had relied upon the statement as a ground of conviction, the objection might have been tenable. It constituted, however, no part of the charge upon which he was indicted and tried. It was offered only to illustrate the intent and purpose with which he made the threats charged in the indictment. The statute punishes only a willful obstruction of recruiting or enlistment. The intent or purpose with which the threats were made was therefore an issue in the case. Unless the purpose to obstruct was deduced from the evidence by the jury, the defendant could not have been convicted. Statements made by the defendant, indicating his hostility to the draft, whether made before or after they became punishable by the Espionage Act, or before or after the draft was made an accomplished fact by legislation, might serve to illustrate to the jury the purpose with which he made the threats alleged to have been made after the approval of the Espionage Act, and which were alone relied upon as a ground for conviction.

[2] The third assignment of error is based on the defendant's exception to the court's general charge. The exception is based on three

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grounds: (a) That it was a charge upon the weight of the evidence, in that it charged the jury that the presumption was that the defendant intended to carry out the threats, if any, he made; (b) and (c) because it charged that if the defendant, by words spoken or acts done, reasonably calculated to do so, intended to hinder or to obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, he would be guilty of the offense charged; and (d) because the evidence affirmatively showed that the words spoken and acts done by the defendant did not obstruct said service, and did not prevent the officers of the local exemption board from doing their duty as such. The exception is too broad, in that it includes portions of the court's charge that are unobjectionable with those that are claimed to be objectionable. Pretermitting this infirmity, we will consider whether the charge misconstrued the act of Congress upon which the conviction is based.

The contention of defendant is that the act punishes alone an obstructing of the service to its injury, or that of the United States, that is successful, and that the court's instruction that "the government is not required to prove, nor is it necessary, that any member of the local exemption board of Somerville county was actually prevented from, or hindered in, the performance of his duty as a member of said board, nor is the government required to prove that any person or persons were actually prevented from enlisting in the military service of the United States, or were actually prevented or hindered from doing anything that they were required to do under the provisions of the Selective Service Act," was in conflict with this construction of the act. The exact contention of the defendant's counsel is that the statutory word "obstruct" is equivalent to the word "prevent," and that success in the sense of an actual prevention of the performance of duty is essential to be proven before a conviction can be had.

We do not agree with this contention. It is true that the statute does not punish an attempt to obstruct, and the indictment does not charge an attempt to obstruct. Yet there may be an unsuccessful obstruction that is more than an attempt. We construe "obstruct," not as the equivalent of "prevent," but rather as the equivalent of "to make difficult" or "to present obstacles to the accomplishment of a thing." The obstacles may have failed to prevent accomplishment, but if they served to make accomplishment more difficult, either in the instant case for the members of the local exemption board against whom the threats were made, or in the future performance of their duties as such members, then we think the service was obstructed, within the meaning of the statute, to the injury of the service or of the United States, though the local board in the case of defendant overcame the obstruction and performed their duty by refusing to reclass him on his demand. That a threat of the nature indicated by the record would make it more difficult for the members of the local board to do their duty, both in defendant's case and in classifying future drafted men, is obvious. Presenting such an obstacle to the performance of the duty of the board in classifying under the draft act, we do not think the government was required to go further, and prove that the obstruction prevailed to the

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extent of causing a miscarriage in a particular case. It was enough that it proved that the natural and inevitable tendency of such threats was to make it more difficult for the members of the board who were threatened to do their duty impartially than it would otherwise have been.

This being our view of what the act requires to be charged and proven, we think the court below correctly charged the jury that the threats, of themselves, and without direct proof of their success in preventing the board from doing its duty, might show to a jury a sufficient obstruction of the recruiting or enlistment service, to its injury and to that of the United States. In this view of the matter, the denials of all the members of the board that they were dissuaded from doing their duty by the threats are not conclusive of that issue, but at most mere evidence for the jury to act upon in determining it. The difficulty of making proof that the threats operated on the minds of the members of the local board effectively is reason enough for the adoption of the construction of the statute we have arrived at, if the language were less clear than it is, that the opposing of obstacles and difficulties to, and not the success of such obstacles and difficulties, is what determines guilt under the statute.

Being of the opinion that the District Court committed no reversible error, the judgment is affirmed.

KENNEY v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 21, 1918.)

No. 3192.

1. CRIMINAL LAW ⟸448(2)—CONCLUSIONS—FALSE ACCOUNTS BY POSTMASTER.
On trial of a postmaster for presenting a false account in reporting excessive postage cancellations, testimony of an inspector, from examination of the records of many offices of the same class, as to the ratio of sales of stamps to cancellations, and also that there were no industrial plants in defendant's town likely to receive stamps from other places, and his testimony from the records of defendant's office as to the relation of sales to cancellations before his incumbency, *held* not incompetent as conclusions.

2. CRIMINAL LAW ⟸322—EVIDENCE—PUBLIC RECORDS.
The records of a public office, as a post office, are presumptively correct.

In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Criminal prosecution by the United States against James Kenney. Judgment of conviction, and defendant brings error. Affirmed.

J. Q. Mahaffey, John J. King, and W. L. Estes, all of Texarkana, Tex., for plaintiff in error.

Clarence Merritt, U. S. Atty., of McKinney, Tex., and J. B. Dailey, Asst. U. S. Atty., of Beaumont, Tex.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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GRUBB, District Judge. The plaintiff in error was tried and convicted of a violation of section 206 of the Penal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1128 [Comp. St. 1916, § 10376]). The first count of the indictment, under which alone he was convicted, charged him with having made a false account, while postmaster at Nash, Tex., in the prosecution of his business as such postmaster, to the Auditor for the Post Office Department, in which he claimed that during the period from April 1, 1916, to June 30, 1916, he canceled $258.10 in stamps, when, in fact, he had canceled a substantially less amount, and that he had made the false account for the purpose of increasing his compensation as postmaster. It was proven that the defendant below was postmaster at Nash during the period stated, and, as such postmaster, had made the report of cancellations of postage in the amount alleged for that period. The disputed questions were whether he had canceled as great an amount of postage as he had reported, and, if not, whether he had reported a greater amount with the fraudulent intent of increasing his compensation as postmaster. Fourth-class postmasters are compensated according to the amount of cancellations of postage. Their compensation increases with their cancellations, under the law by which it is fixed.

The assignments of error relied upon by the plaintiff in error are based on rulings of the District Judge admitting evidence objected to by him, and the denial of requested charges and exceptions taken to the court's oral charge.

[1] The first assignment of error is based on the action of the court in permitting the post office inspector, a witness for the government, to testify:

"That there are no plants or other things being operated there [at Nash], from investigation, as far as he could ascertain, whereby they would send stamps from other places to these local plants."

The ground of objection was that it was a conclusion, and not testimony of a fact. The witness had testified that at fourth-class post offices, generally, sales of stamps exceeded cancellations, and that this was always true, in his experience, unless there were plants at the places which procured their postage from post offices located elsewhere than where the plant was, instancing sawmills and factories, whose home offices, located elsewhere, supplied the mill or branch office with postage. The witness testified that he had been in Nash three days, and had investigated the kind of business done there. He was qualified to testify, as a fact, and not as a conclusion, that he had found in Nash no industries of the kind he described (mills and branch houses), which were likely to be supplied with postage from an office other than that at Nash. The weight of his evidence might be affected by his limited opportunity, but this would not render it inadmissible.

The second and eighth assignments of error are both based on the action of the court below in permitting the same witness to testify:

That "in the ordinary course of business of fourth-class post offices, the sales of postage exceed the cancellation of postage, and that such is the case in about 98 per cent. of the fourth-class post offices."

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The witness had testified that he had investigated about 1,000 fourth-class post offices, and had noted the comparison between cancellations and sales, in his investigations, and gave that as the result of his experience. We think the evidence was competent. It was not hearsay, since it was the result of the witness' personal examinations of the books and records of the offices he had examined, and not of statements made to him by the various postmasters of those offices. For the same reason, the defendant was not denied the privilege, accorded him by the Constitution, of being confronted by the witnesses against him. The fourth-class postmasters were in no sense the witnesses who furnished the testimony. It came from the mouth of the inspector, testifying from the records of the various post offices.

Nor do we think it was either practicable or legally necessary to have produced the records of the various offices his examinations covered. The records of a public office are presumed to be correct. His testimony related to a course of business among fourth-class post offices, and such a course of business could be established by a witness familiar with the conduct of the business, whether his familiarity came from his being engaged in the business himself or from supervising those who were. A bank examiner, as well as a banker, is competent to testify to a banking usage or course of business. If the inquiry had been confined to a single office, and had not been as to the course of business of fourth-class offices generally, production of the records of the single office and of the postmaster who kept them, might have been required. The fact that sales would normally exceed cancellations, unless stamps were procured by patrons from other offices, is so obvious as to require no proof. This is all that the testimony of the inspector amounted to. He excluded from the rule offices where stamps were accustomed to be procured by patrons at other offices than the office of cancellation. The percentage of such offices was unimportant. The important fact was whether Nash was an office of that kind.

[2] The third assignment of error is based on the ruling of the court below in permitting the post office inspector to testify from the records of the post office at Nash at a time prior to the defendant's incumbency as to the relation between sales and cancellations in that office. The records of the office were produced and identified by the defendant, and delivery of them to the inspector made by the defendant. This was a sufficient identification of them as records of the Nash office for the period they purported to cover. The books themselves were introduced in evidence. The only ground of objection was that the defendant was not in charge of the office when they were made, and their correctness had not been established. Being the records of a public office, they were presumptively correct. They were material to furnish a basis of comparison between the office in the respect involved before and during the defendant's incumbency as postmaster.

The fourth assignment of error is based on the ruling of the court below in permitting the government to introduce in evidence "15

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envelopes containing mail matter addressed to the Nash post office, on which there were marks showing postage to be due on each of them." The ground of objection was that the evidence was immaterial and irrelevant, and related to a different offense than that for which the defendant was being tried. The defendant, on cross-examination and without objection from his counsel, identified the envelopes, and testified that they did not bear canceled due stamps, and did contain a notation of due postage, and that they were received at the Nash post office while he was postmaster, and were delivered by him to the cashier of the bank to which they were addressed, and that he either failed to collect the due postage from the addressee, or, if he collected it, failed to place due stamps on the letters, but did place the amounts collected in the postal funds of the office. The envelopes do not appear in the record. They are described as being "15 envelopes last referred to, on each of which was a notation that postage from 2 to 10 cents was due, but on which there were no overdue stamps."

The defendant, without objection on his part, had already testified to the fact that the 15 envelopes which had been received by him and delivered to the addressee had a notation of postage due on each, and had no overdue stamps on them. Clearly the introduction of the envelopes themselves added nothing to his voluntary recital of their contents. Nor would the defendant be permitted, after giving his version of their contents, without interposing any objection to the inquiries, to object to the introduction of the envelopes, if they conflicted with his version. There was, however, no conflict between the envelopes introduced by the government over defendant's objection and his verbal description of them, made without the interposition of any objection from him. As the plaintiff in error could have suffered no injury from the introduction of the envelopes, after voluntarily testifying to their contents, we find it unnecessary to determine whether their admission was erroneous.

The fifth and sixth assignments of error are based on the refusal of the trial court to give requested instructions on the law of circumstantial evidence and reasonable doubt. The District Judge declined to grant the requests, because their subject-matter had, in his opinion, been fully covered in the oral charge. We agree with the trial judge's conclusion in this respect.

The seventh assignment of error is based on an exception to that part of the court's oral charge defining reasonable doubt. We find no error in the definition, and think the court below fairly and fully instructed the jury upon this matter. The exception did not direct the court's attention to any specific defect in the definition.

As we are of the opinion that there is no prejudicial error in the record, the judgment of the District Court is affirmed.

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UNITED STATES v. DIAMOND COAL & COKE CO.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1918.)

No. 5146.

1. LIMITATION OF ACTIONS ⟸100(10)—PUBLIC LANDS—PATENTS—SUIT TO CANCEL.
Under Act March 3, 1891, § 8 (Comp. St. 1916, § 5114), providing that suits to vacate patents hereafter issued shall be brought within six years after the date of issuance, where the fraud is concealed, the cause of action is not deemed to accrue until discovery; but, whether the fraud is concealed, or is committed so that it conceals itself, reasonable care and diligence by the United States to discover it are indispensable conditions to a suit to vacate a patent after the bar of the statute has fallen.

2. LIMITATION OF ACTIONS ⟸195(5)—SUIT TO CANCEL PATENT—BURDEN OF PROOF.
Where the United States, after more than six years from the date of issuance, sues to cancel a patent and seeks equitable relief from the bar of Act March 3, 1891, § 8 (Comp. St. 1916, § 5114), it has the burden of showing that it exercised reasonable care and diligence to discover the fraud before limitations ran, that it had no knowledge or notice of facts which would have incited an ordinarily prudent person to inquiry which would have led to a discovery of the fraud, and that defendant concealed the fraud.

3. STATES ⟸190—UNITED STATES ⟸124—EQUITABLE CLAIMS—RULE APPLICABLE.
The equitable claims of a state or nation appeal to the conscience of a chancellor with no greater or less force than would those of a private citizen under like circumstances; and, barring the effect of mere delay, they are judicable in a court of chancery, to whose jurisdiction the state or nation submits them, under the rules applicable to private citizens.

4. PUBLIC LANDS ⟸120—SUITS TO CANCEL PATENT—LIMITATIONS.
A court of chancery cannot grant relief, in a suit by the United States to cancel a patent on account of fraud, after the expiration of six years, in the absence of reasonable care and diligence on its part to discover the same, for Act March 3, 1891, § 8 (Comp. St. 1916, § 5114), expressly forbids such suits, and to grant relief would be a species of judicial legislation.

5. LIMITATION OF ACTIONS ⟸179(2)—PUBLIC LANDS—SUIT TO CANCEL PATENT—BILL.
In a suit to cancel a patent to public land, begun more than six years after issuance, *held*, that the bill, which showed defendant was and had been in possession, was insufficient to show such diligence on the part of the United States to discover the fraud as would relieve it of the bar of Act March 3, 1891, § 8 (Comp. St. 1916, § 5114).

6. NOTICE ⟸6—POSSESSION.
Possession of real estate is notice to the world of the possessor's title.

7. LIMITATION OF ACTIONS ⟸179(2)—PUBLIC LANDS—SUIT TO CANCEL PATENT—BILL.
A bill seeking cancellation of a patent to public land more than six years after issuance, despite Act March 3, 1891, § 8 (Comp. St. 1916, § 5114), is insufficient, where it merely averred ignorance on the part of the United States at one time, and knowledge of the fraud at a later date, for such allegations are of no effect.

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

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Bill by the United States against the Diamond Coal & Coke Company. The bill was dismissed, as not stating a cause of action, and the United States appeals. Affirmed.

This is a suit in equity, brought by the United States against the Diamond Coal & Coke Company, a corporation, to avoid for fraud in obtaining them the patents to 18 tracts of land, aggregating 2,283 acres, and the deeds thereof made by the 18 patentees to the coal company. The alleged fraud was the hiring and causing by the coal company of dummy entrymen to enter as coal lands, procure patents for, and to convey the lands in controversy to the coal company at its expense and for its benefit, by means of false representations to the local land officers of the United States that each entryman had expended the requisite sums of money in developing the coal mines upon the land he entered, that he was in the actual possession of that land, that he made his entry for his own use and benefit, and not directly or indirectly for the use or benefit of any other person or party, when the facts were that the coal company was in the actual possession of all the land, that it had paid all the expenses of developing mines thereon and all the expenses of entering it, and that it was entered for the benefit of the coal company, and not for the use or benefit of any of the entrymen, all of whom conveyed the lands they respectively entered to the coal company immediately after they finally entered them. The plaintiff alleged that this fraud was perpetrated between February 26, 1895, and December 13, 1906, and that prior to the latter date all the entrymen had conveyed the lands they respectively entered to the coal company. This suit was commenced on October 17, 1917, a little more than 13 years and nine months after the completion of the fraud. The coal company made a motion to dismiss the bill of complaint, on the grounds that it failed to state a case which entitled the plaintiff to any relief in equity, that it disclosed the facts that the alleged cause of action was barred by the act of Congress, and that the plaintiff was guilty of such negligence in failing to discover the fraud and commence the suit, that it was estopped from maintaining it. The court below granted the motion, and the complainant appealed.

David J. Howell, Asst. U. S. Atty., of Cheyenne, Wyo. (Charles L. Rigdon, U. S. Atty., of Cheyenne, Wyo., on the brief), for the United States.

W. B. Rodgers, of Anaconda, Mont. (L. O. Evans and D. M. Kelly, both of Butte, Mont., and B. M. Ausherman, of Evanston, Wyo., on the brief), for appellee.

Before SANBORN and CARLAND, Circuit Judges, and ELLIOTT, District Judge.

SANBORN, Circuit Judge (after stating the facts as above). [1, 2] The Act of Congress of March 3, 1891, c. 561, § 8, 26 Stat. 1099 (Comp. St. 1916, § 5114), provides:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

But this statute is construed and enforced pursuant to decisions of the federal courts in co-operation with the familiar equitable principle that where the victim of a concealed fraud exercises reasonable diligence to discover it and fails so to do, or to receive such notice thereof as would excite the attention of, and incite a person of ordinary prudence and ability in his place to an inquiry which would have led to a discovery of the fraud, the cause of action for the fraud does

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not accrue until such discovery or the receipt of such notice. Exploration Company v. United States, 247 U. S. 435, 38 Sup. Ct. 571, 62 L. Ed. 1200; United States v. Exploration Co., 203 Fed. 387, 121 C. C. A. 491; Exploration Co. v. United States, 235 Fed. 110, 111, 148 C. C. A. 604; Linn & Lane Timber Co. v. United States, 196 Fed. 593, 116 C. C. A. 267; Bailey v. Glover, 88 U. S. (21 Wall.) 342, 348, 22 L. Ed. 636. In the case last cited, which is approved in Exploration Co. v. United States, 247 U. S. 435, 38 Sup. Ct. 571, 62 L. Ed. 1200, the Supreme Court, after stating that ignorance of the fraud produced by affirmative acts of the perpetrator whereby the facts were concealed relieves from the bar of the statute, added that the weight of authority was in favor of the further proposition:

"That where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

So the rule is that, whether the fraud is concealed by special acts of the perpetrator after its commission or is so committed that it conceals itself, reasonable care and diligence of the injured party to discover it are indispensable conditions of the maintenance of a cause of action upon it after the bar of the statute has fallen. The act of Congress declares that suits by the United States to vacate patents for fraud shall not be brought subsequent to 6 years after the date of the patents. When the 6 years have expired such suits are therefore presumed to be barred. And when the injured party invokes the aid of a court of equity to release him from that bar, the burden unavoidably falls upon the plaintiff to plead and prove (1) that it exercised reasonable care and diligence to discover the fraud before the statute of limitations ran; (2) that it had no knowledge or notice of any action which would have excited the attention of and would have incited a person of ordinary prudence and ability in the plaintiff's situation to an inquiry which would have led to a discovery of the fraud; and (3) that the defendant concealed the fraud by trick or artifice, or so committed it that it concealed itself. Hence the question which the case presents is whether or not the United States has so pleaded these facts as to entitle it to relief by a court of equity from the plain bar of the statute.

[3] By the terms of the Act of Congress of March 3, 1891, this suit is forever barred unless the court of equity ought to relieve the plaintiff from that bar on the equitable principle which has been stated. The United States accordingly has invoked the aid of the court of equity and of this equitable principle to secure this relief. The equitable claims of a nation or a state appeal to the conscience of a chancellor with the same, but with no greater or less force, than would those of a private citizen under like circumstances, and, barring the effect of mere delay, they are judicable in a court of chancery, to whose jurisdiction the nation or state voluntarily submits them, by every principle and rule of equity applicable to the rights of a private citizen under similar circumstances. United States v. Stinson, 197 U. S. 200,

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204, 205, 25 Sup. Ct. 426, 49 L. Ed. 724; United States v. Detroit Timber & Lumber Co., 131 Fed. 668, 677, 67 C. C. A. 1, 10; United States v. Debell, 227 Fed. 775, 779, 142 C. C. A. 299; United States v. Chandler-Dunbar Water Power Co., 152 Fed. 25, 81 C. C. A. 221; United States v. Midway Northern Oil Co. (D. C.) 232 Fed. 619, 631; State of Iowa v. Carr, 191 Fed. 257, 266, 112 C. C. A. 477, and authorities there cited.

[4] Nor will mere delay by the United States after the expiration of the 6 years in the absence of reasonable care and diligence on its part to discover the fraud suffice to induce a court of chancery to grant the relief from the bar of the act of Congress and the maintenance of its suit under the rule and the authorities, such as United States v. Nashville, Chattanooga & St. Louis Ry. Co., 118 U. S. 120, 125, 6 Sup. Ct. 1006, 30 L. Ed. 81, United States v. Beebe, 127 U. S. 338, 344, 348, 8 Sup. Ct. 1083, 32 L. Ed. 121, United States v. Kirkpatrick et al., 9 Wheat. 720, 6 L. Ed. 199, Gaussen v. United States, 97 U. S. 584, 24 L. Ed. 1009, and United States v. Insley, 130 U. S. 263, 266, 9 Sup. Ct. 485, 32 L. Ed. 968, cited by counsel in support of it, that no time runs against the sovereignty, or as the Supreme Court states it, that the "United States, asserting rights vested in them, as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." 118 U. S. 125, 6 Sup. Ct. 1008, 30 L. Ed. 81. And this because, first, Congress has clearly manifested its intention by the Act of March 3, 1891, that mere delay for 6 years after the date of the patent shall no longer constitute an excuse for failure to bring, and shall be fatal to, a suit to avoid the patent for fraud, unless a court of chancery relieves it from the bar, on the equitable principle which has been stated, and reasonable care and diligence of the party injured to discover the fraud are a sine qua non of such relief; and, second, because the judicial affirmance of the contention that the mere delay of the United States without reasonable care or diligence on its part to discover the fraud, warrants the maintenance of a suit to avoid the patent after the 6 years would, in effect, repeal the act of Congress and authorize the maintenance of such suits as freely after as before the expiration of the 6 years, and such a decision would constitute pernicious judicial legislation. United States v. Puget Sound Traction, Light & Power Co. (D. C.) 215 Fed. 436, 441.

[5, 6] Hence the first question in this case is: Has the plaintiff averred in its bill of complaint facts which show that it exercised reasonable care and diligence to discover the fraud, that it had no means of knowledge thereof, no notice sufficient to put it on its guard and call for inquiry, and has it alleged the time when the fraud was discovered, the circumstances of its discovery, what the discovery was, and why it was not made before so that the court may clearly see that the discovery could not have been made before by the exercise of ordinary diligence? For the rule is firmly established by repeated decisions of the federal courts that all these allegations and more are indispensable to the statement of a cause of action in equity for relief from a statute of limitations on the ground of ignorance of the fraud. Wood

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v. Carpenter, 101 U. S. 135, 138, 139, 140, 141, 148, 25 L. Ed. 807; Felix v. Patrick, 145 U. S. 317, 321, 12 Sup. Ct. 862, 36 L. Ed. 719; Badger v. Badger, 69 U. S. (2 Wall.) 94, 95, 17 L. Ed. 836; Pearsall v. Smith, 149 U. S. 231, 236, 13 Sup. Ct. 833, 37 L. Ed. 713; Hardt v. Heidweyer, 152 U. S. 547, 559, 14 Sup. Ct. 671, 38 L. Ed. 548. The only facts averred in the bill of complaint pertinent to the question whether or not the plaintiff exercised reasonable diligence to discover the fraud between 1903 when its perpetration was complete and the commencement of this suit on October 11, 1917, were these: The coal company and the entrymen conspired to commit the fraud before they perpetrated it, and, as a part of that conspiracy, they then had an understanding and agreement that they should be silent concerning it and should conceal it. They have done so. "Neither the plaintiff nor any officer of the United States having authority in the premises ever had any knowledge or information concerning the frauds perpetrated upon the plaintiff, as aforesaid, excepting that on or about the month of November, 1916, there was filed in the General Land Office of the United States, at Washington, D. C., a report upon said entries by one John A. Smith, Special Agent of the Department of the Interior." Ever since that day the Interior Department and the Department of Justice have been diligently investigating the fraud and preparing and instituting judicial proceedings to avoid its effect. At the time the lands were entered and at the time the conspiracy to enter them was formed the coal company was in possession of the land, and it has been in possession thereof ever since, and for many years it has been mining these lands and extracting coal therefrom. Each of the entrymen conveyed the portion of these lands that he entered to the coal company immediately after the final entry thereof. The complaint contains no allegations of any other facts tending to show diligence to discover the fraud.

The Supreme Court quoting from Angell on Limitations, § 187 and note, said in 101 U. S. 141, 25 L. Ed. 807:

"The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it."

The transaction here was in reality a sale of the lands by the United States for cash through its local land officers. The fraud alleged was that the United States was induced by the false representations of the coal company and its agents, the entrymen, to sell the lands to the coal company in the belief that it was selling them to the entrymen. But the coal company was in possession of the lands at the time the sale was made and has been in possession of them and operated them ever since. Possession of real estate is notice to the world of the possessor's title. The entrymen conveyed all these lands to the coal company prior to the year 1904. There is no averment in the bill of complaint that these conveyances were not seasonably recorded. In reality this is a suit to rescind a sale for cash of speculative mining property, a proceeding which demands extraordinary promptness and diligence on the part of him who would rescind, on account of the changing values of the property. It is incredible that, under this state of facts, a ven-

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dor to whom the open, continuous, operative possession of the fraudulent vendee gave constant notice of its claim of title ever after 1903, could not or would not, if it exercised ordinary diligence, have discovered to whom it had sold its property long before the six years allotted by the statute expired.

[7] Again the burden was upon the complainant to allege facts disclosing persuasive equitable grounds for excusing its failure to discover and avoid the fraud. The Supreme Court has repeatedly pointed out the averments necessary to be made in a pleading to enable the plaintiff to bear this burden. In Wood v. Carpenter, 101 U. S. 140, 143, 25 L. Ed. 807, it declared that a general allegation of ignorance at one time and knowledge at another, was of no effect, that there must be distinct averments as to the time when the fraud was discovered, what the discovery was, how it was made, why it was not made sooner, that the circumstances of the discovery must be fully stated, and that the delay must be shown to have been consistent with requisite diligence. Over and over again has the Supreme Court approved this statement from Badger v. Badger, 69 U. S. (2 Wall.) 95, 17 L. Ed. 836:

"The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the Chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

The bill of complaint fails to contain the allegations thus specified and adjudged indispensable to the complainant's alleged cause of action. It contains no averments of any impediments to an earlier prosecution of the plaintiff's claim other than the immaterial fact that it was ignorant of its claim in 1903 and aware of it in 1916. The agreement and understanding of the coal company and the entrymen, to keep silent about and conceal the fraud, is alleged to have been made before it was committed and is therefore merged therein. United States v. Puget Sound Traction, etc., Co. (D. C.) 215 Fed. 436, 440. The complaint contains no allegation of any means used by the coal company after the completion of the fraud in 1903 to keep the plaintiff in ignorance of it. There is nothing in the complaint to show why the fraud could not have been discovered and the suit brought as well at any time after 1903 and prior to 1915 as after the latter date. There is no material averment in it of how and when the plaintiff first came to a knowledge of the matters alleged in the bill. The averment on that subject fails to state any pertinent or material fact except that the plaintiff and all its officers having authority in the premises were ignorant of the fraud until and except that in November, 1916, a special agent of the Interior Department filed a report on the entries on which complaint is made. But the bill contains no statement of the facts this report revealed, of who discovered them, when they were discovered or how or why the special agent made the report, or of any other material facts tending to show that the knowledge of the fraud could not have been discovered as well in 1904 as in 1916. And the conclu-

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sion of the whole matter is that the complaint states a case in which, in view of the constant operative possession of the coal company of all the lands in controversy, from prior to 1903 to the present time, and of the conveyance of them to it by the entrymen prior to 1904, the exercise of ordinary care and diligence could and would have discovered the fraud long before the expiration of six years from the dates of the patents and it fails to contain allegations indispensable to constitute a cause of action in equity to relieve the plaintiff from the bar of the Act of Congress of March 3, 1891.

The decree below must therefore be affirmed; and it is so ordered.

MANUEL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1918.)

No. 4988.

1. JURY ⟸131(8)—EXAMINATION OF JURORS—CAPITAL PUNISHMENT.
   Examination of jurors on the point of prejudice against capital punishment, determination of which is, by Cr. Code, § 330,[1] committed to the jury, should be confined to ascertainment of their views and the strength thereof, with the sole object of determining whether they would approach the issue in the proper frame of mind.
2. CRIMINAL LAW ⟸655(4)—EXAMINATION OF JURORS BY COURT—CAPITAL PUNISHMENT.
   Statements of court to jurors, excused for prejudice against capital punishment, determination of which is, by Cr. Code, § 330, committed to jury, as to duty to enforce the laws as made, *held* prejudicial, especially where, relative to letters received by all members of the panel, the court had said some one had tried to obstruct the proper administration of justice in the case by seeking to prevent assessment of death penalty.
3. WITNESSES ⟸48(1)—CONVICT AS WITNESS.
   A convict is a competent witness in a federal court.
4. CRIMINAL LAW ⟸703—OPENING ARGUMENT—REFERENCE TO FORMER CONVICTION.
   Reference by prosecuting attorney in opening argument to the crime, murder, for which defendant was serving sentence at the time of the killing of a prison guard, was unnecessary and prejudicial.

In Error to the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Ono Manuel was convicted of murder, with sentence of death, and brings error. Reversed.

Redmond S. Brennan, of Kansas City, Mo., for plaintiff in error.

L. S. Harvey, Asst. U. S. Atty., of Kansas City, Kan. (Fred Robertson, U. S. Atty., of Kansas City, Kan., on the brief), for the United States.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

STONE, Circuit Judge. Writ of error from a conviction, with sentence of death.

Eleven so-called assignments of error are here urged, but it is unnecessary to decide all of them. It is charged that during the im-

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[1] Comp. St. § 10504.

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panelment of the jury the court made prejudicial statements concerning the capital penalty, and concerning the receipt by the panel of circulars and form letters concerning capital punishment. Although not known at the time of this trial, it is stated by the district attorney with commendable frankness that these circulars and letters had been sent to the entire panel by the mother of a man to be tried at the same term for another killing. The entire panel, in the instant case, were examined concerning the receipt of these papers, and concerning their views upon capital punishment. In the course of the examination of the first juror the court made a statement to the panel regarding these papers. This statement was within proper bounds. It did, however, emphasize to the panel that some one had endeavored to obstruct the proper administration of justice in that case to the extent of seeking to prevent the assessment of the death penalty. This is important in connection with the further action of the court in remarks regarding the death penalty.

In course of the examination of several jurors it developed that they did not favor the death penalty, and some were excused because they declared that they would not assess it. In connection with this examination the court engaged in the colloquies following:

"Q. Do you believe in the enforcement of the laws of our country? A. Yes, sir; I do, but I don't—My conscience does not take that law as one that should be there, the death penalty.

"Q. You have nothing whatever to do, sir, with the making of the laws; it is the obligation of some one else to make the laws. It is the duty of courts and jurors to enforce the law as made. You say you have conscientious scruples against enforcing the laws as made by the lawmaking power? A. Against inflicting the death penalty, I have.

"Q. Well, answer my question. As I understand, you have conscientious scruples against the enforcement of the laws as made by the lawmaking power; that is, the Congress of our country? A. Yes, sir; as it applies to that.

"The Court: Stand down."

"The Court: You understand, do you, that in this country of ours, that we have different departments of government? A. Yes, sir.

"Q. You understand it is the duty of the lawmaking power to make the law? A. Yes, sir.

"Q. You understand it is the duty of our courts of justice to enforce the laws as made? A. Yes, sir.

"Q. Notwithstanding that fact, notwithstanding the fact that you now are an officer of the court, you tell me that you are not in favor of enforcing the laws as made in cases where you would believe that the law required the infliction of the death penalty? A. No, sir; I couldn't vote for it.

"The Court: Stand down."

"The Court: Q. You understand, of course, that as a juror here in this court you have nothing whatever to do with the making of the laws, do you? A. Yes, sir.

"Q. You understand that our courts of justice are organized by the law for the purpose of enforcing the law? A. Yes, sir.

"Q. Do I understand you to say that as an officer of this court, engaged in the administration of justice, that you are not willing to enforce the laws as made by the lawmaking power? A. Not on capital punishment.

"The Court: You may stand down."

"Q. I am endeavoring to tell you, in this court the jury, and the jury alone, is the exclusive judge of the weight of the evidence, the credibility of the witnesses, and the facts proven in the case; on the other hand, the court, and

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the court alone, is the exclusive judge of the law of the case, and it is the duty of a juror to take the law precisely as declared by the court, and to find the facts from the evidence offered here in court, and thus determine whether any one is or is not guilty. Now, if you have any conscientious scruples, sir, against doing that, you are not a fit juror. A. Well, I would have to admit that I have those scruples.

"Q. Have what? A. That I have a conscientious scruple against administering the death penalty; that is, that would be first degree murder, if I understand it right.

"Q. That is, you would have conscientious scruples against doing your duty under the law as an officer of this court and as a citizen of our country—is that right? A. I think so.

"Q. Well, sir, you can stand down. If we had fewer men of such view, we would have less crimes committed.

"(Juror excused.)"

"Q. You mean to say that you wouldn't follow the law as given you by the court in considering your verdict? A. I couldn't do it with the right feeling.

"Q. How? A. I don't believe in capital punishment; I couldn't do it with the right feeling.

"Q. Well, you had nothing whatever to do with the making of the law, had you? A. I know it.

"Q. How? A. I know I didn't.

"Q. Well, so long as it is the law, whatever the law is, as made by the lawmaking power, you wouldn't be willing as a citizen and an officer of this court to enforce it? A. Not with that feeling.

"Q. That is what I am talking about. You have some sort of a notion it is the duty of a citizen to obey the law, do you? A. Yes, sir.

"Q. You have some sort of a notion it is the duty of any good citizen called on to aid in the enforcement of the law to enforce the law as written, have you not? A. Yes.

"Q. Now you say you have conscientious scruples against performing your duty here as a citizen under the law? A. Yes.

"Q. How? A. How is that, I didn't understand it.

"Q. You say—you tell us, you have conscientious scruples, since you have been called here as an officer of the law to enforce the law, against enforcing the law as it is written? A. Not since I have been called here; I have previous had that.

"Q. But you were called here— A. Yes, sir.

"Q. Called here in the manner provided by the law for the purpose of administering justice? A. Yes, sir.

"Q. Now, since you are here, you tell the court that you have conscientious scruples against performing your duty as a citizen and enforcing the law as it is written? Is that what I am to understand? A. Yes.

"The Court: All right, you may stand down."

[1] In capital cases the jury determine for or against capital punishment. Criminal Code (Act March 4, 1909, c. 321), § 330, 35 Stat. 1152 (Compiled St. 1916, § 10504). Considering the delicate position in which every juror must have felt himself placed by the circulars and letters which had been sent with the purpose of affecting his judgment upon that issue, and brought out in the examination of the panel, we deem the above remarks of the court prejudicial to a proper determination by the jury of that matter. The examination upon the point of any prejudice against capital punishment should have been confined to an ascertainment of the juror's views and the strength thereof, with the sole object of determining whether he would approach the issue of capital punishment in the proper frame of mind.

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[2-4] It seems proper to notice three other matters called to the attention of the court. The attack upon the jurisdiction of the court is not well taken. The claim that defendant would be entitled to the testimony of other convicts is sustained by the cases of Rosen v. U. S. and Pakas v. U. S., 245 U. S. 467, 38 Sup. Ct. 148, 62 L. Ed. 406. It is also objected that in the opening address the district attorney used prejudicial language. Defendant was indicted while a convict at the Leavenworth penitentiary for killing E. A. Barr, a prison guard. In his statement the district attorney said:

"Mr. Barr came in contact from time to time with this defendant who was a convict there, and I may say that this defendant was a convict there pursuant to a conviction had in the district of Alaska in 1910, at which time and in which district he was there convicted of the crime of murder, this very man, and on account of that conviction is serving a term here in this prison."

The reference to the crime for which defendant was confined was unnecessary and prejudicial.

The judgment is reversed.

ST. CHARLES AMUSEMENT & TRANSPORTATION CO. v. ELHARDT et al.

(Circuit Court of Appeals, Eighth Circuit. December 2, 1918.)

No. 5027.

1. ADMIRALTY ⟸44—APPEARANCE—EFFECT.
Where the claimant of a vessel libeled had notice and appeared on the return day but did not file its answer, it is immaterial that notice of the seizure and the time when the libel would be heard were not published as required by general admiralty rule 9 (29 Sup. Ct. xl).

2. ADMIRALTY ⟸91—DEFAULT DECREES—VACATION.
Under general admiralty rule 29 (29 Sup. Ct. xlii), providing that the court may in its discretion set aside a default of a defendant, the court should consider in a general way the questions proposed to be raised, as bearing on the question whether the defendant has been deprived of any important right.

3. ADMIRALTY ⟸91—DEFAULT DECREES—VACATION.
The refusal of the District Court to set aside a default, and allow the claimant of a vessel libeled to answer after sale, *held* not an abuse of discretion; it appearing the defendant had actual notice and that irregularities before the sale were merely technical, etc.

Appeal from the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Libel by Ludwig B. Elhardt and others against the steamer Frontenac and barge Mississippi. Petition by the St. Charles Amusement & Transportation Company to set aside its default and be permitted to answer the libel. From an order refusing to set aside the default, petitioner appeals. Affirmed.

Lowrie C. Barton, of Pittsburgh, Pa., for appellant.

H. C. Mead, of Knoxville, Tenn., for appellees Streckfus and Wisherd.

William N. M. Crawford, of Minneapolis, Minn., for libelants.

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Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. On November 28, 1916, the appellant, claiming to be the owner of the steamer Frontenac and barge Mississippi, by its vice president, F. X. Ralphe, filed a petition in the court below to set aside its default in this case and to be permitted to answer the libel filed therein. A copy of the proposed answer was attached to the petition, which was also verified by Ralphe. The petition alleged that on May 15, 1916, appellees filed a libel in the court below in a cause of contract, civil and maritime for wages, against the above-named vessels; that process by attachment and monition was duly issued returnable July 3, 1916. As grounds for setting aside the default of appellant, the petition alleged that the marshal did not cause public notice of the seizure of said vessels to be given in such newspaper within the district of Minnesota as the District Court should order. The petition also contained the following allegation:

"That, as hereinbefore stated, your petitioner received no actual notice of the filing of said libel and proceedings thereunder, but only received constructive notice by reason of the attachment of said vessels. That its officers were ignorant of the proper practice in the premises, fully expecting that actual notice would be served on them as to when they should appear. That it did appear on the 3d day of July, 1916, at 10 o'clock in the forenoon, at Winona, expecting the matter to be called, but the matter was not taken up; they left, expecting that notice would be given them of any further action, and the next it knew was the advertising for sale of the vessels, when it then believed it was too late to take any further steps in the matter, and continued in that belief until a short time since."

These are all the allegations in the petition tending to show any excuse for appellant's default, and in view of the admissions made in the petition it is doubtful whether any cause for setting aside the default is stated. However, we will consider the kind of service that was made upon appellant.

The marshal's return showed that he attached the Frontenac and Mississippi, their engines, etc., on June 1, 1916, at Winona, in said district, and at the same time and place, posted a copy of a notice on said vessels which stated that the marshal had, on the 1st day of June, 1916, seized said vessels and taken them into his custody, and that all persons claiming the same, were notified that the United States District Court, for the district of Minnesota, would on the 3d day of July, 1916, at 10 o'clock a. m. of said day, proceed to the trial and condemnation thereof should no claim be interposed for the same. The return further showed that on the day of the seizure there was served a copy of the monition together with a copy of the above-mentioned notice, on H. C. Bear and George French, at St. Charles, Minn., and on June 2, 1916, the same papers were served on F. X. Ralphe, at Hastings, Minn.

In 1911 appellant, according to the laws of Minnesota, appointed said H. C. Bear, its agent at St. Charles, Minn., for the service of process, the appellant being a foreign corporation, and provided in the appointment that service upon Bear should constitute due and personal service upon the corporation. At the time of the service of

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process on Ralphe, he was vice president of appellant and George D. French was secretary thereof. Ralphe applied to the clerk of the District Court on June 14, 1916, and obtained a copy of the libel. On its own admission, it appeared in court in response to the monition on July 3, 1916, at 10 o'clock in the forenoon, expecting the matter to be called. The matter was not taken up and the officers of appellant left.

[1-3] The requirement of general admiralty rule 9 (29 Sup. Ct. xl) that a notice of the seizure and the time when the libel would be heard shall be published, it is admitted, was not complied with nor does it appear that the court ordered such notice to be published; but this fact is immaterial as to the appellant, because it had notice and appeared in court on the return day. It could have filed its answer to the libel in the clerk's office, whether the matter was called up in open court or not. We are fully satisfied from an examination of the record that the appellant had actual notice of the return day of the libel, and that no excuse whatever has been made for setting aside its admitted default. The argument in the court below and here proceeded on the theory that the appellant was properly in the case, and could attack all proceedings in the court below subsequent to the default; but, if the default be not set aside, appellant has no right to discuss the questions raised by its proposed answer, because it is not in the case and has no pleadings therein. General admiralty rule 29 (29 Sup. Ct. xlii) provides that the court may in its discretion set aside the default of a defendant and admit him to make answer to the libel at any time before final decree. As bearing upon this discretion, the court would consider in a general way, the questions which the appellant proposed to raise, if admitted to defend, not for the purpose of deciding them, but as bearing upon the question as to whether the appellant had been deprived of any important right.

We have therefore considered the objections which the appellant makes in regard to the validity of the sale of the vessels. It is claimed that there was no judgment of default and condemnation before a sale of the vessels. The record does not show such a judgment; but, if it did, it would simply be evidence of the default, which appellant admits, and therefore, so far as appellant is concerned, is largely technical. It is also claimed that the vessels were sold for such an inadequate price as to justify the setting aside of the sale. We are not satisfied by any means that the price for which the vessels were sold was inadequate. The purchaser took great risk in the purchase of the vessels in the condition in which they were at the time of the sale, and there has been spent more than $10,000 in repairs upon the same since the purchase thereof. The record also shows that Ralphe, as vice president of appellant, who verifies the petition to set aside the default and also the proposed answer, was present at the sale with a certified check for $7,000, and did not make a bid, for the alleged reason that he did not propose to furnish money for the purpose of allowing libelants' proctor to get a fee. The record shows that Ralphe and others interested in the vessels were continually importuning the marshal to use his influence with the proctor for the libelants to either have the libel

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dismissed or the vessels sold. The record also shows that the officers of appellant had actual notice of every step in the proceeding from the filing of the libel on, and did nothing until the present petition was filed November 28, 1916, the sale having been made August 31, 1916.

The other matters complained of in the answer are all matters which the appellant had ample opportunity to set up before its default, and upon their face are without merit in this proceeding. We are therefore satisfied there is no equity in appellant's motion. It was addressed to the sound discretion of the trial court, and that discretion was wisely exercised. That it was abused, as claimed by appellant, has no support whatever.

The order of the District Court, refusing to set aside the default, is therefore affirmed, with costs.

FULLER v. ATLANTA NAT. BANK.

In re PHŒNIX PLANING MILL.

(Circuit Court of Appeals, Fifth Circuit. November 21, 1918.)

No. 3242.

1. MORTGAGES ⟸29, 173—EQUITABLE MORTGAGE—ASSIGNMENT OF BOND FOR DEED.

Under Civ. Code Ga. 1910, § 3257, an assignment of a bond for title as security for a debt, which clearly expresses its purpose and specifies the debt and the property, is in legal effect a mortgage, and, to be effective against subsequent liens, must be recorded.

2. MORTGAGES ⟸173—RIGHTS OF TRUSTEE—PRIORITY OF LIENS.

Under Civ. Code Ga. 1910, § 6038, as construed by the state Supreme Court, one holding land under bond for title has no leviable interest therein; but a judgment creditor, nevertheless, has a lien upon his interest which may be enforced as provided by the statute, and the debtor's trustee in bankruptcy, having the rights of a judgment creditor, has a lien which takes precedence of an unrecorded assignment of the bond.

Pardee, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

In the matter of the Phœnix Planing Mill, bankrupt. From an order awarding a fund in court to the Atlanta National Bank, William A. Fuller, trustee, appeals. Reversed.

J. H. Porter and Walter S. Dillon, both of Atlanta, Ga., for appellant.

Alex C. King, Jack J. Spalding, Hughes Spalding, Daniel MacDougald, Eugene Dodd, and Harry Dodd, all of Atlanta, Ga., for appellee.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

BATTS, Circuit Judge. Phœnix Planing Mill, December 22, 1909, purchased land in Atlanta from J. F. Leary, taking bond for title. On March 22, 1913, Phœnix Planing Mill assigned and delivered the bond for title to Lowry National Bank to secure debt. March 25,

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1913, it executed a second assignment (subject to the previous assignment) of the bond for title to the American National Bank to secure a debt. This assignment was delivered to the Lowry National Bank, to be attached to the bond for title. July 29, 1913, the bond for title and the first assignment were recorded. The second assignment was not recorded. Subsequently, the Phœnix Planing Mill becoming bankrupt, the trustee sold the land free from the claims of the vendor and the claims of the transferees of the bond for title. The claims of Leary and of the Lowry Bank were paid, and the controversy between the trustee and the Atlanta National Bank (successor to the American National Bank) is over the balance of the proceeds of the sale.

The trustee has the rights of a judgment creditor with a lien. These rights were fixed prior to a record of the assignment to secure debt to the Atlanta National Bank of the bond for title executed by Leary. There is no requirement in the Georgia law that a bond for title be recorded. Executed with certain formalities, its record is permitted. Sections 4213 and 4214, Civil Code of Georgia of 1910. The litigation, however, deals, not with the record of a bond for title, but with the failure to record the assignment of a bond for title; the assignment being made to secure debt.

The legal effect of an assignment to secure a debt of a bond for title is to create a mortgage. The mortgage results from and is evidenced by the assignment; the bond for title defines and limits the rights which the mortgagor has, and upon which he fixes a lien. That this interest is capable of being subjected to a mortgage is indicated by Owens v. Kenney, 146 Ga. 257, 91 S. E. 65, in which it is held that the grantor in a security deed has an interest which he may convey by deed, and by Wood v. Dozier, 142 Ga. 538, 83 S. E. 133, in which a distinction is made between a mortgage of the equity resulting from a security deed with bond for reconveyance, and a mortgage on the "entire interest or estate."

[1] The assignment under consideration names the parties, "clearly indicates the creation of a lien, specifies the debt to secure which it is given, and the property upon which it is to take effect," and must be held a mortgage. Civ. Code 1910, § 3257. A mortgage "shall, as against the interest of third parties acting in good faith without notice, who may have acquired a transfer or lien binding the same property, take effect only from the time it is filed for record." If a judgment creditor could, by his judgment, or by judgment and any character of process, acquire on the property a lien superior to the lien of the unrecorded mortgage, the trustee in this case has a lien superior to that of the mortgagee holding under the unrecorded mortgage.

[2] Since the passage of an act in 1894 (section 6038, Civ. Code 1910) prescribing the procedure when the defendant in execution has an interest in, but not the legal title to, property, the ruling has been that one holding land under bond for title has no leviable interest therein. The interest of a grantor in a security deed, or of one holding bond for title, is not changed by the legislation. Shumate

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v. McLendon, 120 Ga. 396, 48 S. E. 10. The rights of the judgment creditor would not appear to be affected, except as to the remedial procedure. Instead of sale of the property and application of proceeds to the extinction of the debt due the holder of the legal title, the statute requires that his "debt be paid before sale." Notwithstanding the statute, there may be circumstances under which a judgment creditor could have his rights enforced by levy and sale before title has become revested by redemption. V. C. Chemical Co. v. Rylee, 139 Ga. 668, 78 S. E. 27.

The change in procedure effected by this act apparently has no effect in creating or preventing a lien. This would seem to be definitely determined by O'Connor, Executrix, v. Georgia Railroad Bank, 121 Ga. 88, 48 S. E. 716, wherein it is held that:

"Regardless of the inability of A.'s creditors to levy on the equity of redemption, the lien of their judgments attached to his interest in the land from the date of rendition; * * * and the right of the creditors to subject the surplus realized under the sale under the security deed to the payment of their judgments was superior to the claim of the transferee of the bond to reconvey, whose interest was acquired subsequently to the date of their judgments."

It is clear that there may be a lien, notwithstanding the absence of a "leviable interest." To this effect also is Va. Car. Chemical Co. v. Rylee, 139 Ga. 668, 78 S. E. 27. The trustee has had, since the date of the bankruptcy, the status of a lien creditor. The transfer of the bond for title, being a mortgage, and not having been recorded prior to that date, is without effect in so far as his rights are concerned.

In this case the remedy of the statute is superseded by the remedies of the Bankruptcy Law. All liens against the property having precedence over the rights of the trustee have been discharged. Procedure under the statute requires that such liens be paid as may be required for placing the legal title in the defendant in execution. If a lien exists, payment of which is necessary to give legal title, but which is subordinate to the judgment lien, the judgment creditor would not, of course, be without a remedy.

The judgment is reversed, for proceedings to conform herewith. Reversed.

PARDEE, Circuit Judge (dissenting). Considering the facts and circumstances of this case, I have serious doubts as to whether this court has jurisdiction of this appeal.

The proceeding in the bankruptcy court was one for marshaling liens on property and funds within the custody of the court, administrative in character, in which there was no contest over the amount of any claim, and the only contest was as to the rank of the lien of the Atlanta National Bank, and therefore it seems to me that no appeal lies from the final decision of the court. The right to appeal must be found in section 25 of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. 1916, § 9609]), and, as that section has been construed by the courts, no appeal lies thereunder in administrative proceedings. In re Whitener, 105 Fed. 180, 44 C. C. A. 434; Coder, Trustee, v. Arts, 213 U. S. 223, 29 Sup. Ct.

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436, 53 L. Ed. 772, 16 Ann. Cas. 1008; Matter of the Petition of Loving, Trustee, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725.

If the court has jurisdiction in the case, I dissent from the reasoning and conclusion of my Brethren denying the lien of the Atlanta National Bank, because the same was not duly recorded. The question presented arises, and should be decided, under Georgia law, and under that law I think the decision in the lower court was correct. The reasoning and authorities are fully stated in the opinion of Judge Newman, found in the transcript, and I concur with him as to the conclusion reached.

EMPIRE TRUST CO. et al. v. AUBREY.

(Circuit Court of Appeals, Fifth Circuit. November 18, 1918.)

No. 3224.

1. RECEIVERS ⟸96—ATTORNEYS—APPOINTMENT.
It is for the court, and not the trustee named in a mortgage, upon whose suit for foreclosure a receiver was appointed, to determine who should be attorney for the receiver, and be compensated under order of court; so the trustee could not select, in place of the attorney appointed, a firm of which the receiver was a member.

2. RECEIVERS ⟸96—ATTORNEYS—CHANGE.
Merely because it is cheaper, the court, appointing a receiver on mortgage foreclosure, is not required to permit its receiver to employ as his attorney a firm of which he is a member, and which represents one of the parties in the cause, but the court may determine what is for the best interest of all.

3. RECEIVERS ⟸96—ATTORNEYS—DISCRETION OF COURT.
The refusal of the court, appointing a receiver on mortgage foreclosure, to grant the request of the trustee under the mortgage that the attorney appointed to represent the receiver be removed, and a firm of which the receiver was a member be substituted, *held* not an abuse of discretion.

Appeal from the District Court of the United States for the Western District of Texas; William R. Smith, Judge.

Bill by the Empire Trust Company against the Medina Valley Irrigation Company, on which Floyd McGown was appointed receiver. From a decree denying the motion of the complainant to set aside the order appointing William Aubrey, attorney for the receiver, etc., the complainant and receiver appeal. Affirmed.

Floyd McGown, of San Antonio, Tex., and Alex S. Coke, of Dallas, Tex., for appellants.

Frank H. Booth and William Aubrey, both of San Antonio, Tex., for appellee.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. On August 12, 1914, under a bill filed in the District Court by the Empire Trust Company (hereinafter referred to as the Trust Company) against the Medina Valley Irrigation

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Company, for the foreclosure of a mortgage or deed of trust given by the latter, Floyd McGown was appointed receiver of the properties embraced by the instrument sought to be foreclosed, and William Aubrey (hereinafter referred to as the appellee) was appointed the general attorney for said receiver. On January 11, 1915, the court made an order authorizing the receiver to pay to the appellee for his services as such attorney $250 per month until further ordered by the court, that order providing that—

"The sums so paid on said account shall be taken into consideration by the court when the compensation of said William Aubrey for such services is finally fixed by the court for payment herein."

In pursuance of the orders mentioned, the receiver made payments to the appellee until June, 1915. On August 23, 1917, the court ordered the receiver to pay to the appellee, for services rendered by him as attorney for the receiver, $250 per month from and including July, 1915, until further ordered by the court; the order providing that the sums so paid shall be taken into consideration by the court when the compensation of the appellee for his services as attorney for the receiver is finally fixed by the court. By the same order the receiver was directed to employ and avail himself of the professional services of the appellee in all litigation to which the receiver is a party and in all matters and things affecting said receivership, the property in the hands of the receiver as such, and the said receiver in his official capacity. Thereafter the Trust Company moved the court to set aside the order appointing the appellee attorney for the receiver, and the above-mentioned orders of January 11, 1915, and August 23, 1917. By a decree entered on the 18th day of December, 1917, the just-mentioned motion was overruled, the receiver was directed to pay to the appellee $250 per month from the time of his appointment as general attorney for the receiver, less any sums theretofore paid to him under the orders of the court, and it was further ordered that—

"Neither the law firm of Denman, Franklin & McGown, or either of the members of said law firm, shall be or act as attorney or counsel of Floyd McGown, receiver of this court, as such, in any matter affecting this receivership or the property in the hands of said receiver, as such, or the action of said receiver in his official capacity."

The appeal is from the last-mentioned decree.

[1-3] The record discloses nothing upon which to base an attack upon the correctness or propriety of the decree appealed from, unless it is the existence of a contract entered into some time during the year 1916 between the trustee and the law firm of Denman, Franklin & McGown, of which the receiver is a member, by which that firm, for an agreed compensation of $25,000, undertook to represent the trustee in all litigation affecting the trust estate held under mortgages or deeds of trust in suit, and also to represent the receiver in all matters and litigation affecting the trust estate held by him as receiver. Not long before the making of that contract the trustee had terminated the employment of the attorneys who had theretofore represented it in the suit, and had settled with them for the services rendered under

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their employment. The fitness and competency of the appellee for the proper and efficient discharge of the duties of attorney for the receiver were not questioned. That the services he had already rendered as such attorney at the time the decree was entered were reasonably worth more than the amount payable to him under that decree was shown by evidence which was practically undisputed. At any time the court may, of its own motion or at the instance of an interested party, order the discontinuance or reduction of the monthly payments provided for, if it is made to appear that the services rendered or to be rendered by the appellee as attorney for the receiver have been or will be properly compensated for by the payments already made or to be made under the orders of the court. It was disclosed that the receiver, without any order of the court, discontinued the payment to the appellee of the monthly compensation, and to a considerable extent ceased to avail himself of the services of the appellee in matters requiring the rendition of legal services to the receiver, because of the existence of the above-mentioned contract between the trustee and the firm of which the receiver is a member, and because the trustee objected to the appellee's continued rendition of services as attorney for the receiver.

It was for the court, not for the trustee, to determine who was to render the legal services required by the receiver and to be compensated for under the orders of the court. The court's selection of the agencies for the administration and protection of the estate in its custody was not subject to be set aside in whole or in part by the action of a party to the cause, taken without the court's consent or approval. It was beyond the power of the trustee, the plaintiff in the suit, or of the receiver, to substitute in the place of the attorney selected by the court to represent the receiver a firm representing the plaintiff in the suit, of which firm the receiver was a member, entitled to share in its earnings. It has not been made to appear that the court abused its discretion in making the order appealed from. It was not even made to appear that it would cost the trust estate more for the receiver to be represented by the appellee, pursuant to the orders of the court, than it would be for the court to set aside those orders and permit the firm of which the receiver is a member to act as the attorney for the receiver, pursuant to the contract between that firm and the plaintiff in the suit.

The aggregate of the sums payable to the appellee under the court's orders and that properly chargeable against the trust estate for services rendered to the plaintiff by its attorneys under the above-mentioned contract may be less than $25,000. But merely because it is cheaper, the court is not required to permit its receiver to employ as his attorneys a firm of which he is a member and which represents one of the parties to the cause. It was for the court to determine whether the due protection of the estate in its custody required that the receiver have an attorney not in the employment of a party to the cause, and one whose compensation would not be shared in by the receiver. It is no more than a proper precaution to deprive a receiver of any incentive to magnify the services rendered by his attorney. An appro-

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priate means to that end is the selection for the position of attorney for the receiver of one in whose compensation the receiver has no interest.

We discover no error in the action of the court evidenced by the decree appealed from. That decree is affirmed.

UNITED PRESS ASS'NS v. NATIONAL NEWSPAPERS ASS'N.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1918.)

No. 5157.

1. APPEAL AND ERROR ⟸1195(1)—RETRIAL—LAW OF CASE.
   A decision on a former writ of error that plaintiff was entitled to recover future profits is the law of the case on subsequent trial; the relevant facts remaining the same.
2. APPEAL AND ERROR ⟸1062(1)—HARMLESS ERROR—SUBMISSION OF QUESTION TO JURY.
   The erroneous submission of issues to the jury is harmless, where the verdict is in favor of the plaintiff in error.
3. APPEAL AND ERROR ⟸977(1)—DENIAL OF NEW TRIAL—ABUSE OF DISCRETION.
   While ordinarily the ruling of the trial court on motion for new trial is not subject to review, the motion being addressed to the sound discretion of the court, yet, if an abuse of discretion is shown, the matter may be reviewed.
4. NEW TRIAL ⟸75(3)—GROUNDS—INCONSISTENT VERDICT.
   In an action for breach of contract, where the jury found that defendant broke the contract, but awarded plaintiff a much less sum than the undisputed evidence showed it was entitled to recover, *held*, that the verdict was so inconsistent that the refusal of the trial court to grant plaintiff a new trial was an abuse of discretion.
5. ESTOPPEL ⟸88(1)—EQUITABLE ESTOPPEL—DAMAGES.
   A telegram by plaintiff's agent, stating that the damages for a certain breach of contract would not be less than $500, *held* not to estop plaintiff from claiming greater damages in a subsequent suit on the contract.

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by the United Press Associations against the National Newspapers Association. There was judgment for plaintiff for part only of the recovery sought, and plaintiff brings error. Reversed, and new trial ordered.

G. B. Arnold, of St. Louis, Mo. (Tyson Dines, Jr., of Denver, Colo., and J. W. Curts, of Cincinnati, Ohio, on the brief), for plaintiff in error.

Frank M. Lowe, of Kansas City, Mo. (John T. Bottom, of Denver, Colo., on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and ELLIOTT, District Judge.

CARLAND, Circuit Judge. [1] This case was before us at a previous term, and a reference to the opinion then rendered is made for a

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statement of facts. 237 Fed. 547, 150 C. C. A. 429. On the former writ of error it was decided that upon the facts found by the trial court the plaintiff was entitled to recover future profits. This result was reached by deciding that on the facts found the plaintiff had not waived its right to treat the contract between the parties at an end on March 13, 1911. This is the law of the case; the relevant facts remaining the same. The evidence whereby the defendant sought to justify its breach of the contract was not considered by us when the case was here before, as such a defense had not then been pleaded. By an amendment which is known in the record as the third defense of defendants' second amended answer, the defense of justification is pleaded; but, as the jury found in favor of the plaintiff on that issue, any error committed by the court in submitting to the jury the evidence relating to justification was not prejudicial, and therefore no cause for reversal.

[2] The facts upon which we based our decision when the case was here before consisted largely of letters and telegrams, and this evidence was the same on the second trial of the case as on the first. Notwithstanding this, the trial court submitted the questions which we had decided to the jury. This was error, but as the jury found for the plaintiff it was error without prejudice, and not cause for reversal.

[3] It is assigned as error that the trial court abused its discretion in denying the motion for a new trial. Ordinarily the ruling of the trial court on motion for a new trial is not subject to review, the motion being addressed to the sound discretion of the trial court. There is, however, an exception to this rule in cases where the trial court has, as the law terms it, abused its discretion. Pugh v. Bluff City Excursion Co., 177 Fed. 399, 101 C. C. A. 403; Vallery v. Glenwood Irrigation Co., 248 Fed. 483, 160 C. C. A. 493.

[4, 5] On the question of damages there was an item of $875 conceded to be due from defendant to plaintiff for services rendered under the contract. This sum, with interest, amounted to $1,259. The jury were instructed to return a verdict for this amount in favor of the plaintiff. The other damages claimed were for future profits, had the contract been performed by defendant. The jury retired for deliberation on their verdict June 6, 1917. On the next day they returned their verdict in favor of the plaintiff for $1,259, as directed by the court, and assessed damages for future profits at $1. This verdict, being manifestly inconsistent with the evidence and charge of the court, was not received, and the court, at the request of counsel for both parties, resubmitted the case to the jury in the following language:

"Gentlemen of the jury, it is believed by counsel for each of the parties, and also by the court, that your verdict is inconsistent, so much so that it cannot stand. Your verdict involves the necessary implication that you find that the defendant broke the contract, but it refuses to allow anything more than merely nominal damages; whereas, there is no controversy whatever in the case as to the approximate amount of that damage, and under these facts appearing from the evidence in this case, if you find that the defendant broke the contract, then the plaintiff is entitled to substantial damages. If, on the other hand, you find that the defendant did not break the contract, then the plaintiff is not entitled to any damages at all—not even $1. It is true that

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under the instructions of the court both of these subjects and questions of law were left to you—that is, whether or not the contract was broken, and also the amount of damage. Those questions still remain with you, and are the questions for you to consider when you go back to the jury room. If the contract was broken as charged, I repeat, then the plaintiff is entitled to more than $1 damages, under the uncontradicted evidence; if the defendant did not break the contract, then the plaintiff is not entitled to any damages—not even $1, and your verdict must be consistent in that respect, so the bailiff will hand you this form of verdict, and you will retire to further consider."

There was no exception to this charge by either party. In the original charge the court stated the items of damage which the plaintiff claimed, and also stated the total amount to be $13,017, irrespective of the item of $1,259. In the supplemental charge the court stated that there was no controversy whatever in the case as to the approximate amount of plaintiff's damages, if the defendant broke the contract. This statement was true. The damages according to the evidence of the plaintiff amounted to $13,017. Conceding all that the defendant claimed on the question of damages, they amounted to $11,317.30. The jury returned a second verdict in favor of plaintiff for the sum of $1,259, as directed, and fixed the damages for future profits at $500. In explanation of the amount allowed for future profits, we are referred by counsel to a telegram sent by Mr. Clayton D. Lee, formerly vice president of the plaintiff, to the defendant, which reads as follows:

"New York, February 10, Mr. F. G. Bonfils, Care the Kansas City Post, Kansas City, Missouri. Our Kansas City manager reports that you have served notice on him that bureau space and proofs will be refused United Press after Sunday unless your request for a discontinuance of our day service is granted refusal of access and news will be plain breach of your contract damage to us will be not less than five hundred dollars. Our contract made in good faith will be protected."

This telegram was sent long before this suit was commenced, and was simply the opinion of the sender of what damages would be suffered in regard to the items referred to in the telegram. The statement that plaintiff's damages would not be less than $500 in no way estopped the plaintiff from showing that they were much more. If this telegram had been the only evidence in the case on the question of damages, it would not have supported a verdict for the plaintiff in any sum whatever. Neither can the telegram be used to reduce the damages actually proven to the sum of $500. On the evidence the last verdict was just as inconsistent as the first.

It is our opinion that the trial judge, being an integral part of the court charged with the duty and responsibility of seeing that justice was administered between the parties, should have granted a new trial, and that his failure so to do was an abuse of his discretion. The jury not only disregarded the undisputed evidence in the case, but also the charge of the court.

For the error in refusing to grant a new trial, the judgment below is reversed, and a new trial ordered.

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UNITED STATES v. MINCEY.

(Circuit Court of Appeals, Fifth Circuit. November 8, 1918.)

No. 3162.

INTERNAL REVENUE ⟸46—FORFEITURE OF PROPERTY USED IN VIOLATIONS—OWNER'S INNOCENCE.

Where the owner of an automobile sent an employé therewith on a lawful errand, and the employé used it in removing and concealing distilled spirits on which the tax had not been paid, with intent to defraud the United States, the automobile is subject to forfeiture, under Rev. St. § 3450 (Comp. St. 1916, § 6352), despite the owner's innocence of any fraud.

Batts, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Proceeding by the United States, under Rev. St. § 3450 (Comp. St. 1916, § 6352), for the forfeiture of one Ford automobile, claimed by James M. Mincey. There was a judgment for claimant, and the United States brings error. Reversed.

Hooper Alexander, U. S. Atty., of Atlanta, Ga.

Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

WALKER, Circuit Judge. This was a proceeding for the forfeiture of one Ford automobile, on the alleged ground that, before its seizure, it was by one W. F. Mincey used in the removal and for the deposit and concealment of 25 gallons of distilled spirits, with intent to defraud the United States of the tax thereon, which had not been paid. James M. Mincey interposed a claim to the automobile.

In the trial it was conceded that the automobile had been used, as charged, in violation of law, and for the purpose alleged. The evidence for the claimant tended to prove that the automobile was the property of the claimant, who was a farmer and merchant living in Dawson county, Ga.; that W. F. Mincey was in the employment of the claimant, and that on the day in question the claimant had sent W. F. Mincey in said automobile to the town of Gainesville, in Hall county, Ga., with instructions there to procure certain hardware and other lawful merchandise; and that claimant had no knowledge of the fact that W. F. Mincey would use the automobile for any other purpose, and had no reason to apprehend that W. F. Mincey had the purpose of defrauding the United States, or would use the automobile for that purpose.

Exceptions were duly reserved to instructions of the court to the jury to the effect that the automobile was not subject to forfeiture if it was used for the illegal purpose charged without the claimant's consent, and without reason on his part to apprehend that it would be used for an improper purpose.

The proceeding is based upon the following statute:

"Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels, proper or intended

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to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, * * * respectively and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited." R. S. U. S. § 3450 (Comp. St. 1916, § 6352).

Nothing in the terms of this statute indicates an intention to make the right to a forfeiture dependent upon the property being owned by the person guilty of a specified unlawful use of it, or upon the fact that the owner of the property shared in the guilt of the unlawful user of it. It has been authoritatively decided that under similar statutes property may be forfeited for misconduct not participated in by the owner of it. Dobbins' Distillery v. United States, 96 U. S. 395, 24 L. Ed. 637; United States v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555. In each of the cases cited the court sustained a judgment forfeiting property for an unlawful use of it by a party other than the owner, to whom the owner had intrusted possession of it for an entirely lawful purpose. It is not a novelty to subject property used for an unlawful purpose to forfeiture, though the owner of it was not a participant in the wrongful conduct, and no criminality is imputed to him. In the opinion rendered in the first cited case it was said:

"Cases often arise where the property of the owner is forfeited on account of the fraud, neglect, or misconduct of those intrusted with its possession, care, and custody, even when the owner is otherwise without fault."

We understand it to be settled that, under statutes like the one in question, property is subject to forfeiture, though the owner did not share in the guilt of the user of it, to whom the owner had intrusted possession and control. The Frolic (D. C.) 148 Fed. 921; United States v. One Black Horse (D. C.) 129 Fed. 167; United States v. Two Hundred and Twenty Patented Machines (D. C.) 99 Fed. 559. Whether the automobile would have been subject to forfeiture if the person who made use of it for the purpose of committing a fraud on the public revenue had acquired possession of it without the knowledge or consent of the owner is a question not presented by the facts of the case. On the facts disclosed, the nonparticipation of the owner in the unlawful use of his property was not a bar to the forfeiture sought. The court erred in the above-mentioned rulings.

Because of that error, the judgment is reversed.

BATTS, Circuit Judge (dissenting). The holding in United States v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555, that buildings and fixtures erected for distilling, and leased and used for that purpose, may be forfeited for failure of lessee to comply with the revenue laws, may be justified by the owner's destination of the property for a business necessarily under strict regulations, with knowledge of the consequences of their infraction.

To hold that section 3450, R. S. U. S. (Comp. St. 1916, § 6352)

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subjects property designed for and used in transportation generally to forfeiture, when used in carrying distilled spirits upon which the tax has not been paid, by one to whom it has been let for an innocent and proper purpose, the owner being without fault, is to ascribe to the legislative department an indifference to fundamental constitutional principles not warranted so long as another construction is possible.

That the powers incidental to taxation are necessarily strong, and that in their practical administration inequalities and injustices almost necessarily result, can afford no justification for the disregard of basic rights which the government was formed to protect.

BRADLEY et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 26, 1918.)

No. 4923.

1. INDIANS ⟸38(5)—INTOXICATING LIQUORS—EVIDENCE.
In a prosecution for introducing intoxicating liquor into an Oklahoma county, evidence *held* sufficient to sustain the conviction.

2. CRIMINAL LAW ⟸721(5)—ARGUMENT OF PROSECUTOR—COMMENT ON DEFENDANT'S FAILURE TO TESTIFY.
Argument by the attorney for the United States that the evidence against defendants was conclusive, and that it had not been contradicted, is not objectionable as a comment on the failure of defendants to testify.

3. CRIMINAL LAW ⟸304(5)—VENUE—JUDICIAL NOTICE.
Where the evidence showed the location of the offense with reference to a city, a river, and lines of railroad, the court may take judicial notice of the location of the same, and that the offense occurred in the county where prosecution was had.

4. CRIMINAL LAW ⟸829(1)—TRIAL—REFUSAL OF INSTRUCTIONS.
The refusal of requested instructions covered by those given is not error.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

B. W. Bradley, Frank James, and others were convicted of introducing liquor into the county of Muskogee, state of Oklahoma, and defendants named bring error. Affirmed.

S. E. Gidney, of Muskogee, Okl. (John M. Gidney, of Muskogee, Okl., on the brief), for plaintiffs in error.

C. W. Miller, Asst. U. S. Atty., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., of Muskogee, Okl., Walter J. Turnbull, Asst. U. S. Atty., of Durant, Okl., and Alvin F. Molony, Special Asst. U. S Atty., of Muskogee, Okl., on the brief), for the United States.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

WADE, District Judge. Plaintiffs in error, with others, were convicted under an indictment charging introduction of liquor into the

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county of Muskogee, state of Oklahoma. Upon this appeal the sufficiency of the evidence is challenged, and other errors are relied upon.

Twenty-two sacks of whisky were loaded into an ore car at Joplin, Mo., which car was part of a train on the Missouri, Oklahoma & Gulf Railroad, already made up and ready to leave the yards at Joplin, to run to Muskogee, Okl. The particular car in which the liquor was placed was billed to Kusa, Okl., 40 or 50 miles south of Muskogee, on the Missouri, Oklahoma & Gulf Railroad. Upon reaching a point a short distance north of the city of Muskogee, where the Missouri, Kansas & Texas Railway crosses the Missouri, Oklahoma & Gulf Railroad, the door of the car was opened, and the sacks of liquor were dropped out along the right of way by parties in the car, who jumped out, and were promptly arrested by officers lying in wait. These officers had been advised of the loading of the liquor upon the train by an officer at Joplin.

Defendant James was arrested while in the act of picking up one of the sacks of liquor. Defendant Bradley was shown to have procured one Jones, his employé, to take his (Bradley's) horse and get a wagon to meet this train, advising Jones that he had a telephone message from Joplin to have some one meet the train.

[1] 1. Defendants each contend that the evidence is insufficient to warrant a verdict of guilty. We have gone over the record carefully, and we are satisfied that the evidence is ample to sustain the guilt of each of the defendants.

As to James, there was no direct evidence that he had alighted from the car; but the evidence does show that, about 9 or 10 o'clock at night, Deputy Sheriff Hughes and five or more other parties went out upon the right of way, responding to the information from an officer at Joplin that this liquor was on the train, and "paired off" in different positions along the railway, and waited something like 2½ hours before the train arrived. They had a full view of the right of way. It was not at a point where pedestrians would travel, nor where there was occasion for travel along the right of way, or adjacent thereto. James was not seen by these watchers until he was caught in the very act of stooping over one of the sacks of liquor which had been dropped from the car. He was practically in possession of the contraband liquor. His acts and conduct corresponded with the acts and conduct of the other defendants who had alighted from the train. He was right beside the train. It must be quite apparent that he was not on the right of way before the train arrived, or he would have been observed by the men in waiting.

"He was starting to pick up a sack of whisky—bent over it and took both hands, and the sack of whisky was right along by the track. He just bent over and was in the act of picking up this sack."

His presence there, and his acts and conduct, clearly indicated an association with the others arrested at that time. There can be no question but what the evidence was ample to sustain conviction.

The defendant Bradley was the proprietor of a store, and John Paul Jones was in his employment. On the day the liquor was transported, Bradley told Jones of receiving a telephone message from

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Joplin to have some one meet the train, "at this first cut outside of the yards"; told him to take the horse and wagon, and to go through a certain gate near the cut, and told him that probably he could get a couple of cases of whisky cheap by hauling it. Jones executed his request and was there at the proper place—waiting in the darkness ready to receive the shipment of liquor.

It is clearly shown that Bradley had full knowledge that the liquor was coming, and where the liquor was to be unloaded from the car, and that he had the responsibility of having it carted away from the right of way. There can be no question about the sufficiency of the evidence as to this defendant.

[2] 2. Complaint is made because the attorney for the United States, in his argument to the jury, stated that—

"The evidence against said defendants was conclusive and convincing of their guilt, and the said evidence had not been contradicted or denied, thereby calling to the attention of the jury the fact that said defendants had not taken the stand to testify in their behalf."

That there was no error in the remarks of counsel is settled by the holding of this court in Rose et al. v. United States, 227 Fed. 357, 142 C. C. A. 53.

[3] 3. It is contended that the government failed to prove the venue. It was clearly proven that the liquor was unloaded from the interstate train three quarters of a mile north of where the Missouri, Kansas & Texas Railway crosses the Missouri, Oklahoma & Gulf Railroad, north of Muskogee, between what is known as the Katie crossing and the Arkansas river—a short distance north of the city of Muskogee. The court taking judicial notice of the river, and the lines of railway, and the city of Muskogee, there can be no question about the venue having been established.

[4] 4. Error is assigned as to the refusal to give certain instructions asked by the defendants. A careful examination of the instructions given by the court satisfies us that the substance of the instructions asked were incorporated in the charge of the court.

5. There was no error in that portion of the instruction referred to in the fourteenth assignment of error. Fielder et al. v. United States, 227 Fed. 832, 142 C. C. A. 356.

Upon the whole record, the judgment against each defendant is affirmed.

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FRIEDMAN v. VANDALIA R. CO.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5009.

1. RAILROADS ⟸358(1)—INJURIES TO SERVANT OF ANOTHER ROAD—JOINT USE OF RAILWAY PROPERTY—CARE.

While the law of Illinois requires each company, in case of joint use of railway property, to exercise ordinary care for the safety of employés of the other company while on the property, *held*, that defendant, which owned its own right of way, was under no duty to guard the same for employés of another corporation, whose terminal facilities it used; there being no usage of defendant's right of way by such employés.

2. RAILROADS ⟸256—LIABILITY FOR TORTS—RELATION OF COMPANIES.

Defendant railroad company *held* a stockholder in a corporation furnishing railroads with terminal facilities, which relation furnished no basis for any tort liability for injuries to employés of the terminal company.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Bettie Friedman, administratrix of the estate of William G. Richardson, deceased, against the Vandalia Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

David Goldsmith, of St. Louis, Mo. (M. N. Sale, of St. Louis, Mo., on the brief), for plaintiff in error.

Truman Post Young, of St. Louis, Mo. (S. W. Fordyce, Jr., John H. Holliday, and Thomas W. White, all of St. Louis, Mo., on the brief), for defendant in error.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

STONE, Circuit Judge. Writ of error from directed verdict favoring defendant in a personal injury death claim brought by an administratrix.

The deceased was a car inspector employed by the Terminal Railroad Association of St. Louis. At the conclusion of inspections he, with two others, left the yards of the Terminal in the dark of early morning to carry the inspection reports for filing to an office some distance away. The route taken and intended to be pursued was westerly along a Terminal track, across a Terminal bridge over Cahokia creek, thence a short distance further on the Terminal track to a path which led down to a street which passed near the office. About 40 feet east of Cahokia creek this track is crossed by a Vandalia track, which continues westerly across the creek on a Vandalia bridge located a few feet north of the Terminal bridge. This Vandalia bridge was built prior to the Terminal bridge and the Vandalia right of way over the creek reaches to near the north side of the Terminal bridge. There is a space upon this right of way between the two bridges which is unprotected at either bank. Upon the morning of the injury the three men had crossed the above track intersection and were approaching the

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Terminal bridge, which they intended to cross. Supposing that he was stepping upon a plank at the end of the Terminal bridge, the deceased mistakenly stepped into the east end of the open space between the two bridges. As correctly said by plaintiff in her statement of the case, he "was proceeding along or near the Terminal track, with the intention of crossing the Terminal bridge; it being dark, so that he could not clearly see where he was going, he fell into this hole."

[1] Several questions have been presented by counsel and examined by the court, but it is unnecessary here to treat but one proposition: Did the defendant (Vandalia) owe any legal duty to the deceased to guard the east end of this opening? The duty intended and necessary to be found is one due the deceased, and one due at the time of the injury and in connection with the place and circumstances thereof.

Plaintiff bases her contention that such duty existed upon the theory that defendant was a joint user with the Terminal of a common yards at the place of the accident. The law of Illinois, the place of this injury, is that joint usage of railway property involves certain duties of care by each railway toward the employés of the other. The limits of this rule seem to be that such a railway owes to such employés the duty of ordinary care for their safety while they are on its property in the discharge of their duties.

"Under the facts, as the jury must have found, the appellant owed the same duty to the servants of the Michigan Central Company, when crossing the former's tracks in the regular discharge of their duties, that it did to its own servants when crossing the same tracks." Ill. C. R. R. Co. v. Frelka, 110 Ill. 498.

"The evidence warranted the jury in believing that the inspection at these tracks was made in the regular course of business pursuant to the understanding of the two roads. Under these circumstances, plaintiff, while working as inspector for the Pere Marquette, was not a mere licensee, but was there by defendant's invitation, in the course of defendant's business as owner and possessor of the premises in which plaintiff's employer, under a business arrangement, was transacting its own business. The defendant, therefore, owed him a duty to exercise ordinary care." Arens v. Chicago Junc. Ry. Co., 159 Ill. App. 427.

To the same effect is a portion of a quotation made in plaintiff's brief from 1 White on Personal Injuries on Railroads, par. 229, as follows:

"Where different companies use the same track, depots, or yards, each company will be held liable for a failure to use ordinary care for the protection, not only of its own employés but also of those of the other company, rightfully on the premises, in the discharge of their various duties."

In other words, the use of the railway's property by the foreign employé must be in the necessary or natural performance of his work. Here each road owned its separate right of way, tracks, and bridges. None of deceased's duties required or naturally caused him to use the Vandalia property in the course of his work for the Terminal. No licensed usage thereof by him or other inspectors was shown, but, on the contrary, a usage of the Terminal, and not the Vandalia, right of way in this vicinity. At the time of the injury deceased was not knowingly or intentionally on or using the Vandalia right of way. In short, no general duty of his employment carried him onto the Vandalia right of way near this place; the particular duty which then engaged

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him did not carry him there, and had nothing to do with the Vandalia, and no right by user is claimed or shown, but the opposite. We conclude that no such duty to deceased from defendant as claimed existed.

[2] This conclusion is not shaken by the contractual relations between the two companies. Those relations were as follows: The Terminal Association is a corporation organized by various railways (including defendant) entering St. Louis for terminal purposes. Its stock is held in equal shares by these railways. Under a contract between it and the various railways they are given joint use of its properties; it is bound to receive, deliver, and transfer all of their traffic; they each appoint a member of its board of directors, which board governs the Terminal Company; they pay for such services a sum slightly in excess of the expenses, with a limited responsibility for deficits; three-fourths of the directors determine as to additions and betterments, if such require stock or bond issues or contributions from the railways; cost of replacement of destroyed property, beyond insurance, is to be borne by the railways; all subordinate officers and employés of the Terminal Company are subject to removal on request in writing by any of the railways, and for good cause shown. The relation of the Vandalia to the Terminal is, in legal terms, as a stockholder, and as a party contracting for the use of the services of that company. These relations constitute no basis for any tort liability for injuries to Terminal employés.

The judgment is affirmed.

BENTALL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5117.

WITNESSES ⟹396(3)—EXAMINATION—SURREBUTTAL.

Where defendant on cross-examination was asked if he had an identified conversation, and he not only denied having said the things to which his attention was directed, but gave his understanding of the conversation, and the government in rebuttal placed a witness on the stand who contradicted him, defendant on surrebuttal is not entitled to again give his version.

In Error to the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Jacob O. Bentall was convicted of aiding, abetting, counseling, commanding, and inducing another to refuse to register for military service, pursuant to Act May 18, 1917, c. 15, § 5, 40 Stat. 80, and he brings error. Affirmed.

T. E. Latimer, of Minneapolis, Minn., for plaintiff in error.

Alfred Jaques, U. S. Atty., of Duluth, Minn., for defendant in error.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

STONE, Circuit Judge. Writ of error from a conviction for aiding, abetting, counseling, commanding, and inducing one John F. Kas-

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sube to willfully fail and refuse to register for military service pursuant to section 5 of the act of May 18, 1917, entitled "An act to authorize the President to increase temporarily the military establishment of the United States."

Three errors are assigned. Two of these are the same in substance, and attack the sufficiency of the evidence to justify the verdict of guilty. The evidence has been carefully examined, and we have no doubt of its sufficiency to sustain the verdict.

The other error relates to the refusal of the court to permit defendant to answer a certain question asked of him on surrebuttal. While he was on the stand in his own defense he was cross-examined as follows:

"Q. Didn't the sheriff ask you if you had a man working for you that had not registered? A. He did.

"Q. Then you had that talk about the boy? A. John was not there at the time.

"Q. And did you say to the sheriff you didn't have a man working there who had not registered, and that there had been nobody working on your place that failed to register? A. I did not say that.

"Q. You did not say that? A. No, sir; I told him I had a boy; his father and this boy. The father was working there; the two of them came about the 3rd of July. They were working at my place at that time.

"Q. I am asking you whether you didn't say to the sheriff of Meeker county that there hadn't been anybody working on your place, farm, that summer, that failed to register? A. No, sir; I did not,

"Q. Then, if he claimed that you did say that to him, he is— A. He is mistaken, absolutely.

"Q. Then the sheriff asked you how it was that the rumor started that there was a man out there that was not registered? A. No, sir.

"Q. Do you remember of having said to the sheriff, in that conversation, that you had started that rumor to fool the government? A. No, sir.

"Q. But that he was too good a friend of yours, and you did not want to fool him, and that there was nothing in it? A. The boy had been—this boy who was working for us at the time had been—interviewed by the sheriff in the northern county from which he came, up near Richville. This is the way that happened—

"Q. What happened? A. The impression Mayor Konshak may have spoken of—this boy said a sheriff there had interviewed him, and he had evaded the question of his age for the purpose of some joke. What that was, I don't know, but they were sort of neighbors and he was joking with him.

"Q. I should think it was a joke. A. I did not say so; that is what the boy said about the former interview by a sheriff. And I said, 'How old a boy?' That was this boy, John McFadden. Then I said to Mr. Konshak, I would not do that which that boy did with the other sheriff—perfectly legitimate. I said to Mr. Konshak, 'You are a friend of mine, and I would not try to fool you as the sheriff up in the other county.'

"Q. Didn't you say to him you didn't start that rumor to fool the government, but you would not fool him; you are too good a friend? A. No, sir; did not."

The government, in rebuttal, placed the sheriff upon the stand, who testified as follows:

"Q. At that time did you have a conversation with him in regard to registration? A. I had.

"Q. Did you ask him whether there was anybody on his farm, or had been anybody on his farm, that failed to register? A. I did.

"Q. And what did he say? A. He said, 'No.' Of course, he said—when I asked him that, if he had any man on his farm, or his working man, which

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did not register, or if he had any under the age of registration age, that didn't register during the registration time, and he says, 'Yes, I have a couple of men working here for me; always thought they was going—something similar—I can't remember the exact words; he said something similar, if they would ask him he would say, 'No, I had men that didn't register;' and he says he didn't like to lie to me, and he says he had one which was too young and one which was too old; that is the reason he didn't register. Then I asked him if he ever had a man during that time that worked for him that did not register, and he said, 'No.'"

Upon surrebuttal, the defendant was asked concerning that conversation, which resulted as follows:

"Q. What was said at that conversation? A. Mr. Konshak—

"Mr. Jacques: Objected to, not being proper rebuttal; the witness having gone over the conversation on cross-examination, and denied he said what the witness said he said.

"The Court: I think the question was asked in direct examination whether he made certain statements, and he said he did not. Now, the sheriff was called simply to prove that he did make that particular statement. It doesn't seem to me it is proper rebuttal; what the conversation was would not be material. He has already denied making the statement specified in the question that was put to him. That is as far as it is necessary to go.

"Mr. Latimer: Exception."

We think the court made no substantial error in its ruling. The defendant had been asked on his cross-examination if he had a certain identified conversation. He not only denied having said the things to which his attention was directed, but went further and stated his understanding of what was there said. The purpose of the cross-examination was evidently solely to lay the ground for impeachment by proof that he had made the statement incorporated in the inquiry. That statement in substance was covered by the testimony of the sheriff in rebuttal. As said above, defendant not only denied this statement in the cross-examination, but he went further and gave his version of what was there said. How could he add to that situation? The jury had clearly his version and that of the sheriff. The question was objected to as not proper rebuttal, and that objection was properly sustained.

The judgment is affirmed.

NULOMOLINE CO. v. DICKINSON, District Judge, et al.

(Circuit Court of Appeals, Third Circuit. November 27, 1918.)

No. 2305.

INJUNCTION ⇐189—SCOPE OF RELIEF.

Where petitioner contended its invert sugar was of special and superior kind, one who unfairly obtained petitioner's formula, and from a faithless employé obtained the names of petitioner's customers, to whom he sold sugar made under the formula at a reduced price, will not be restrained from selling any kind of invert sugar to such customers, as petitioner asserted they desired only sugar having the characteristics of its brand.

Petition for Mandamus to the District Court of the United States for the Eastern District of Pennsylvania.

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Petition by the Nulomoline Company for a writ of mandamus against Oliver B. Dickinson, District Judge, to require the insertion of certain provisions in the decree entered by the District Court pursuant to the decision in Nulomoline Company v. Stromeyer, 249 Fed. 597, —— C. C. A. ——. Petition denied.

Chester N. Farr, Jr., of Philadelphia, Pa., for petitioner.

Michael J. Ryan, of Philadelphia, Pa., opposed.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This petition grows out of the decision in Nulomoline Co. v. Stromeyer (C. C. A. 3) 249 Fed. 597, —— C. C. A. ——. After that decision a decree was entered by the District Court for the Eastern District of Pennsylvania that was intended to carry out our directions, and no complaint is made of its provisions, except in one particular. The company asked, and the District Court refused, the insertion of the following paragraph:

"The said Julius Stromeyer is enjoined and restrained from at any time hereafter selling any products of invert sugar, manufactured in any manner or by any formulas whatsoever, whether those of the said Julius Stromeyer, or those used by the plaintiff company, or otherwise, to any customers previously the customers of the plaintiff company, whose names were disclosed to the said Julius Stromeyer by the said Maxwell Tausek, the plaintiff's former employé. * * *"

The present petition asks us to direct the court below to adopt the foregoing paragraph, or its equivalent. The company insists, that as Stromeyer, by his unlawful conduct with Tausek, has taken away certain of the company's former customers, he should be wholly and forever prevented from selling to these customers any invert sugar, no matter how, or when, or by whom, such sugar might be manufactured. In our opinion the authorities to which we have been referred (Witkop Co. v. Boyce, 61 Misc. Rep. 126, 112 N. Y. Supp. 874; s. c., 64 Misc. Rep. 374, 118 N. Y. Supp. 461; Witkop Co. v. Great Atlantic & Pacific Tea Co., 69 Misc. Rep. 90, 124 N. Y. Supp. 956; People's Coat Co. v. Light, 171 App. Div. 671, 157 N. Y. Supp. 15; Vulcan Co. v. American Can Co., 72 N. J. Eq. 387, 67 Atl. 339, 12 L. R. A. [N. S.] 102; Stevens v. Stiles, 29 R. I. 399, 71 Atl. 802, 20 L. R. A. [N. S.] 933, 17 Ann. Cas. 140; Empire Laundry Co. v. Lozier, 165 Cal. 95, 130 Pac. 1180, 44 L. R. A. [N. S.] 1159, Ann. Cas. 1914C, 628; Grand Union Tea Co. v. Dodds, 164 Mich. 50, 128 N. W. 1090, 31 L. R. A. [N. S.] 260), do not go as far as this, and we do not think the principles that underlie them support the petition.

The theory of the bill is that the company's secret process produces a kind of invert sugar so characteristic and so marked as to be superior to the product of its competitors. Nulomoline, although belonging to the class of invert sugars, is said to stand apart, and therefore a customer that orders it does not receive what he wants, if he is given another invert sugar. The gravamen of the charge is that Stromeyer unfairly obtained knowledge of the company's process, made Nulomoline thereby, and sold it at a lower price to certain consumers, who

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had theretofore been customers of the company; their names having been obtained by Stromeyer from the faithless employé. Presumably, what the customers wanted was a sugar that had the special characteristics of Nulomoline, and this they not only believed themselves to be getting, but they actually got, although under another name. This unfair practice has been forbidden by the decree, and we think the company is not entitled to the additional provision for which it asks in the paragraph quoted, which indeed amounts, not only to the future prevention of a wrong, but to the infliction of a punishment as a penalty for the past. Because Stromeyer has sold Nulomoline unfairly, and has thereby taken away (at least for the present) certain customers that wanted this product, we are asked to decree that he shall no longer sell to these customers invert sugar of any kind, made at any time, by any process, or by any person. Now, if all invert sugars were so much alike that one was practically identical with another, some support might be found in the cases for the proposition that Stromeyer should not be allowed to profit by the trade he had unfairly acquired; but, as we have already said, the company's theory is that Nulomoline is distinctive, so good that no other variety will take its place, and, if that be so, the company obtains adequate relief when Stromeyer is prevented from making and selling its peculiar product. If its former customers want Nulomoline, they can no longer get it from Stromeyer, and must go back to the company; but if they want Syrline, or some other sugar, from Stromeyer, we do not see our way to deny him the right to supply them. He has made Syrline for years, and has a right to sell it for what it is; but, of course, he cannot sell it as Nulomoline, nor can he make Nulomoline, and sell it as Syrline, in order to keep these particular customers or to gain others.

The proposed paragraph is too sweeping, and the District Judge was right in refusing to adopt it.

The petition is therefore refused.

ST. LOUIS MERCHANTS' BRIDGE TERMINAL RY. CO. v. MUNGER.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5116.

CARRIERS ⟸348(3)—PASSENGERS—INJURY—INSTRUCTIONS.

In an action by plaintiff, struck by defendant's engine at one of its passenger stations, after he had passed through the gates, which had been unlocked by the gateman, who announced plaintiff's train, etc., instructions on invitation to plaintiff to pass through gate, etc., *held* to correctly announce the law.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Carlton A. Munger against the St. Louis Merchants' Bridge Terminal Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

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T. M. Pierce, of St. Louis, Mo. (J. L. Howell, of St. Louis, Mo., on the brief), for plaintiff in error.

Marion C. Early, of St. Louis, Mo. (Edward E. Campbell, of Louisiana, Mo., on the brief), for defendant in error.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

STONE, Circuit Judge. This case, on writ of error from judgment for damages because of personal injuries, is here for the second time. See 246 Fed. 938, 159 C. C. A. 210. The facts and pleadings necessary to understand the point now presented are as follows:

Munger was struck by a Terminal Company engine at one of its passenger stations. The waiting room of this station opened upon an inclosed space, separated from the tracks by a high iron fence, with sliding gates, which could be locked. These gates were in charge of a gateman, who controls the movement of passengers through them. Munger was one of a crowd of passengers in the inclosure waiting to take a train. Upon its approach the gateman announced the train, passed through the passengers in the inclosure, unlocked the south gate nearest Munger, went through, leaving that gate unlocked, and almost, if not entirely, closed, passed to the other gate 30 feet distant, which he unlocked, but did not open, turned, and stood watching the approaching train. The testimony does not show who afterwards opened the south gate, through which Munger passed, but it is evident that it could have been done only by some passenger other than Munger. Munger was struck, not far outside this gate, by a rapidly moving engine, while crossing an intervening track toward his train.

The petition relied upon several acts of negligence, all connected with the operation of this engine. The answer was a general denial, and a plea of contributory negligence "in attempting to cross the railroad tracks in front of, and in close proximity to, a moving locomotive."

The proposition of error here presented is that the court did not properly submit to the jury the matter of "invitation" to Munger by the company to pass through the gates, and therefore onto the tracks. This matter of invitation arises as bearing upon the legal status of the parties at the time of injury.

The company requested the court to charge as follows:

"The court instructs the jury that, if you find and believe from the evidence that the gate through which the plaintiff went onto the platform carrying the two tracks was open by some unauthorized person not in the employ of the defendant, St. Louis Merchants' Bridge Railway Company, and the plaintiff was thereafter injured by going onto the south-bound track so close to an approaching engine as to render a collision inevitable and unavoidable, your verdict must be for said defendant."

It also complains that the court—

"prominently left the decision of the case by the jury to the negligence alone of the engineer in charge of the engine, and in disregarding the issue tendered in the pleadings by the plaintiff, as to whether or not there was an invitation to pass through the gates onto the platform, and in disregarding the defense and denial of such invitation, and in utterly disregarding the plaintiff's fail-

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ure to prove an invitation to pass through said gates, although pleaded in the petition."

Those parts of the given charge relating to the matter of invitation were as follows:

"The evidence here is that, about the time that train was due to arrive, an agent and servant of the defendant announced the train, and himself passed through the middle gate—two gates being in use, the south and the north gate; that he unlocked the gate, went through the gate, and out onto the platform in front of the gate. There is no controversy about that. He says that he latched the gate, but did not lock it. One witness says that he left the gate ajar, neither locking nor latching it. These are questions that you have to deal with: they are matters that concern you. He says that, after he walked out of that gate, he walked up the platform to the other gate and unlocked that. It need not be told you, nor anybody else who is an observer of things, that when the train came, and the opportunity seemed to be there presented for their reception upon that train, the people started. It is estimated that from 40 to 75 people were behind that gate when the train came. They started to go to take the train, as they were in the habit of going to that train, and, as I have said, a train that had been running there for years before this accident happened. Those are facts about which there is no controversy. * * *

"Something was said in the course of the argument, and in an instruction that I am asked to give you, about applying the rule that it was the duty of the passenger [this plaintiff] at that time to stop, listen, and look.

"The general principle of law is that one who goes to a railroad station, and purchases a ticket for a train due shortly afterwards, is entitled to the right of a passenger in crossing the track to board the train after it has been announced. A passenger who is required to cross a track on which a train is approaching, in order to board it, may rely on the invitation of the station agent to cross at a particular time as an assurance that it may be done in safety.

"It was the duty of the defendant to use care in seeing that passengers were not injured. If passengers go over, and it is known to the railroad company that they have to cross another track to get to the one on which the train stands, they have a right to assume that everything has been done to provide for their care, and under such circumstances the doctrine of 'stop, look, and listen' does not apply.

"I have stated this to you as clearly as I can. This plaintiff was there as a passenger. If that gate was unlocked and open, and the agent of the defendant announced the coming of the train, it is for you to say whether that was an invitation to this passenger, who was to board that train, that everything was safe."

We consider that the charge fairly presented to the jury the determination of whether the evidence showed an invitation to Munger to go through the gate. We are confident the evidence justified such a submission.

The judgment is affirmed.

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PARENT v. PICOTTE.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5106.

1. EQUITY ⟸293—PLEADING—AMENDMENTS.
Where complainant was entitled to no relief under the evidence, the denial of an amendment to the bill, at close of testimony, as to a certain matter, and changing the prayer for relief, was not error.

2. QUIETING TITLE ⟸10(1)—TITLE OF PLAINTIFF.
Plaintiff's suit to establish title to and regain possession of Indian lands allotted and patented to the defendant can be maintained only on the strength of complainant's title, and the weakness of defendant's title is immaterial.

3. INDIANS ⟸27(6)—INDIAN LANDS—ALLOTMENT.
Evidence *held* insufficient to show that complainant selected, and applied for as her allotment, Indian lands allotted to defendant.

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suit by Josephine Parent against Irene L. Simmons Picotte. From a decree for defendant, complainant appeals. Affirmed.

Thomas L. Sloan, of Washington, D. C., and H. C. Brome, of Worland, Wyo., for appellant.

Edward E. Wagner, of Sioux Falls, S. D., for appellee.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

STONE, Circuit Judge. Appeal from dismissal, upon the merits, of a bill by Josephine Parent to establish title and regain possession from Irene L. Simmons Picotte and her tenant of land allotted and patented from the Yankton Sioux lands.

Appellant claims that she is a Yankton Sioux mixed-breed; that she selected and applied for allotment of this tract in 1892; that defendant Picotte, to whom the land was allotted and patented, was not qualified to receive an allotment.

[1] At the close of the testimony appellant was denied an amendment to the bill. The object of this offer was, as stated in the printed argument, not "for the purpose of introducing new evidence, but in order that the complainant might receive appropriate relief upon the case as made by the pleadings and proof." The bill alleged a written application for allotment. The amendment sought to vary this to an allegation that it was written or oral. There was no testimony whatever of any oral application, so that this amendment would have been futile. The amendment also contemplated a change in the prayer. As the appellant was not entitled to any relief, this amendment would have been of no value.

[2] Counsel have discussed at length the weakness of the right of appellee to the land. The primary issue in a cause of this character is the strength of complainant's title. As we are unable to find that

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complainant has any rights to this land, we need not discuss the standing of the defendants in that regard.

[3] Appellant's rights involve two propositions: Was she entitled to an allotment; and, if so, did she select and apply for this tract of land. She must maintain both. A careful examination of all of the testimony shows the following as all of the testimony as to the selection and application for this particular tract. Mrs. Zallie Dripps, first cousin to appellant, testified:

"I know about Mrs. Parent making a selection of land for allotment. In 1892 Mrs. Parent came to my mother's home on the Ponca reservation; Charles Rulo and myself drove over to the Yankton reservation. Walter Archorn, grandfather of the defendant, it was through knowledge from him that we selected this land. We drove over to about where the description of this land we supposed was. My brother Charlie walked around. We had a spade and looked for the corners of the survey, and he found what he thought was the corner of this land, and he put two or three mounds there, and we went down to the agency. I left the application with the agent in charge. We stayed all night with my cousin, Susan Fredrick. Mr. Foster, I think, was in charge of the agency. He took the paper and told us this land was allotted, and he didn't think there was any use to put in an application, but he would look after it for her. He would see about it. I made the application in writing for Josephine Parent. For the southeast quarter—

"Mr. Wagner: I object that the application would be the best evidence.

"The Court: Yes.

"I have not seen the application since. I made a number of applications since, so I never made a search for it. No; I wasn't able to find the original application. The application was made in the spring of 1892, April or May. It was during the allotments were being made. Mr. La Rochelle told us that there was land unallotted, but the agent in charge told us it was all allotted. Mr. Foster said he would look after it and write us, but we never received a letter from him."

The agent testified that no such application could be found in the office files, where it naturally would and should be. No attempt was made at improvements upon the land until 1913.

In our judgment the trial court rightfully ruled that, as against the patent to appellee, no selection and application for this land was shown by the above proof.

The judgment is affirmed.

UNITED STATES v. FERNANDEZ.

(Circuit Court of Appeals, Fifth Circuit. November 18, 1918.)

No. 3293.

1. War ⇐5—Restrictions on Trade—Statute.

Where the United States libeled gold coin, on the ground that it was delivered for export and shipment and for the purpose of being taken out of the United States, in violation of Act June 15, 1917, and of the presidential proclamation of September 7, 1917, *held* that, as the proceeding fell within title 7 of the act dealing with exports, return of the coin on the giving of bond, etc., could not be allowed, under title 6, § 5, which is part of the general provision relating to seizure of arms, etc.

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2. APPEAL AND ERROR ⊂=1177(1)—REVIEW—REMAND.
Where gold coin was forfeited in proceedings under Act June 15, 1917, on the ground it was delivered for export outside of the United States, but it was ordered delivered to the claimant on his giving a bond conditioned that it would not be exported, etc., *held* that, though the provision for delivery on bond was unwarranted, the entire judgment will be reversed, to enable the trial court to pass on questions of law and fact under a proper construction of the statute.

Appeal from the District Court of the United States for the Southern District of Texas; William B. Sheppard, Judge.

Libel by the United States to forfeit $40,300 in gold coin, alleged to have been delivered for export and shipment, and for the purpose of being taken out of the United States, which was claimed by Jesus Fernandez. From a judgment of forfeiture, providing that the coin should be delivered to the claimant upon the giving of a bond, conditioned that the coin should not be exported, etc., the United States appeals. Reversed and remanded.

John E. Green, Jr., U. S. Atty., of Houston, Tex.
Maco Stewart, of Galveston, Tex., for appellee.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. Libel by the United States government to forfeit $40,300 in gold coin, alleged to have been "delivered for export and shipment, and for the purpose of being taken out of the United States," in violation of title 7 of the Act of June 15, 1917, c. 30, 40 Stat. 225, and of the President's proclamation of September 7, 1917. Judgment was that the coin be forfeited, but that it should be delivered to the claimant, Jesus Fernandez, upon the giving by him of a bond, conditioned that it would not be exported or employed contrary to law.

[1] The judgment is evidently based upon section 5 of title 6 of the cited act. The subtitle of title 6 is "seizure of arms and other articles intended for export." The title deals with "arms and munitions of war, and other articles" intended for export, in violation of laws for the protection of neutrality. The law is general and permanent in character. Title 7 deals with exports "during the present war." The words "or other articles," as used in section 1 of title 6, while literally all-inclusive, should be construed with reference to "arms and munitions of war," used in connection with them, and should be limited to articles exportation of which is at all times unlawful, or to be made so by proclamation of the President. The reference in section 6 of title 6 to the action of the President "as provided in section 1 of this title" might (no action being there provided for) present difficulties in applying title 6, but the conclusion reached obviates necessity for construing that section.

Title 7, the only law under which a forfeiture could be had in this case, does not provide for the giving of a bond and the release of the property.

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[2] Instead of amending the judgment by eliminating the provision with reference to the giving of the bond, the entire judgment will be reversed. It is possible that the forfeiture would not have been adjudged, except as the predicate for a bond. We prefer that the questions of law and fact involved in the forfeiture, under the assumption that title 7 is alone applicable, should be primarily determined by the trial court.

The judgment is therefore reversed, and the cause remanded.

Reversed and remanded.

LEITNER et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 15, 1918.)

No. 3208.

APPEAL AND ERROR ⟸554(3)—BILL OF EXCEPTIONS—NECESSITY.

Where there was no bill of exceptions, and no error appeared in the record, judgment must be affirmed on writ of error.

In Error to the District Court of the United States for the Western District of Texas; W. R. Smith, Judge.

Proceeding between William Leitner and another and the United States. There was a judgment for the United States and Leitner and another bring error. Affirmed.

Hugh R. Robertson, U. S. Atty., of San Antonio, Tex., and W. H. Fryer, Asst. U. S. Atty., of El Paso, Tex.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. There is no bill of exceptions in this case, and we discover no error in the record.

The judgment is affirmed.

NATIONAL METAL MOLDING CO. v. TUBULAR WOVEN FABRIC CO.

(Circuit Court of Appeals, First Circuit. November 14, 1917.)

No. 1288.

PATENTS ⟸328—INFRINGEMENT—FLEXIBLE ELECTRICAL CONDUIT.

A modified structure of defendant *held*, in a supplemental bill, not to infringe the Osborn patent, No. 652,806, for flexible electrical conduit, as construed in the original case.

Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Suit by the National Metal Molding Company against the Tubular Woven Fabric Company. On supplemental bill. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 248 Fed. 526.

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Charles F. Perkins and William K. Richardson, both of Boston, Mass. (Carroll L. Perkins, of Boston, Mass., on the brief), for appellant.

Livingston Gifford, of New York City (William Quinby, of Boston, Mass., on the brief, for appellee.

Before DODGE and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. The questions in this case arise under a supplemental bill, and they relate to flexible electrical conduits. The original case concerned the Osborn patent, No. 652,806, in which the question of its validity was at issue and the question of infringement as well. The patent was sustained, and it was held that the defendant's conduit, as then manufactured, infringed certain of its claims. The defendant thereafterwards modified its conduit, and, as claimed here, thereby eliminated the infringing feature.

In the original case there was an opinion by the Circuit Court of Appeals (227 Fed. 884, 142 C. C. A. 408), sustaining the patent and holding infringement, and the case was remanded to the District Court for further proceedings not inconsistent with the opinion, where there was an interlocutory decree in which the defendant was enjoined from constructing, using and vending any article embodying the invention described in the claims of the Osborn patent numbered 1, 2, 3, 4, 5, 6, 9, 10, 11 and 12.

Subsequently to such decree, and to the alleged modified structure of the defendant, the plaintiff instituted a contempt proceeding based upon the allegation that the newly made conduit did not differ in structure from the one originally complained of. The District Court declined to adjudge the defendant in contempt upon the ground that the character of the alleged new infringing structure raised a new question of infringement, and that the proper mode of procedure was upon a supplemental bill, and the motion that the defendant be adjudged in contempt was continued to await such proceeding, and in the event of such proceeding not being instituted within thirty days the motion for contempt was to be dismissed. This line of procedure was approved by the Court of Appeals (239 Fed. 907, 153 C. C. A. 35), upon the theory that it was properly open to the District Court in its discretion to proceed summarily upon the ground of contempt if it deemed the new structure to be only colorably different from the one formerly at issue, and if it deemed a supplemental bill as the method best adapted to do justice, that it might direct the question involved to be presented by supplemental bill.

It results from this that the particular question before us is whether the defendant's modified or changed article of manufacture is an infringement of the Osborn claims enumerated, and as sustained and construed by the Court of Appeals in the original case. It becomes necessary, therefore, to consider the theory upon which the Osborn patent was sustained, and the intended scope of the claims involved as explained in the decision sustaining the patent and holding infringement.

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The opinion of Judge Brown under the supplemental bill in the court below is so exhaustive, analytical, and convincing, not only in respect to what was decided by the Court of Appeals, but in respect to the prior art and the new question of infringement, that very little remains to be said. It may be observed, however, that the fundamental and leading idea of the decision below was that the Osborn patent and structure contemplated different materials, one to be semiflexible and the other flexible, and that while the Osborn patent device embodies two elements only, that "the defendant's structure is of three, all essential, and all co-operating under a principle of combination different from that of Osborn's structure," the defendant's third element, consisting of the step involved in stiffening its loosely woven and soft tube of one material by successively immersing it in waterproofing and fireproofing compounds. The defendant in argument and on its brief deals with its new conduit as embodying only two steps; first, that of manufacturing through loosely weaving on a circular loom, using for its wefts and warps a single material consisting of cotton—that of soft twist cotton yarn—and the second step as involving the saturation of the conduit of the first step with waterproofing and fireproofing compounds. But the question whether the defendant's completed conduit involves two or three steps or elements is quite immaterial, if it results that its means of manufacture and its means of properly stiffening are substantially different from the means described and employed by Osborn.

Now, what did the Court of Appeals decide in respect to the Osborn patent and its infringement? It is apparent that that decision was based upon the idea that Osborn, in describing his device, was for his helix, dealing with a material sufficiently flexible to yield to tube formation, and sufficiently flexible to yield to turns and angles when subjected to use, and yet sufficiently rigid and nonflexible as to be noncollapsible under such use, and that for his material to resist longitudinal strain and extension, that he was dealing with a pliable or flexible material so interwoven or interconnected with the turns of the semiflexible helix as to accomplish the desired result. Indeed, Osborn, in his specification, describes the term "interwoven," as employed, as contemplating association of the binding material with the outer and inner faces of the circumferentially extending elements or with the spaces between the same, to impart strength to the structure in a longitudinal direction, and for the pliable or flexible material used to bind or lock the convolutions together he enumerates thread, yarn, wire or any similar material lending itself to being readily interwoven with the semiflexible element. He speaks of the convolutions of the helical coil form, as it were, the woof threads, or elements of the fabric, and of the elements of pliable material extending longitudinally as constituting the warp threads or elements, and he speaks of the two series of elements as being interwoven to form as a whole a tubelike structure or fabric possessing a necessary resistance to collapsing and the necessary longitudinal rigidity, while being readily flexed due to the relative movement permitted between the adjacent turns or convolutions. And he says:

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"My structure thus comprises, in effect, a series of woofs extending circumferentially, and a series of warps extending transversely thereto to interlock and bind the same together into a tubelike structure."

The means thus described necessarily require, in the manufacture of the article intended, different kinds of material, or at least materials performing different functions, and it is plain that the original decision of the Court of Appeals sustaining the patent was alone upon the idea of the conception of such means, and a description of such a structural combination of the materials, as would accomplish the desired result, and not permit of the removal of the helix with the consequent loss of its insulating qualities and its useful circumferential rigidity.

The defendant in its new conduit, so far as its structure, or structural step, is concerned, does not at all employ the idea of material sufficiently flexible as to permit of being bent or twisted into spiral form and of yielding sufficiently to permit of use around the angles of walls and ceilings, and yet sufficiently rigid to be noncollapsible under such use, and so adjusted as not to permit of the removal of the helix. The defendant in its new conduit apparently aims to accomplish all these results through substantially different means. Quite independent of the element of stiffening, so far as the structural step is concerned, it takes the old principle involved in circular loom weaving, which produces tubing like that of the garden hose, and using a single material consisting of soft absorbent cotton warps and wefts, and working quite within the scope of the old art, produces a soft and flexible tube or conduit which it subjects to treatment by immersing it first in waterproofing, and second in fireproofing, compounds. The compounds, being in a melted state, are applied to the exterior without penetrating to the interior, and when cooled bind the warp and wefts together, thereby stiffening them against lateral pressure and collapse, and thereby uniting them against longitudinal strain; and these results of stiffening and strengthening are thus accomplished without loss of the required flexibility, together with the result that there is no helix susceptible of being removed.

It is true that the Court of Appeals alluded to fireproofing and waterproofing compounds in connection with the Osborn patent; but it is not understood that the allusion was to compounds, as an element of the Osborn invention, but to something old in the art, bearing upon the question whether Osborn's was an invention for an electrical conduit and something which might, through implication, be read into the patent as old means contemplated for insulating purposes. Thus the observation of the Court of Appeals in this respect was quite independent of the idea of the stiffening means and elements described and included in Osborn's invention and structure.

Neither the patent nor the opinion in the original case deals with the disparity between the sizes of the wefts and warps as an essential element of the Osborn invention; nor does Osborn in his invention make any point in respect to either the weft or woof strands being susceptible of waterproof or fireproof absorption. Therefore, the question of infringement under the supplemental bill cannot be made to turn upon such grounds.

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In Osborn there is no hint suggesting the employment of liquid compound materials, which, when applied and cooled, should perform the function of stiffening a woven cotton tube to be used as a conduit in electric wiring, but not to the degree of excluding the necessary flexibility, and yet to the degree of creating a rigidity sufficient to prevent collapse when the tube should be subjected to use; nor was there any suggestion that compounds so applied would perform the function of creating the strength required to resist longitudinal strain.

The required stiffening of the Osborn conduit is inherent and is perfected in Osborn's contemplated structure, without any regard whatever to subsequent treatment by compounds as a stiffening element, while in the defendant's new conduit the required stiffening is not at all involved in the structural process, but results altogether, or at least in every substantial sense, through subsequent treatment by old and different materials from those described and used by Osborn for structural stiffening.

In conclusion, we think the defendant produced its new conduit by combining elements old in the art under conditions which differ substantially from Osborn's conception, and by employing means which are quite independent of the means and combination which Osborn described. Osborn was not a pioneer inventor, and we do not think his claims should be so broadly construed as to include the defendant's new conduit.

The decree of the District Court is affirmed, with costs of this court.

DOWSE v. FEDERAL RUBBER CO. et al.

(District Court, N. D. Illinois, E. D. December 6, 1918.)

No. 973.

1. PATENTS ⟸93—OWNERSHIP—INVENTIONS OF EMPLOYÉ.
Whether a patent for an invention made by an employé belongs to him or the employer depends upon his position. If the work for which he is paid is done under direction of others, any invention he makes outside of such work is his own; but if he contracts to devote his time and services to making improvements in articles made by the employer, a patent for any such improvement belongs in equity to the employer.

2. PATENTS ⟸93—OWNERSHIP—INVENTION OF EMPLOYÉS.
A patent for an essential and valuable improvement in rubber tires for automobiles, developed by employés of a rubber company as the result of many and various experiments, and for which patent was issued to the president and general manager, who had sole charge of the company's business and was the second largest stockholder, *held*, under the facts shown, to be the property of the company.

3. PATENTS ⟸328—VALIDITY—OWNERSHIP—RUBBER TIRE.
The Dowse patent, No. 1,174,238, for a method of reinforcing automobile tires, *held* valid, and to be in equity the property of the Federal Rubber Company in whose plant the invention was developed.

In Equity. Suit by Byron C. Dowse against the Federal Rubber Company and others. Decree for defendants.

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Albert H. Graves and Cyril A. Soans, both of Chicago, Ill., and Louis Quarles and Charles B. Quarles, both of Milwaukee, Wis., for plaintiff.

George T. Buckingham and Edward Rector, both of Chicago, Ill., Chester H. Braselton, of Dayton, Ohio, and George T. May, Jr., and Harry W. Lindsey, Jr., both of Chicago, Ill., for defendants.

SANBORN, District Judge. There are three defendants, the Federal Rubber Manufacturing Company, a Wisconsin corporation, formerly located at Cudahy, Wis., the Federal Rubber Company, a Massachusetts corporation, which succeeded to the manufacturing company, and the Federal Rubber Company of Illinois, the selling agent of both the other corporations successively. The latter was the only original defendant; the others being later brought in.

The suit involves both the validity and ownership of patent No. 1,174,238, of March 7, 1916, issued to B. C. Dowse, upon a method of reinforcing automobile tires known as the "double cable base." The patent was applied for in Dowse's name, while he was employed by the manufacturing company, and issued to him after he left it. The main question is whether the patent equitably belongs to the corporation, or whether it has merely a shop right. Plaintiff relies on Hapgood v. Hewitt, 119 U. S. 226, 7 Sup. Ct. 193, 30 L. Ed. 369, on the question of ownership, and also contends that the shop right has lapsed because it was incapable of transfer from the manufacturing company to the rubber company. An assignment from the manufacturing company to the rubber company was made May 12, 1916, purporting to assign all its property, expressly mentioning patents, patent rights, and shop rights. At this date the Dowse patent had been issued to him. Dowse sold his stock and left the manufacturing company December 8, 1915.

The patent relates to the means for retaining the tire upon the wheel rim; also for prevention of tire destruction. It is unnecessary to consider it in detail, because the chief question in the case is patent ownership, and the equitable claim of the rubber company to an assignment. It may be said, however, that it covers the wire cable imbedded in the base of the tire which holds the tire firmly on the rim. There is a presumption of validity. Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017. The tire has been quite a successful one. The patent has great utility. It should be sustained in both its claims.

[1]The all-important question is Dowse's relation to the tire-manufacturing business. If he was only a hired man, taking orders as to his work from another officer or employé, the invention belonged to him, leaving only an implied license or shop right to the corporation, and this right was only personal to it, incapable of being assigned. The Supreme Court thus states the rule:

"An employé, performing all the duties assigned to him in his department of service, may exercise his inventive faculties in any direction he chooses, with the assurance that whatever invention he may thus conceive and perfect is his individual property." "That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer. Whatever rights as an individual he may have had in and to his inventive powers, and that which they are able to accomplish, he has sold in advance to his employer." Solomons v. U. S., 137 U. S. 342, 11 Sup. Ct. 88, 34 L. Ed. 667.

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It thus becomes necessary to examine Dowse's relation to the corporation. He did not expressly contract as a part of his duties to design new tires; but if he did so agree in substance, and was more than a mere employé, having the main responsibility to make the business successful, then he should be compelled to assign the patent. In this connection Judge Buffington's statement of the governing rule is pertinent:

"The obligation of an employé to assign to an employer an invention made in the course of his employment does not arise from the existence of the relation of employé and employer alone, but there must be in addition a contract to assign. Thus, in Dalzell v. Dueber Mfg. Co., 149 U. S. 320, 13 Sup. Ct. 888, 37 L. Ed. 749, it is said: 'A manufacturing corporation, which has employed a skilled workman, for a stated compensation, to take charge of its works, and to devote his time and services to devising and making improvements in articles there manufactured, is not entitled to a conveyance of patents obtained for inventions made by him while so employed, in the absence of an express agreement to that effect. Hapgood v. Hewitt, 119 U. S. 226, 7 Sup. Ct. 193, 30 L. Ed. 369.'" Pressed Steel Car Co. v. Hansen (C. C.) 128 Fed. 444.

[2] So the real test is whether Dowse occupied such a relation to the corporation that he was its alter ego, in such a capacity that it is only consistent with good faith that he should recognize its ownership of the patent issued to him. Can he, without breach of his obligation toward his late employer, insist upon retaining and enforcing against it the patent he took out? Worthington Pumping Engine Co. v. Moore, 19 Times Law Rep. 84.

The facts from which defendants argue that Dowse was not a mere employé, but the principal and directing officer of the corporation, are as follows:

B. C. Dowse has been engaged for many years past in manufacturing rubber tires. Just prior to 1911 he was president of the G. & J. Tire Company engaged in such manufacture. Before that he had had extensive experience with other tire manufacturers.

J. N. Willys, of Toledo, Ohio, is, and was in 1911, president of the Willys-Overland Company, engaged in automobile manufacturing and selling. For a number of years his company had been purchasing tires from concerns with which Dowse was identified. He had known Dowse for over 20 years. He had the fullest confidence in Dowse as an individual and in his knowledge of the tire-manufacturing business. Willys, personally, had had no experience in tire manufacturing in 1911. Early in 1911 these two men decided to become jointly interested in a rubber tire manufacturing enterprise. In March they arrived at a general understanding. An investment of about $1,000,000 was contemplated. A plant would be purchased. Willys was to advance the principal amount of money. Dowse was to be president and general manager of the company to be formed, and to operate it; the running of the business was to be left to him. Willys was to furnish 80 per cent. of the money, and Dowse 20 per cent.; Willys to "carry" Dowse for the latter's share.

The plan was put in prompt execution. Dowse negotiated the purchase of a plant of the Federal Rubber Company, a Wisconsin corporation, at Cudahy, Wis. The purchase price, plus incidental expenses,

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amounted to about $125,000. Title to the property was taken by James E. Kepperley, as trustee. Kepperley was attorney for Willys. Thereupon, in April, 1911, a new Wisconsin corporation, namely, the Federal Rubber Manufacturing Company, was organized, and the property was turned over to it. The capital stock of this corporation was $1,000,000 (all common). The property was conveyed to the new company in payment of $250,000, par value, of stock. Ultimately all of the capital stock was disposed of at par; over 90 per cent. of it being taken up on behalf of Willys and Dowse, and the remainder going to a few stockholders, some of whom like Dowse, were "carried" by Willys.

In so far as the financial relation of Dowse to the company and to Willys is concerned, the following is substantially correct: Dowse put up in cash $11,050. When the plant, purchased for approximately $125,000, was turned over to the manufacturing company for $250,000 value of stock, Dowse received $50,000, par value, of that stock as a bonus or promotion stock, and received his 20 per cent. of the remainder, after a few shares—his 20 per cent. of the small amount allotted to Kepperley—had been deducted. At the end of the business relationship, Dowse, on his investment of $11,050 cash, owned outright of the common stock $72,200, and was being "carried" by Mr. Willys for $164,000. On each issuance of stock for which Mr. Willys supplied the entire amount of cash, 20 per cent. was issued to Dowse, who gave his note for the purchase amount to Willys and made the purchased stock collateral to the note.

The original $1,000,000 of common stock was all issued and paid for in the manner above stated by the last of June, 1912. It then became necessary to have more capital, and an additional issue of $1,000,000 preferred stock was authorized to be sold at par. Ultimately Willys bought somewhat more than 95 per cent. of this.

On August 31, 1911, Messrs. Dowse and Willys made a written agreement showing their basic relation, which contained, among other things, the following language:

"Whereas, party of the second part is a competent rubber manufacturer, with experience extending over a period of 15 years, and has been induced to take hold of and manage the said Federal Rubber Manufacturing Company upon the promise and undertaking that party of the first part would furnish the major part of the finances necessary to organize and operate said corporation, and party of the first part has been induced to agree to furnish a large percentage of finances and to enter into said enterprise with the distinct understanding that party of the second part would affiliate himself and remain with said enterprise and give his entire time and attention thereto. * * *"

Willys testified (and it is not denied by Dowse) that at the inception of their relation Dowse agreed that he would take full and entire charge of the contemplated enterprise and would "give his entire time, thought, and attention wholly and solely to this particular business."

When the manufacturing company acquired the Cudahy plant, Dowse selected his own organization, chiefly of men who had been identified with him, took charge of the business of the new corporation, and thereafter was president and general manager. Initially his

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salary was $10,000 per year, and in December, 1912, it was raised to $12,000 per year.

As president and general manager of this corporation Dowse had sole, full, exclusive, and complete control of its operation and management. Willys relied on him absolutely. Thus Kepperley says:

"I had no means of knowing as to the actual handling of that plant there because, as I have repeated two or three times, I knew nothing about rubber manufacturing. I knew nothing about the business, and relied entirely upon Mr. Dowse, as those were Mr. Willys' instructions to me—that Mr. Dowse was in charge of that plant and was the one upon whom we were relying. I was largely there in a legal capacity."

And Willys says:

"I was to advance the principal amount of money and he was to run the business. I was to leave the running of the business practically to him. He was to be general manager and president of the company, and operate it. I was very busy engaged in my own business, and didn't have any time or any knowledge about the tire business, and of course I appreciated that he did, so naturally I did just the same as I have in lots of other enterprises—got hold of some man who had the knowledge, put some money in with him, and went ahead."

On December 10, 1915, Dowse sold his stock to Willys for $90,000, yielding him a net profit of approximately $60,000, resigned as president and general manager, and retired from the corporation. There was some dissatisfaction with Dowse's management, but it is unnecessary to notice it, or pass upon the merits of Dowse's claim that he was forced to resign.

The business of making automobile tires, in 1911, was in a rapidly developing state, and many and successive improvements in construction details were being made by all manufacturers in that product. The former company which had operated the Cudahy plant, at the time it sold out, did not make, and for a year before the sale had not made, automobile tires, and therefore the manufacturing company proceeded to develop a tire-manufacturing business "from the ground up." Several different kinds and types of tires were manufactured at first, and, on being tried, changes were successively made in them from time to time, and various improvements resulting from experiment and experience succeeded each other, as a part of the evolution of the new company's tire product. This enterprise, undertaken by Dowse and Willys, with the practical details left wholly to the former, was inherently one of development of a satisfactory product, and on Dowse, and the operatives selected by Dowse, rested the practical duty of that development.

During the course of this development, Dowse and his organization began the manufacture of tires of the "straight wall" or "straight side" type. This was a type that then was fast coming into the popularity that now makes it the standard construction. Such a type of tire was a necessity to meet the then existing demands of the trade. The construction adopted included in the "bead filler" of the tire base a single "cable" of five turns of piano wire. This is called in the record the "single cable base" tire.

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After these straight wall tires had been put out and widely sold and distributed, it developed that many of them were unsatisfactory, because of their tendency to blow off the rim and also to pinch the inner tube. Complaints of this began coming in through the sales department in the latter part of 1912, and by the early part of 1913 the situation had become acute. Dowse, F. Haskell Smith, factory manager, his assistant, Frank, Githens, sales manager, Thompson, in charge of the laboratory, and all the other important men in the construction and sales organization, were greatly concerned over this situation, and there was an active and earnest effort on the part of every one to locate the trouble, and to find a remedy for it. The matter stood as a manufacturing impediment in the course of the development essential to the enterprise, and naturally every one concerned in the production sought to find the channel of escape from the difficulty. Meanwhile the manufacture of this straight wall type of "single cable base" tires was almost suspended. It ran down from 4,075 tires in the month of January, 1913, to 1,397 in the month of April, 1913, and to 1,173 in the month of May, 1913, both of which last months are at the height of the tire-manufacturing season. Indeed, the situation was so acute that Dowse, by his own account, was unable to sleep at night because of the worry thereby occasioned.

Some time in the month of May, 1913, there was evolved and constructed in the plant, as the outcome of the many and various experiments, tests, and conferences, a tire construction which proved to be a solution of this manufacturing problem, and this construction is known as the "double cable base." This differed from the former construction only in that there were two cables, instead of one, placed in the bead filler in the tire base. This "double cable base" construction was put in regular production May 14, 1913, and from thenceforth became the standard tire product of this plant, and so remained during the entire business career of the manufacturing company, and afterward, in the same plant, of its successor, the rubber company.

It appears from Willys' testimony that in January, 1913, he went to Europe, returning about April 30th, and that he remained in America until about May 21st, when he again left for Europe. Shortly before his departure he visited the plant at Cudahy, and then it was, according to his recollection, that he learned of this double cable base development. It was represented to him as something on which the business could be greatly extended, as a great improvement, one that had overcome their trouble, and so, as Willys puts it, "* * * when they came along in May and had this thing, and I had a big investment there, I naturally put in a lot of money to back up that investment." It appears from the record that on May 22d Willys put up $247,000 for more of the preferred stock.

Dowse himself states in effect that he extolled the merits of this improvement to Willys as "the best thing ever produced for holding tires on the rim," though he does not know whether it was at this precise time.

Willys returned from Europe in September, 1913, and found the tires to be on the market, in fact, in use on the Willys-Overland cars,

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and during the next month he purchased and paid for approximately $125,000 of preferred stock, which exhausted the issue.

In the autumn of 1913, after this new bead construction had been practically tested and found to produce excellent results, the company embarked upon an advertising campaign. It adopted the name "Federal Double Cable Base" as a trade-mark for tires having the improved base construction, and stamped that name upon the tires. It also proceeded in a large way to advertise the tires of this construction under the name "Federal Double Cable Base." This advertising had for its central feature pictures of the two-cable construction, and the nub of the whole advertising campaign was that this particular construction was an exclusive feature of the Federal Rubber Manufacturing Company. Backing up this advertising, effort was made to protect the trade-mark, and to make truly exclusive by patent the feature of construction so heavily advertised.

The advertising designs, which are in evidence, are shown to have been evolved and planned by the advertising staff of the company, and to have all received the approval of Dowse, and to have been used with his specific knowledge. This advertising, in circulars, newspapers, and magazines, was extensive, expensive, and widespread; hundreds of thousands of dollars of the corporate funds being spent on it while Dowse remained president of the company. It held out, and was intended to hold out, to the dealers and to the public that this particular construction, identified under the name "Federal Double Cable Base," was the exclusive feature of the manufacturing company, to be found only in its tires.

The facts relating to the patent application are that Ward, the secretary, first took up the trade-mark matter in a letter to Munn & Co. on October 14, 1913. This letter stated that it was desired to protect the company by "letters patent or copyright" on the name. The New York attorneys replied that a trade-mark registration on this name was probably impossible to obtain, because it was descriptive, and after some correspondence the subject was dropped, pursuant to Ward's letter of October 28th. On January 5, 1914, Ward, for the corporation, again wrote the New York attorneys, this time as to the possibility of obtaining patent on "our new tire construction." With this letter there was inclosed an advertising circular of the corporation showing the construction. Further correspondence ensued, and on March 10, 1914, Dowse in person called on the New York attorneys and confirmed the instructions to proceed with the patent application and effort at trade-mark registration. Dowse took the matter up as president of, and as representing, the Federal Rubber Manufacturing Company.

In due course, and after correspondence, the patent and trade-mark applications, respectively, which had thus been taken up as a company matter, and as part of a single transaction, by Dowse as president of the company, with the attorneys, were prepared and filed; the patent application, which under the law had to be in the name of an individual, being signed by Mr. Dowse personally, and the trade-mark application, which had to be in the name of the company, being signed

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by him as president. The patent application was filed in the Patent Office, June 16, 1914, and the trade-mark application was filed June 26, 1914. For the fees and charges for both of these filings, as well as the attorneys' services in connection therewith in the amount of $105, bills were rendered by the attorney to the corporation, and were paid by its check dated June 13, 1914.

In advertisements of the company of the "double cable base" tires, beginning with the April issue of "Motor," 1914, just after Dowse's visit to the patent attorneys in March, the words "Patent Applied for" are printed in conjunction with the illustration of the "double cable base" feature, and in the June issue of this magazine (standing as a typical advertisement of the company) the same "Patent Applied for" legend appears in the same conjunction with the representation of this special construction, again represented by the text to be an "exclusive" feature.

The testimony taken at the trial proves that the charges of the New York attorneys thus paid by the company were never charged against Dowse, or paid for by him, but remain an item of expense on the corporation's books to this day. Dowse and Ward testified generally to the effect that in December, 1915, after Dowse resigned, Dowse said that these patent expenditures which the company had paid were to be charged to him personally on the company books, but it appears that this was not done.

It appears that Mr. Dowse knew of these advertisements. There were also conversations with him to the effect that, if another company undertook to use the double cable base, they would have to pay royalty to the manufacturing company. Nor did the plaintiff ever claim ownership of the patent application until after his resignation from the offices of president and general manager.

It thus appears that plaintiff was not a mere employé, under the direction of a superior officer. During the whole period he was president and general manager, and one of the directors. The others were Githens and Kepperley, the former coming with Mr. Dowse from the G. & J. Company, and the latter representing the Willys interests. The plaintiff, therefore, was practically the corporation, taking orders from no one. His executive authority and control were practically exclusive. He could be dismissed only by the board of directors, and then only by consent of Mr. Githens, who came there with him, until Willys should exercise his majority stock control by changing the board. It is true that Willys had the ultimate power of corporate control, and for the time being this authority was vested solely in Dowse.

While by the law of Wisconsin he was not strictly a trustee for the corporation, only an agent, yet by reason of his relation to Willys, and the great importance of the new cable base to the corporate business success, his position was that of a quasi trustee, such as to make it clear that the patent was taken out by him for the corporation. Had the invention affected only a detail or unimportant part of the corporate business, it is probable that plaintiff would be regarded as its owner, both legal and equitable, as in American Stoker Co. v. Underfeed Stoker Co. (C. C.) 182 Fed. 642; Id., 188 Fed. 314, 110 C. C. A.

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292. Here the patent involved the very life of the corporation. It was developed by the whole corporate force as something absolutely necessary, under the supervision of the president, who was straining every nerve to make good. It entered vitally into the very business life of the company, and was finally issued while plaintiff was still drawing his salary, although no longer in control. Under the circumstances it would be grossly inequitable for plaintiff to retain title, and the rule of Hapgood v. Hewitt and the cases following its rule does not apply. In the ordinary case a shop right to the corporation will satisfy all equitable demands; but here the new company's title to that right would be quite doubtful. A case closely in point is Worthington Pumping Machine Co. v. Moore, supra.

[3] There should be a decree sustaining the patent, and that the federal company is the equitable owner, entitled to have an assignment, with costs against plaintiff.

PRESSED STEEL CAR CO. v. UNION PAC. R. CO.

(District Court, S. D. New York. December 17, 1918.)

1. PATENTS ⟸212(1)—LICENSES—EFFECT.
Where plaintiff, the owner of a patent for railroad cars, entered into an agreement with a railroad company providing that it might manufacture cars covered by the patent on payment of a certain royalty per car, or cause them to be built, *held*, that the railroad company was not required to pay royalty on cars bought from another company, which had a nonexclusive license to make and sell cars embodying the invention.

2. DAMAGES ⟸40(2)—PROFITS—SPECULATIVE PROFITS.
Where a contract between plaintiff, the owner of a patent, and a railroad company, which gave the latter the right to build cars covered by the patent, provided that plaintiff should have a preference over other car builders for the construction of cars covered by the patent, *held* that, on the railroad company's breach of the preference agreement, plaintiff could not recover damages, for the profits which plaintiff might have made are wholly speculative.

At Law. Action by the Pressed Steel Car Company against the Union Pacific Railroad Company. Judgment in part for plaintiff, but denying in part the recovery sought.

See, also, 241 Fed. 964.

The parties entered into a contract, the essential features of which are as follows:

"Agreement made the 1st day of November, 1905, between Pressed Steel Car Company, a corporation * * * (hereinafter called the Car Company), of the first part, and Union Pacific Railroad Company, a corporation * * * (hereinafter called the Railroad Company), of the second part;

"Whereas, the Car Company is the owner of certain patents covering various devices or designs used by the Railroad Company in the construction of 'common standard' freight cars; * * * and

"Whereas, the Railroad Company admits the use by it in the construction of its 'common standard' freight cars of certain designs and patented devices owned by the Car Company, * * * and admits the validity of the patents embodied therein, and has agreed not to evade or attempt to evade said patented devices * * * as embodied in its 'common standard' freight cars; and

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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"Whereas, the Railroad Company is desirous of making an arrangement with the Car Company whereby it may build or cause to be built, under royalty, freight cars containing such designs and patented devices for its own use and the use of the various railroad companies now or hereafter owned or controlled by it by the ownership of a majority of the capital stock herein or otherwise, or leased or operated by it, but not for sale; and

"Whereas, the Railroad Company has since the 1st of June, 1904, built and caused to be built 'common standard' freight cars in which the devices covered by said patents of the Car Company have been used:

"Now, therefore, * * * it is agreed as follows between the parties hereto:

"First. From the date of the execution of this agreement until the 21st day of December, 1914, the Railroad Company shall have a right and license to construct or have constructed for its own use and the use of the various railroad companies now or hereafter owned or controlled by it by the ownership of a majority of the capital stock therein or otherwise, or leased or operated by it, and to use and to permit to be used by and upon the lines of the various railroad companies so owned, controlled, leased, or operated by it, freight cars containing the designs and devices covered by patents now owned or controlled or which may during the said period be acquired, owned, or controlled by said Car Company. * * *

"Third. For each car hereafter built or caused to be built during the period of this contract by the Railroad Company (except cars constructed for the Railroad Company by the Car Company or by the Western Steel Car & Foundry Company) containing any of the designs or devices covered by patents now owned or controlled or which may hereafter be owned or controlled by said Car Company, the Railroad Company shall pay as royalty to the Car Company, within ninety (90) days after completion of such car, ten dollars ($10) per car in cash. * * *

"Fourth. The Railroad Company hereby gives to the Car Company and/or to a corporation known as the Western Steel Car & Foundry Company, a corporation organized and existing under and by virtue of the laws of the state of New Jersey, and for which company the Car Company in this regard will act as agent, a preference (provided they can make reasonably prompt or similar deliveries, under the same plans and specifications) over any other car builders in the construction of any or all freight cars containing designs and devices covered by patents now owned or controlled or which may hereafter be owned or controlled by the Car Company, caused to be built by the Railroad Company outside of its own shops, at the price of ten dollars ($10) per car in excess of the price bid by such other car builders for the construction of any freight cars embodying such designs and devices; the Railroad Company, however, reserves the right to build such cars in its own shops, in which event the Railroad Company agrees to pay to the Car Company a royalty of ten dollars ($10) per car for each car so built.

"Fifth. It is further agreed that if the Railroad Company abandons its present 'common standard' and adopts instead thereof a new design, which it contends does not embody any of the designs and devices covered by the patents now or hereafter owned or controlled by the Pressed Steel Car Company, and if such contention is disputed by the Car Company, then the question whether or not such new design does embody any design or device of patent owned by the Car Company, shall upon written request of either party to the other, be referred to * * * arbitrators. * * *"

Kiddle & Margeson, of New York City (John B. Stanchfield, Alfred W. Kiddle, Charles A. Collin, and Wylie C. Margeson, all of New York City, of counsel), for plaintiff.

George S. Payson, of Chicago, Ill., and Henry W. Clark, of New York City (George A. Ellis, James R. Sheffield, and James J. Cosgrove, all of New York City, of counsel), for defendant.

MAYER, District Judge (after stating the facts as above). The action is at law, and was tried without a jury, and numerous questions,

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involving (1) the construction of contract relations and (2) the use of alleged infringing devices by defendant, were disposed of in the course of the trial. Two questions remain to be considered, and both arise out of the contract referred to supra.

[1] 1. Plaintiff claims $10 per car on 200 gondola cars built for and delivered to defendant by the Betterndorf Axle Company, to which company, on or about August 17, 1909, plaintiff granted a license to build and sell cars covered by a patent to one Streib, No. 942,224, owned by plaintiff. The license to the Betterndorf Company gave that company the right to make and sell freight cars embodying the improvements or inventions covered by what are the first three claims of the Streib patent. The history of the arrangement between plaintiff and Betterndorf Axle Company may be briefly stated. This history seems to be irrelevant, but is referred to, so that all the facts may be apparent.

An application for a patent covering, as is contended, the same invention as that set forth in the Streib application, was filed by one Betterndorf, and the Betterndorf application was placed in interference with the Streib application. During this interference, Betterndorf conceded priority of invention to Streib, and plaintiff, as assignee of Streib, granted the Betterndorf Axle Company, as assignee of Betterndorf, a nonexclusive license whereby the Betterndorf Axle Company acquired the right to make and sell freight cars embodying the inventions covered by the first three claims of the Streib patent, without the requirement of paying plaintiff any royalty therefor.

The question now is whether defendant can be held liable for cars purchased from Betterndorf Axle Company which embodied claims 1, 2, and 3 of the Streib patent. Plaintiff claims that it has the right to elect under which of the two outstanding licenses the cars in question were built. In other words, the plaintiff, having given to Betterndorf Axle Company the right to manufacture and sell freight cars under the claims of a patent owned by plaintiff, now urges that it may segregate defendant from the rest of the public by virtue of the contract theretofore made between plaintiff and defendant. When plaintiff granted the license to Betterndorf Axle Company, all the world was entitled to purchase cars from the licensee upon any terms suitable to the licensee and the purchaser. In Keeler v. Standard Folding Bed Co., 157 U. S. 659, 666, 15 Sup. Ct. 738, 740 (39 L. Ed. 848) the court points out, with apt expression, that—

"The purchase of the article from one authorized by the patentee to sell it emancipates such article from any further subjection to the patent throughout the entire life of the patent. * * *"

The point is that the monopoly is lost and the article has been "emancipated."

It is quite immaterial as to what the arrangement was between plaintiff and Betterndorf Axle Company. Such an arrangement sometimes takes the form of a royalty, and sometimes is entered into with considerations of mutual forbearance. Whatever the consideration, whether called royalty or not, the passing of the consideration can occur but once, so far as affects the rights of purchasers.

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The contract between plaintiff and defendant becomes immaterial, so far as relates to the right of defendant to purchase cars, made pursuant to the patent, from any person having the right to make and sell such cars.

I hold, therefore, that the defense on this ground is good, and plaintiff may note an exception to my ruling. If what has already been decided, in regard to the patent infringement features as to these 200 gondola cars, shall be sustained, then my ruling on this question of license will become academic.

[2] 2. The next question is one of damages. The plaintiff claims that it is entitled to recover substantial, and not nominal, damages by reason of the breach by defendant of the "fourth" paragraph of the contract, in that defendant did not accord to plaintiff, in respect of 702 cars, the preference therein set forth. It was held during the trial that what this provision for a preference meant was that defendant should give equal opportunity to plaintiff, with other car builders, to bid competitively for the construction of freight cars containing designs and devices covered by patents then owned or controlled, or which might thereafter be owned or controlled, by plaintiff company; and if plaintiff bid within not to exceed the $10 in excess of any other car builder, defendant was obligated to award the contract to plaintiff, with the proviso always that defendant could build cars in its own shops, in which event defendant was obligated to pay to plaintiff a royalty of $10 per car. The provision in question is a valid provision, and the breach thereof might entitle plaintiff to certain remedies; but the question now under consideration is whether, as a result of such breach, it can be said that it would be possible for plaintiff to show that it had lost what is spoken of as its manufacturer's profit, or, for that matter, that it had been subjected to any damage by way of loss of profits.

It is important to distinguish between those cases (1) where there is a rule of damage, but great difficulty and sometimes uncertainty in the ascertainment of what the damage is, and (2) those cases to which a rule of damage cannot be applied and where any damages awarded would be the result merely of speculation or conjecture.

The first class of cases is well illustrated by Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676, and Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 754, 117 C. C. A. 503. The courts, in those cases, did not fail to lay down rules of damage, merely because of the difficulty of ascertaining damages.

The second class of cases is exactly illustrated by the case at bar and, inter alia, by Locker v. American Tobacco Co., 218 Fed. 447, 134 C. C. A. 247, and to some extent by Troy Laundry Machinery Co. v. Dolph, 138 U. S. 617, 11 Sup. Ct. 412, 34 L. Ed. 1083.

Counsel for each side have analyzed with great care the opinion in the Dolph Case and its history as exemplified by the record on review and the various steps which the litigation took. There is some language in the opinion of Mr. Justice Brewer which has led to considerable argument; but the fundamental proposition of the case does

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not revolve around the question as to whether the provision there under consideration was a subordinate or principal provision. After all, the main questions were whether the breach of such an optional arrangement as was disclosed in the Dolph Case, and the provision as to "open competition," laid the foundation for substantial damages. That precise question was not present in the Locker Case, supra, but the principle is the same. It will be noted that the Circuit Court of Appeals, at the conclusion of its opinion in the Locker Case, said:

"As we have thus disposed of the case upon the principal question, it is unnecessary to discuss the subsidiary questions involved. We think it proper to say, however, that we find no satisfactory proof of damages; the matter seems to be left to speculation and conjecture."

The Locker Case was brought to recover treble damages under the so-called Sherman Anti-Trust Law (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. 1916, §§ 8820–8823, 8827–8830]), and was tried before the court with a jury. A mass of testimony was there introduced which, in the opinion of the court, failed to lay a foundation for damages except upon a mere speculative basis. The District Court, in that case, was of the opinion, therefore, that plaintiff, as matter of law, had not proved any damages and directed a verdict for defendant. It will be noted that the verdict thus directed was not for nominal damages, but it was for defendant on the theory that no damages whatever had been proved.

In the case at bar the first step necessary for the plaintiff would be to show that the plaintiff would have availed of the preference. There was no obligation on plaintiff's part so to avail, and whether the plaintiff would have so availed is a matter of speculation, which is but another way of saying that there existed a precedent element of such uncertainty, not as to the amount of damage, but as to the fact of damage, as to disable the plaintiff from laying any foundation whatever for damage. If the provisions of paragraph "fourth" were binding on both parties, so that, for instance, in addition to the right of plaintiff to bid, there would have been the binding obligation of plaintiff to bid, and to manufacture if the bid were properly awarded, then it might be argued that, if plaintiff's bid had not been accepted, it would have been damaged. In such circumstances, it might well be contended that the rule would have been simple enough, and would not have been embarrassed by any uncertainty.

But the difficulty is that no one can say, as of the time when the 702 cars were ordered and manufactured, that the plaintiff would have availed of the preference accorded under the fourth paragraph. In fact, there can be no better illustration of the complete uncertainty of this provision of the fourth paragraph than in this very case, because the testimony shows that in many instances, involving thousands of cars, plaintiff did not bid, and thus did not avail of the preference.

It seems to me, therefore, that any damages are purely speculative, and the logical result would be to allow the plaintiff no damage whatever in this regard. There is, however, some confusion in the cases as to whether no damage should be allowed or whether there should be

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awarded to plaintiff nominal damages. In the case at bar the financial result in this particular is substantially the same.

While, therefore, I think the proper conclusion requires that no damage be awarded to plaintiff, I am not disposed to decline to award 6 cents as nominal damages, if defendant so desires. On this question of damages for loss of profits, counsel may arrange to shape the record so as to save the point, if the case should be reviewed.

When counsel shall have figured the correct amount to which plaintiff, under my rulings, is entitled, they will advise me, so that the record may conclude in orderly fashion.

UTAH CONST. CO. v. ST. LOUIS CONSTRUCTION & EQUIPMENT CO. et al.

(District Court, D. New Mexico. December 30, 1916.)

No. 116.

1. REMOVAL OF CAUSES ⊜10—STATUS OF CAUSE AFTER REMOVAL—SUIT BY FOREIGN CORPORATION.

When the maintenance of an action commenced in a state court is prohibited by a state statute, because of the failure of plaintiff as a foreign corporation to comply with its requirements, plaintiff cannot better its position by removing the cause into a federal court.

2. CONTRACTS ⊜284(2)—CONTRACT FOR RAILROAD CONSTRUCTION—CONDITION PRECEDENT TO RECOVERY—ENGINEER'S CERTIFICATE.

Where a contract for railroad construction made the chief engineer of the company the final arbiter of all disputes, and required his final estimate of the work done, and his certificate that it was free from claims for labor or material for which liens might be enforced before any right of action should accrue to the contractor, such certificate is a condition precedent to a right of action, or the contractor must excuse the failure to procure it by alleging and proving by direct and convincing evidence that in refusing it the engineer acted fraudulently, or so arbitrarily as to indicate fraud.

3. CONTRACTS ⊜287(1)—CONTRACT FOR RAILROAD WORK—CONSTRUCTION—"FINAL SETTLEMENT"—"FINAL ESTIMATE."

Under a contract for railroad construction, providing that before final settlement the contractor should furnish evidence to the chief engineer of freedom from liens, and that the engineer should make and certify a final estimate of the amount due, which should be conclusive on both parties, "final settlement" and "final estimate" mean practically the same thing; a final adjustment of the account being necessary to the making of the certificate.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Final Estimate; First and Second Series, Final Settlement.]

4. CONTRACTS ⊜284(2)—ACTIONS FOR BREACH—CONDITIONS PRECEDENT—ENGINEER'S ESTIMATE.

A provision of a contract for railroad construction, requiring a certificate of final estimate by the chief engineer as a condition precedent to a right of action by the contractor, cannot be ignored by the court.

In Equity. Suit by the Utah Construction Company against the St. Louis Construction & Equipment Company, the St. Louis, R. M. & P. Railway Company, and the Metropolitan Trust Company of

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New York City, trustee, with the Bell & Levy Contracting Company as cross-petitioner. Bill and cross-bill dismissed.

POLLOCK, District Judge. This is an action to recover an alleged balance claimed by the plaintiff against the defendant St. Louis, Rocky Mountain & Pacific Railway Company, for construction work in building said railroad in New Mexico, and to enforce a mechanic's lien therefor. The Bell & Levy Contracting Company, a subcontractor, files a cross-petition to enforce a mechanic's lien in its favor on the corpus of the railroad for an alleged balance due it from the principal contractor. The Metropolitan Trust Company of New York City, trustee under a mortgage for the railroad, is made a party defendant.

[1] Among other defenses the defendant Railway Company pleads the following statute of New Mexico, in force at the time of making the contract in question, and yet in force:

"Every foreign corporation, except banking, insurance and railroad corporations, before transacting any business in this territory, shall file in the office of the secretary of the territory a copy of its charter, or certificate of incorporation, certified by the proper authority of the territory, state or county of its creation, and a statement of the amount of its capital stock authorized and in amount actually issued, the character of the business which it is to transact in this territory, and designating its principal office in this territory and an agent who shall be a domestic corporation or a natural person of full age actually resident in this territory, together with his place of abode, upon which agent process against said corporation may be served. * * * Upon the filing of such copy and statement, the secretary of the territory shall issue to such corporation a certificate that it is authorized to transact business in this territory, and that the business is such as may be lawfully transacted by corporations of this territory, and he shall keep a record of all such certificates issued."

"Until such corporation so transacting business in this territory shall have obtained said certificate from the secretary of the territory, it shall not maintain any action in this territory, upon any contract made by it in this territory."

"Every foreign corporation transacting any business in any manner whatsoever, directly or indirectly, in this territory, without having first obtained authority therefor, as hereinbefore provided, shall for each offense forfeit to the territory the sum of two hundred dollars, to be recovered with costs in an action prosecuted by the solicitor general in the name of the territory."

Laws 1905, c. 79, §§ 102, 103, 105.

The Construction Company and the subcontractor were foreign corporations of states outside of New Mexico, and the work to be done was on a railroad situated in said territory. The contractor did not comply with the requirements of the foregoing statute, but after the work was completed, and after suit was brought, it did attempt to comply with the statute.

As the suit was instituted in a territorial court of New Mexico, in 1908, where the principal pleadings were had, and the case was not removed therefrom into the United States District Court of New Mexico until 1912, which removal was made at the instance of the plaintiff, the federal court took the case as it stood at the time of removal, subject to the legal status and rights of the parties as they were established at the time of the removal. If the cause of action

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had no right to exist in the jurisdiction where suit was brought, the plaintiff could not vitalize it by getting it transferred to another jurisdiction.

The cause must therefore be considered, in respect of the above provisions of the statute of New Mexico, the same as if the case now stood in the territorial court. We must therefore eliminate, as of any controlling effect, the ruling of the federal courts, of which the case of Lupton's Sons v. Auto Club et al., 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699, is representative, wherein, under the New York statute, which declared:

"No foreign stock corporation doing business in this state shall maintain any action in this state on a contract made by it in this state unless prior to the making of such contract it shall have procured from the designated office the required certificate authorizing it to do business in the state"

—it was held that, inasmuch as the statute only prohibited the right to bring such action in the state court, it did not have the effect to prevent the nonresident contractor from bringing and maintaining suit in the United States court.

As the statute imposed no other restriction than a denial of the right to sue in the courts of the state, without imposing any penalty therefor, the Supreme Court held that such regulation of the state did not have the effect to deny the right of a citizen of a foreign state to resort to the federal court, when the requisite diversity of citizenship existed.

But the case at bar is where the plaintiff has sued in the local court to enforce a contract made without compliance with the statute, where the statute stigmatizes the dereliction of the corporation as an offense against the state and penalizes it. In this regard it is worthy of note the statute above quoted does not alone prohibit the bringing and maintaining of any action on a contract made in this state in violation of its terms, but it further provides as follows:

"Every foreign corporation transacting any business in any manner whatsoever, directly or indirectly, in this territory, without having first obtained authority therefor, as hereinbefore provided, shall *for each offense forfeit to the territory the sum of two hundred dollars, to be recovered with costs in an action prosecuted by the solicitor general in the name of the territory.*" Laws 1905, c. 79, § 105.

In such case there can be no doubt whatever but that the very business transacted by complainant and cross-complainant, the Bell & Levy Contracting Company, was prohibited by the act, hence unlawful, for which they might have been penalized in the sum of $200.

Mr. Benjamin, in his work on Sales (3d Am. Ed.) § 538, after reviewing at length the authorities, says:

"The propositions that seem fairly deducible from the foregoing authorities are the following; First. That, where a *contract* is prohibited by statute, it is immaterial to inquire whether the statute was passed for revenue purposes only, or for any other object. It is enough that Parliament has prohibited it, and it is therefore void. Secondly. That, when the question is *whether* a contract has been prohibited by statute, it *is* material, in *construing the statute,* to ascertain whether the Legislature had in view *solely* the *security and collection of the revenue,* or had in view, in whole or in part, the protection of the public from fraud in contracts, or the promotion of some object of public policy. In the former case, the inference is that the statute was

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not intended to prohibit contracts; in the latter, that it was. Thirdly. That, in seeking for the meaning of the law-giver, it is material also to inquire whether the penalty is imposed once for all, on the offense of failing to comply with the requirement of the statute, or whether it is a recurring penalty, repeated as often as the offending party may have dealings. In the latter case the statute is intended to prevent the dealing, to prohibit the contract, and the contract is therefore void; but in the former case such is not the intention, and the contract will be enforced."

The above text appears to be amply supported by authority. See McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; Bartlett v. Vinor, Carthew, 253; Pittsburg Const. Co. v. West Side Belt Railroad Co., 154 Fed. 929, 83 C. C. A. 501, 11 L. R. A. (N. S.) 1145; Thorne v. Travelers' Insurance Co., 80 Pa. 29, 21 Am. Rep. 89; Johnson v. Hulings, 103 Pa. 498, 49 Am. Rep. 131; Stevenson v. Ewing, 87 Tenn. 46, 9 S. W. 230; Yount v. Denning, 52 Kan. 629, 35 Pac. 207; Holt v. Green, 73 Pa. 198, 13 Am. Rep. 737; Dillon v. Allen, 46 Iowa, 299, 26 Am. Rep. 145; Woods & Co. v. Armstrong, 54 Ala. 150, 25 Am. Rep. 671.

In McMullen v. Hoffman, supra, the court said:

"The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce * * * any alleged rights directly springing from such contract. In cases of this kind the maxim is 'Potior est conditio defendantis.'"

In the noted case, often cited with approval by the courts, of Bartlett v. Vinor, supra, Lord Chief Justice Holt said:

"Every contract made for or on account of any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitive words in the statute."

The Court of Appeals for the Third Circuit, in Pittsburg Construction Co. v. West Side Belt Railroad Co., supra, considered a somewhat similar right of a foreign corporation to maintain an action to enforce a similar contract to the one at bar without having complied with the provisions of the statute of the state of Pennsylvania. That statute, as here, required the foreign corporation, before doing any business in the state of Pennsylvania, to file a like statement, to establish an office, and to appoint an agent in the state upon whom service of process could be had, declaring it should not be lawful for any such foreign corporation to do any business in the commonwealth until it had filed in the office of the secretary of state the required statement and obtained from him the specified certificate. It then declared that—

"Any person or persons, * * * who shall transact any business within this commonwealth for any such foreign corporation without the provisions of this act being complied with, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished"

—either by imprisonment or fine in the discretion of the court. The court said, inter alia, that:

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"The weight of authority is to the effect that it is not absolutely necessary * * * to make such contracts void that the Legislature should in express terms, declare them so."

After quoting with approval the declaration of Lord Chief Justice Holt, supra, it was said:

"That rule in this state has been generally followed by the courts, especially by the Supreme Court of Pennsylvania in a number of cases. The reason for the enactment of such statute it is said is expressed in the case of Delaware, etc., Co. v. Passenger Ry. Co., 204 Pa. 25, 53 Atl. 538, as follows: 'The purpose of the act is to bring foreign corporations doing business in this state within the reach of legal process.' This purpose is not accomplished by a registration of the corporation at the pleasure of its officers, or *when it may be to their interest to appeal to our courts.* The act is for the protection of those with whom it does business, or to whom it may incur liability by its wrongful acts, and nothing short of a registration before the contract that it seeks to enforce is made can give it a right of action. Any other construction of the act would violate its plain words and wholly defeat its object, by affording protection to the corporation and denying it to the public."

In the case at bar plaintiff, the subcontractor, made a contract to be executed in New Mexico. For years it engaged in the construction work of building a railroad in the territory, dealing with the people, prosecuting the enterprise, before asking leave of the territory, without designating a place of office, or an agent or person on whom legal process could be served, and not until after the business was all transacted, and suit was brought to enforce the contract in its favor, did it undertake to comply with the statute. There was then no occasion for obtaining such permit to transact its business.

The statute unquestionably contemplated that the statement filed with the secretary of state was as to business thereafter to be transacted in the territory, for it expressly stated that the statement should contain—

"the character of the business which *it is to transact* in the territory, and designating its principal office in said territory and an agent who shall be a domestic corporation or a natural person of full age, actually resident in this territory, together with his place of abode, upon which agent process against said corporation may be served, and the agency so constituted shall continue until some other agent is designated."

The certificate the foreign corporation is required to obtain from the secretary of the territory was in the nature of a permit to do business in the territory, and was necessarily prospective in its operation. It would seem to lead to a positive absurdity to give to the second provision of the statute the construction that such statement could be filed with the secretary of state and a certificate obtained from him after the business was all transacted, and then maintain an action thereon.

The Supreme Court of New Mexico has not construed this statute. By the removal of this case into this jurisdiction the plaintiff has prevented an opportunity for such ruling by the Supreme Court of New Mexico. The provisions of the New Mexico statute were taken from the statute of New Jersey, almost literally. The Supreme Court of the latter state in Wolf v. Lancaster et al., 70 N. J. Law, 201, 56 Atl. 172, held that a contract made by a Pennsylvania corporation for business done in New Jersey could not be enforced when the contractor had

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failed to comply with the provisions of the statute in question, although the contractor subsequently did obtain such certificate from the secretary of state. The court said that the certificate obtained in November, 1902, was not sufficient, where the contract was made prior to 1902. The general rule is that, where the Legislature enacts the provisions of the statute of another state, the construction placed by the original state on the statute is presumably imported with it.

While frankly confessing the question here involved is not devoid of doubt, yet I may say, were it deemed necessary to a decision of the case, in the light of authority, I would be constrained to hold against the right of complainant and cross-complainant, the Bell & Levy Contracting Company, in the face of the statute above quoted, to maintain their suits. However, the concession of the railway company, made at the hearing, to permit complainant to have a decree for the amount of the contract price unpaid, as determined by the engineer of the railway company, impels me to give complainants the benefit of the doubt, and to proceed to decision of the remaining question presented.

[2] The second defense interposed by the defendant railroad company against this action is that it was prematurely brought, and cannot be maintained, because the chief engineer of the railroad company had not given the plaintiff any certificate of final estimate of the work done.

The contract for the construction work of the railroad is similar in every essential particular to that in the case of Choctaw & M. R. Co. v. Newton, reported in 140 Fed. 225, 71 C. C. A. 655. Briefly stated, that contract constituted the chief engineer of the railroad company the arbiter and umpire between the parties, to prevent dispute or misunderstanding relative to any of the stipulations and provisions of the agreement, as well as the performance of the contract by either of the parties. He was to decide—

"all such questions and matter; and he shall also determine, and set forth in the final estimate, the amount and quantity, character, kind, and classification of all work and materials performed and furnished by the contractor, * * * including all extra work and material; and his decision and determination as to any and all such questions, matters, and things, and in construing any of the terms and provisions of this contract, shall have the force and effect of an award, and shall be final, binding, and conclusive, to all intents and purposes, and in all places, upon the said parties thereto."

The contract also provided that the engineer should make monthly estimates of the work done, out of which said sums found due the engineer should retain 10 per cent. as a safeguard against mistakes and for protection.

The twenty-first section required the contractor to promptly pay all subcontractors, materialmen, laborers, and other employés as often as payments are made to it by the Construction Company, and it also authorized the company to retain from the payments such deficiencies due to employés and pay them. This was followed by the following provision:

"Before final settlement is made between the parties hereto for work done and materials furnished under this contract, and before any right of action shall accrue to the contractor against the company therefor, the said con-

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tractor shall furnish evidence satisfactory to the chief engineer of the [Railway] Company that the work covered by this contract is free and clear from all liens for labor or materials, and that no claim then exists against the same for which any lien could be enforced."

Section 22 of the contract is as follows:

"Sec. 22. Whenever in the opinion of the chief engineer of the Railway Company this contract and all things herein agreed to be done by the contractor shall have been completely performed and finished according to the provisions hereof, and within the time herein limited, said chief engineer shall make and return a final estimate of the amount due to it therefor and remaining unpaid, and shall certify the same in writing under his hand, and the Construction Company shall within sixty days after the completion of the work aforesaid, and the return of said final estimate, pay to the contractor the full amount so found to be due it and remaining unpaid, including the percentage retained on former estimates as aforesaid, except as in this contract is otherwise provided. The procuring of such certificate and final estimate shall constitute a condition precedent to any right of action by the contractor against the company."

As this action was instituted without the plaintiff having obtained from the engineer the required certificate of final estimate, the question to be decided is whether or not the plaintiff has pleaded and shown by evidence sufficient reason or excuse for going around the engineer and asking the court to ascertain what the final estimate should be. As such ascertainment would, by the express provisions of the contract, lodge in the engineer prior to the right to bring suit, making his findings conclusive at law, most certainly it devolved upon the plaintiff to show both by its pleadings and evidence that the engineer, in failing or refusing to give such certificate, did so with a fraudulent intent, or acted so arbitrarily as of itself to indicate the fraudulent mind and purpose. Fraud in such cases cannot be supplied by mere epithets or denunciations of the disappointed party. The facts constituting the fraud must be fully alleged, and the proof must be so direct, cogent, and convincing as to fully satisfy the judicial mind. Suspicion is not equivalent to proof, and it ought not to be inferred from refined, metaphysical reasoning, or inference drawn by speculative minds. The proof should be tangible.

What are the facts alleged in the petition to excuse obtaining final estimate from the engineer before suit was brought? They are that the plaintiff had fully performed the contract, and was justly entitled to demand such certificate, and that the engineer, on request therefor, arbitrarily refused to give the same, for the reason that he had received notice from the subcontractor, protesting against giving such certificate of final estimate to the plaintiff, on the ground that the subcontractor had a claim against plaintiff for damages caused in delaying the completion of the work within the time specified in the contract; second, that the engineer refused to give such certificate of final estimate until the plaintiff should furnish him satisfactory evidence that the work was free and clear from all lines for labor or materials, and that no claim existed against the same for which a lien could be enforced.

What is the evidence upon which the court is asked to find that this refusal was tinctured with a fraudulent design? While this action of the engineer is characterized in the pleadings of the contractor and sub-

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contractor as having been prompted by sinister, selfish motives, that the engineer was acting collusively with the railroad company to prevent or delay suit on the contract, we are unable to discover any tangible fact developed by the evidence to warrant the court in thus stigmatizing the conduct of the engineer.

Mr. Wattis, representing the Construction Company, testified that in January, 1907, he met Mr. Turner, the engineer, in Raton, and that his purpose of visiting Raton was to check up the condition of the business and endeavor to get a settlement; that this was about the 20th or 21st. He testified that the chief engineer had never furnished the Construction Company with final estimate.

"I went down to his office and spoke to him, and asked him for the final estimate, and was refused. His refusal was sort of evasive. I asked him why he should refuse to give final estimate, and told him our subcontractors were there, and we wanted to get a settlement with them. I said, 'We have finished the work;' and he said, 'Yes, you have finished the work, but I cannot give it to you; you have not settled with your subcontractors.' I said, 'We are ready to settle with them; that is the reason I want this final estimate.' I said, 'We are not asking you for money; before we ask you for money, we will show you our subcontractors are paid.' He said, 'I understand some of them are going to file liens; then they won't take this estimate.' I said, 'We want to see what the estimate is; if it is not satisfactory, our company will be protected, and we will look after the liens.' He continued to refuse in that manner. After I laid down, the office was furnished with figures of some kind purporting to be quantities that had turned up. I suppose it was work done in January, 1907; it was not a summary of all the work that had been done. I think that the only data we have received from Mr. Turner, the chief engineer, is that contained in these monthly estimate sheets furnished the company from time to time and a subsequent sheet for work, part of which was done in January, 1907."

Mr. Turner, in reply, testified, in substance, that he met Mr. Wattis at Raton, just as he was going in or coming out of the post office, that they met just inside the post office door.

"Mr. Wattis said, 'So you refuse to give me a final estimate.' I said, 'Now, Mr. Wattis, I am perfectly willing to give you a final estimate when you have shown me that there are no liens or claims upon which a lien could be enforced, existing;' and he said, 'You refuse to give me a final estimate;' and I said, 'Now, Mr. Wattis, I am perfectly willing to give you a final estimate when you have complied with the conditions of the contract;' then he said, 'You lied.' And this is all the conversation that took place at that time. I had probably two or three conversations with him prior to this one. I told him I was perfectly willing to give him a final estimate, when he had shown me that there were no liens, or no claims upon which a lien could be enforced. Nothing was said in this conversation by Mr. Wattis, requesting me to furnish him estimates for work of the Bell & Levy Contracting Company. I did furnish them estimates for all work that was done by that company. The estimate furnished for September, 1906, contained all of the work done by that company. They should have had all of them by October 10, 1906. I did not make any changes after October, and told representatives of the Utah Construction Company there were no further changes in the Bell & Levy Contracting Company's quantities and classifications. As I recall it, that was in October, 1906. I think I told them in December, also."

From Mr. Wattis' own testimony it would appear that the chief engineer only refused to give him certificate of final estimate because he had failed to furnish satisfactory evidence that all liens or claims for which liens could be filed were satisfied; that monthly statements had

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been made from which the work done by the subcontractor was ascertainable. His evidence is quite conclusive of the fact that there was no collusion between Mr. Turner and the Railroad Company to either prevent or delay the bringing of the suit by the contractor, as it is a fact that the representative of the Railroad Company asked Mr. Turner to give the final estimate. That was on the 24th of January, 1907. Of this Mr. Turner testified as follows:

"The general manager, Mr. Van Hooten, insisted that I furnish the Utah Construction Company with a final estimate, which I declined to do, as I did not consider that the Utah Construction Company had complied with their contract; but I informed the general manager that I would notify the Utah Construction Company that there would be no change in the estimates furnished, and I did notify that company."

The letter to the Construction Company was dated January 26, 1907, in which letter Mr. Turner advised the Construction Company that he had received written notice from the St. Louis Construction & Equipment Company, protesting against giving said final estimate now, saying that they had a claim for damages on account of work not being completed within the time and in accordance with the terms specified in the contract, and further said:

"As I understand the contract, such final estimate cannot in any event be given by me until you shall furnish satisfactory evidence that the work is free and clear of all liens for labor and materials, and that no claims exist against the same for which a lien could be enforced. This you have not yet done, and I understand that some of your subcontractors have not yet been settled with. I am ready at all times to give you any detailed information regarding portions of the work done by subcontractors, which you or they may require in order to make settlement."

As the contractor had all the monthly estimates on the work done by the subcontractor, and was notified by the engineer that no changes would be made therein, there was nothing to prevent the contractor from settling with the subcontractors. The Railroad Company was under no obligation to provide money to the contractor with which to pay any subcontractor, and it was under no obligation to adjust any matters of differences between them. The evidence shows that the contractor had been paid on monthly estimates, less the 10 per cent. withheld under the present contract, to be accounted for in the final estimate and adjustment, and that the amount of money so paid to the contractor was amply sufficient to pay the subcontractor what was coming to him. So there was no legal excuse for the contractor not settling with any subcontractor, and preventing the filing of a mechanic's lien later.

If it be answered that the engineer complained to the contractor of having been notified of a claim for damages on account of having delayed the subcontractor in its work, and assigned that among the grounds for withholding final settlement, and, conceding that no mechanics' liens would obtain therefor, yet, as a matter of fact, the subcontractor filed no mechanic's lien on such claim for damages, but did file such lien for the balance claimed on account of the work and materials furnished under the contract. That lien the contractor did not discharge before bringing this suit, and that lien is sought to be en-

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forced by the cross-petition of the subcontractor. How, then, can this action be maintained in the face of the express provision of the contract that "before any right of action shall accrue to the contractor against the company therefor, the said contractor shall furnish evidence, satisfactory to the chief engineer of the Railroad Company, that the work covered by this contract is free and clear from all liens for labor or materials," and that no claims existed against the same for which any lien could be claimed?

[3] Counsel for plaintiff on argument placed stress upon the preceding language of said paragraph in the contract:

"Before final settlement is made between the parties hereto for work done and materials furnished under this contract."

With much refinement they have sought to attach to the term "final settlement" an office, in effect, which I think is inapplicable here. The final settlement is one thing, and obtaining the certificate of final estimate is another. Presumptively there must be an adjustment between the engineer and the contractor before the engineer could give the certificate of final estimate, and therefore they mean practically one and the same thing. When the engineer should make the final estimate of the work done, and certified as to the result, he is presumed to have made an adjustment with the contractor of the accounting between them. This must be so, as a certificate of final estimate is conclusive on the Railroad Company, and it must pay the amount so found by the engineer, the umpire, whose estimate binds both parties. Omaha v. Hammond, 94 U. S. 98, 24 L. Ed. 70.

"A certificate of an engineer, when sufficient in form, is conclusive evidence of the performance of the contract, which provides that the work shall be done to his satisfaction to be testified by a writing or certificate under his hand." McGuire v. Rapid City, 6 Dak. 346, 43 N. W. 706, 5 L. R. A. 752, 753.

In Illinois Surety Co. v. Peeler, 240 U. S. loc. cit. 219, 36 Sup. Ct. 323 (60 L. Ed. 609), Mr. Justice Hughes, speaking of the employment of the term "final settlement" in contracts for public transaction and account, said that term "has been used from the beginning to describe administrative determination of the amount due. * * *" The words "settled" and "adjusted" are taken to mean the determination in the treasury department for administrative purposes of the account and the amount due; and we entertain no doubt that in contracts like the one under consideration, so long and so frequently employed in contracts for construction work, it means nothing more than an adjusting of the account of credits and debits to arrive at the final estimate. As the certificate given by the engineer of what the final estimate is would conclude both parties, it would necessarily imply that the final settlement or adjustment of the accounting had been made between the engineer and the contractor.

Stress was laid by counsel for plaintiff on argument upon the case of Springer v. Ford, 168 U. S. 513, 527, 18 Sup. Ct. 170, 175 (42 L. Ed. 562). The distinction between the provisions of the contract there under consideration and the one here is so palpable as to hardly justify discussion. The court in that case held that Ford was excused from showing that the work was free from all danger of liens because of

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the failure of the owners to pay him the amount of the final estimate. Ford's contract provided that—

"The amount due to the contractor under the final estimate will only be paid upon satisfactory showing that the work is free from all danger of liens or claims."

Whereas, under the present contract, there could be no amount due until the chief engineer was satisfied that there was no lien. Neither was Ford, under his contract, required to show to the satisfaction of the chief engineer that the work was free and clear from all liens as a condition precedent to the right to demand final payment. All he was required to show was "that there was no danger of liens on account of his failure to pay the subcontractor before he was entitled to receive payment." So that the contractor there was required to make his showing with respect to liens only before final payment; but in the case at bar the contractor was positively required to make such showing before final estimate and certificate therefor.

[4] Counsel for plaintiff and cross-petitioner make earnest appeal that, as all the parties concerned are before the court, this objection to the action brought should be waived, and the court proceed to final ascertainment of the actual amount owing to plaintiff and the cross-petitioner.

Bad precedents, like hard cases, are the quicksands of the law, and are sure to come up to plague the court. If conceded in this instance, why not in any other, where the express stipulation of the parties is that no action shall be brought to enforce such contract until the suitor had obtained from the chief engineer, the umpire, a certificate of the amount due and owing? Any such holding in this case would thwart the very object and purpose of such provision in the contract. It would invite dissatisfied contractors to go around the engineer, the sole arbiter of the parties, and compel the adversary, as in this case, to go into court with pleas and counterpleas, with accumulated costs, annoyances, and delays, the very conditions the contract sought to obviate; and, as in this case, when the controversy comes on for hearing before the court, the contractor presents an array of outside experts to criticize and controvert the estimates and constructions of the engineer, and thus by this indirect method substitute the opinions and estimates of outsiders for that of the engineer, who at the very outset of the contract, conditioning its execution, the parties consented should decide such matters, and this without the persuasive, convincing proof requisite in equity to show fraud and oppression on the part of the engineer to invite the interposition of chancery.

It must follow that the petition and cross-petition should be dismissed, unless the plaintiff will file its written consent herein of acceptance of the offer, made by counsel on hearing, that, rather than have future litigation over this matter, judgment might be entered against it for the sum of $———, which I understand is the amount of the balance due on the estimate made in the testimony of the engineer. This course was pursued in the case of Choctaw & M. R. Co. v. Newton, 140 Fed. 250, 251, 71 C. C. A. 655, which also directed the manner of estimating the allowance of interest on the claim, under a somewhat similar situation.

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UNITED STATES v. LEHIGH VALLEY RY. CO. et al. (two cases). SAME v. SCHAEFER et al. (two cases). SAME v. LEHIGH VALLEY RY. CO. (two cases).

(District Court, S. D. New York. January 29, 1918.)

Nos. D4336-D4341.

1. CARRIERS ⟸38—INTERSTATE COMMERCE—DISCRIMINATION—OFFENSES.
Under the statute declaring that every person or corporation, whether shipper or carrier, who shall knowingly offer, grant, or give, or solicit, accept, or receive rebates, etc., shall be guilty of a misdemeanor, the mere offer by a carrier is an offense.

2. CARRIERS ⟸38—INTERSTATE COMMERCE—DISCRIMINATIONS—INDICTMENT.
An indictment charging that railroads had not collected demurrage, and that the shippers had not paid it, *held* insufficient to charge the offense of discrimination, etc.

3. CARRIERS ⟸38—INTERSTATE COMMERCE—DISCRIMINATION—INDICTMENT.
Indictments charging that, while an embargo in respect to the transportation of hay was in force, a railroad company did unlawfully offer, grant, and give permits for transportation to certain shippers, while others similarly situated did not receive certain permits, *held* insufficient to charge the offense of discrimination, etc., it not being alleged there was any transportation, etc.

4. CARRIERS ⟸32(2)—INTERSTATE COMMERCE—"DISCRIMINATION."
Transportation pursuant to authorizations given one shipper while an embargo was enforced against others is an unlawful "discrimination," and constitutes a violation of statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Discrimination.]

5. CARRIERS ⟸32(1)—INTERSTATE COMMERCE—EMBARGOES—DISCRIMINATION.
That a railroad embargo was illegal does not make discriminatory transportation under it legal.

The Lehigh Valley Railway Company and others were indicted for conspiracy; Charles Schaefer, Sr., and another, were indicted for knowingly soliciting, accepting, and receiving a concession from a railroad company; the Lehigh Valley Railway Company was indicted for knowingly offering, granting and giving a concession in respect to transportation, etc.; Charles Schaefer, Sr., and another, were indicted for knowingly soliciting, accepting, and receiving a concession and discrimination in regard to shipments; the Lehigh Valley Railway Company and another were indicted for knowingly offering, granting, and giving a discrimination, etc.; and the Railway Company was indicted for willful failure to strictly observe its tariffs. On demurrers to indictments. Demurrers sustained in part, and defendants given leave to plead over, where overruled.

Francis G. Caffey, U. S. Atty., and Julian Hartridge, Asst. U. S. Atty., both of New York City.

Henry A. Wise, of New York City, for defendants Lehigh Valley Ry. Co. and Signer.

Herbert Goldmark, of New York City, for defendants Schaefer.

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MAYER, District Judge. Indictments were filed against the Lehigh Valley Railroad Company, Fred E. Signer, Charles Schaefer, Sr., and Charles Schaefer, Jr., as follows:

(1) D 4336. Against all the above-named parties, for conspiracy. Section 37, Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1916, § 10201]).

(2) D 4337. Against the two Schaefers, for knowingly soliciting, accepting, and receiving a concession from the Lehigh Valley, etc. (ten counts, re boat demurrage). Section 1, Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847), as amended June 29, 1906 (34 Stat. 587, c. 3591 [Comp. St. 1916, § 8597]).

(3) D 4339. Against the Lehigh Valley, for knowingly offering, granting, and giving a concession to Schaefer firm, in respect of the transportation of hay, whereby such property was by a device transported at a less rate than that named in the tariffs (ten counts, re boat demurrage). Section 1, Elkins Act, as amended June 29, 1906.

(4) D 4340. Against the two Schaefers, for knowingly soliciting, accepting, and receiving a concession and discrimination from the Lehigh Valley, in regard to shipments of hay (five counts, re receiving "authorizations"; five counts, re actual transportation of hay).

(5) D 4341. Against Lehigh Valley and Signer, for knowingly offering, granting, and giving a concession and discrimination to the Schaefer firm in respect to the transportation of carload shipments of hay, whereby advantages were given and discriminations practiced (five counts, re granting "authorizations"; five counts, re actual transportation of hay). Section 1, supra.

(6) D 4338. Against Lehigh Valley for willful failure strictly to observe tariffs (ten counts). Section 1, supra.

Defendants filed demurrers to each of the above-mentioned six indictments. In respect of indictment (6), D 4338, the attorneys for the Lehigh Valley Railroad Company have requested that they be permitted to withdraw the demurrer and to plead over. Such permission is herewith given.

Since the oral argument, the government has taken over the executive administration of the railroads and the questions involved (except as they affect the particular defendants herein) do not seem to have the broad importance which apparently they possessed at the time of the argument. By this I merely mean that the determination of the interesting questions involved now concerns only situations which arose prior to the exercise of government control, and that, in view of present government administration, it will be some time before these questions will be of practical importance as affecting the future conduct of carriers and shippers. Because of what has been stated supra, I shall dispose of the questions, with a brief statement of my reasons, and without setting forth any elaborate analysis of cases.

[1] *Conspiracy Indictment (No. D 4336).* The statute provides:

"Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor. * * *" Comp. St. 1916, § 8597.

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To constitute the crime it is not necessary that the railroad should "offer" *and* the shipper "accept" the discrimination. The mere offer of the rebate, concession, or discrimination, knowingly made by the railroad, is one of the offenses denounced by the statute. The proof may show that the unlawful agreement was that there should be given, and at the same time received, the discrimination complained of. If the proof so develops, the trial judge can deal with the question as he may be advised, and will consider that he is not to be hampered by this memorandum opinion. Here, however, the question must be dealt with as it appears on the face of the indictment. The indictment charges, not only that the railroad and its duly authorized agent and the shippers conspired, but makes as parties to the conspiracy the old-time "divers other persons to the grand jurors unknown." In many conspiracy cases these "divers other persons" unknown to the grand jury never appear and are never mentioned; but the court, in passing on the indictment, must assume that there are such divers other and unknown persons. I think the indictment is good, and the demurrer is overruled.

[2] *Boat Demurrage Concessions (Nos. D 4337 and D 4339).* Stripped of indictment language, all that these indictments amount to is a charge in one indictment that the railroads have not collected demurrage and a charge in the other indictment that the shippers have not paid it. The use of the word "unlawfully" does not help out, because this is merely a conclusion. While, under certain circumstances, a device need not be set forth in the indictment, yet when, in point of fact, it is set forth, the court can determine whether such device is of a character to constitute or help constitute the crime charged. Of course it is plain that what is sought to be shown is that there was an agreement or understanding by which demurrage should not be collected: but these indictments do not set forth an agreement, but are drawn in such a way as to amount merely to charging that the railroad has not collected certain accrued and proper charges and that the shipper has not paid them. The demurrer to each of these indictments is sustained.

[3] *Discrimination re Transportation of Hay (No. D 4341).* This indictment contains ten counts, and may be subdivided into two heads —those counts numbered 1 to 5, inclusive, and those numbered 6 to 10, inclusive. As to counts 1 to 5, inclusive, the indictment sets forth that there was an embargo in respect of the transportation of hay, and that hay would not be transported for shippers by the Lehigh unless a permit or authorization for such transportation was obtained from Signer, acting for the Lehigh; that the Schaefers received such permits, while others similarly situated did not, even though these others requested such permits or authorization.

The mere receiving of permits, unaccompanied by transportation, is not a crime under the act; for the act provides that it is unlawful to "offer, grant or give * * * any rebate, concession or discrimination *in respect to the transportation* of any property in interstate * * * commerce."

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If there is no transportation, the mere giving of a permit is an idle act, although the case might be different if the railroad "offered" to transport.

It is sought to sustain these counts because the indictment charges that defendants "did knowingly offer" the alleged concession and discrimination to the Schaefers. Such an argument relies upon the form of words rather than their substance.

Take, for instance, count 1 as illustrative. What the indictment charges against defendants is that they "did * * * knowingly grant" (not offer) to the Schaefers authorizations for 57 carloads of hay. The word "offer," where it appears in this and the similar counts, may therefore be treated as surplusage, or as disregarded, because plainly inconsistent with the facts as definitely set forth in the indictment. The demurrer to the five counts is sustained.

[4, 5] As to the remaining counts, the points raised by defendants go rather to the proof than to the indictment. Transportation pursuant to authorizations to one shipper, and denials to others similarly situated is clearly a violation of the statute. Whether the shippers are similarly situated is a question of fact (or possibly of law) to be determined on the evidence. If the embargo was illegal, that does not make discriminatory transportation under it legal.

Demurrers to counts 6 to 10, inclusive, overruled.

Discrimination re Transportation of Hay (No. D 4340). As to the first five counts, the case is even stronger, if anything, for defendants than in No. D 4341. Demurrer to these counts sustained. Demurrer to counts 6 to 10, inclusive, overruled.

Defendants may, of course, plead over in those instances where the demurrers are overruled.

UNITED STATES v. METROPOLITAN LUMBER CO. et al.

(District Court, D. New Jersey. November 30, 1918.)

1. CARRIERS ⟸38—OFFENSES—DISCRIMINATIONS.
Elkins Act, § 1, as amended by Hepburn Act (Comp. St. 1916, § 8597), embraces the granting or receiving of discriminations or concessions, in transportation service, irrespective of whether they in any way affect transportation rates or charges.

2. CARRIERS ⟸38—OFFENSES—DISCRIMINATIONS.
The receipt of discriminations or concessions in transportation service falls within the criminal provisions of the Elkins Act, as amended by the Hepburn Act (Comp. St. 1916, § 8597), although they were procured by misrepresentations, and were thus granted without knowledge or connivance of the carrier.

3. CARRIERS ⟸38—OFFENSES—INDICTMENT.
Indictments charging violations of the Elkins Act, as amended by the Hepburn Act (Comp. St. 1916, § 8597), in that defendants by misrepresentations obtained the transportation of goods on which a railroad embargo had been laid, *held* to sufficiently allege a discrimination, showing other persons were denied the same transportation service defendants enjoyed.

4. CARRIERS ⟸38—OFFENSES—"SHIPPERS."
One is a "shipper," within the meaning of Elkins Act, § 1, as amended by Hepburn Act (Comp. St. 1916, § 8597), who, although a consignee,

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exercises such direct control over shipments of commodities consigned to him by another as enables him, by his own act, to procure for himself discriminations in respect to transportation service.

5. CARRIERS ⊂=38—OFFENSES—DISCRIMINATIONS—EMBARGO.
Where defendants by misrepresentations, etc., obtained transportation despite a railroad embargo, thus violating the Elkins Act, as amended by the Hepburn Act (Comp. St. 1916, § 8597), *held*, that prosecution could not be defeated because the embargo had not been submitted to the Interstate Commerce Commission and its reasonableness ascertained and adjudicated.

6. CARRIERS ⊂=39—CARRIAGE OF GOODS—EMBARGOES.
Carriers by railroad have the power to lay embargoes for the proper conduct of their business.

7. CARRIERS ⊂=38—OFFENSES—ACTION BY INTERSTATE COMMERCE COMMISSION.
A prosecution against shippers charged with obtaining discriminations in violation of the Elkins Act, as amended by the Hepburn Act (Comp. St. 1916, § 8597), cannot be defeated on the theory that the Interstate Commerce Commission should first have determined whether the actions of the shippers constituted violation, because one court might hold they did and another they did not.

8. CARRIERS ⊂=23—SUSPENSION OF INTERSTATE COMMERCE ACT—GOVERNMENT OPERATION OF RAILROADS.
In view of the presidential proclamation of December 26, 1917, whereby the President, as a war measure, under the authority of Act Aug. 29, 1917, assumed control of the railway systems of the country, and in view of Federal Control Act March 21, 1918, *held*, that the operation of the Interstate Commerce Acts, including the Elkins Act (Comp. St. 1916, §§ 8563–8604), was not suspended.

9. CARRIERS ⊂=23—SEIZURE OF RAILROADS—SUSPENSION OF INTERSTATE COMMERCE ACT.
While Act Aug. 29, 1917, allowing the President in time of war to assume control of the railway systems, was passed pursuant to the war power of Congress, given by Const. art. 1, § 8, *held*, that a railroad embargo promulgated under presidential authority, though giving preference to war material, was nothing more than a regulation incident to the proper conduct of the business of railroads, and the control which the President had assumed.

10. CARRIERS ⊂=38—OFFENSES—DISCRIMINATIONS.
Where defendants by misrepresentation obtained transportation service despite an embargo laid after the President had assumed control of the railroads, *held* that, as the Elkins Act, etc., was not suspended, and defendants obtained a discrimination, prosecution could not be defeated on the theory that there was no statute making it criminal to fail to comply with the embargo regulation.

11. CARRIERS ⊂=38 — OFFENSES — INDICTMENT — PROMULGATION OF REGULATIONS.
An indictment charging that defendants, in violation of the Elkins Act (Comp. St. 1916, § 8597), obtained a discrimination by securing through misrepresentation transportation service, notwithstanding an embargo laid after the President, under Act Aug. 29, 1917, assumed control of railroads, *held* not defective, on theory that the President's assent to embargo was not alleged; it being obvious he must act through agents.

The Metropolitan Lumber Company and another, the Southern Lumber Company and another, the Franklin Lumber Company, the Boynton Lumber Company, Ira R. Crouse, and Perrine & Buckelew, Incorporated, were severally indicted for alleged violations of Act Feb. 19, 1903, c. 708, § 1, as amended by Act June 29, 1906, c. 3591. On demurrers to the indictments. Demurrers overruled.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Charles F. Lynch, U. S. Atty., of Newark, N. J., and Andrew J. Steelman, Asst. U. S. Atty., of Jersey City, N. J.

Robert H. McCarter, of Newark, N. J., for defendant Crouse.

Osborne & Cornish, of Newark, N. J., for defendants Boynton Lumber Co. and Perrine & Buckelew, Inc.

Harrison P. Lindabury, of Newark, N. J., for defendants Southern Lumber Co., David Jacobson, and Franklin Lumber Co.

Edward P. Stout, of Jersey City, N. J., for defendants Metropolitan Lumber Co. and Jacob Jacobson.

HAIGHT, District Judge. As the indictments in these cases are in all material respects the same, as are also the questions which the demurrers to each raise (at least so far as the points relied upon at the argument are concerned), the demurrers were argued together, and the decision herein announced will apply to all of the cases. The indictments are based on alleged violations of section 1 of the Act of February 19, 1903, c. 708, 32 Stat. 847, commonly known as the Elkins Act, as the same was amended by the Act of June 29, 1906, c. 3591, § 2, 34 Stat. 587, commonly known as the Hepburn Act (8 U. S. Comp. St. 1916, § 8597). All are alike in form, and each contains several counts.

A summary of the first count of the indictment against the defendant Crouse will suffice to illustrate what all set forth. It alleges, in substance, that on January 24, 1918, the Pennsylvania Railroad Company was a common carrier, engaged in interstate commerce, and subject to the various acts to regulate commerce; that on that date, "under the authorization" of the Director General of Railroads, who had theretofore been appointed as such by the President, when the latter, on December 28, 1917, took possession of the railroad systems of the country, and "upon the recommendation of the Regional Director, said Pennsylvania Railroad Company," because of the extremely severe weather, particularly affecting the operation of railroads crossing the Allegheny Mountains, which then prevailed, laid an "embargo against the transportation of property, including, among other things, lumber not constituting war supplies specifically approved by the War Department of the United States," over certain of its railway routes, including the points mentioned in the indictment; that the defendant, who was engaged in "purchasing, shipping, and selling lumber" at Perth Amboy, in this district, on April 2, 1918, in order to deceive the Pennsylvania Railroad Company, and obtain transportation over its lines of a carload of lumber from the state of Virginia, where it was located, to Perth Amboy, in the state of New Jersey, notwithstanding the embargo, caused the lumber to be consigned to "Ira R. Crouse, in care of United States Government Quartermaster, Government Order A-1-1014 U. S. Property G-783-347 at Perth Amboy"; that he thereby caused the railroad company to believe that the lumber consisted of war supplies specifically approved by the War Department, and therefore that the transportation of it was not prohibited by the embargo, and to transport it accordingly, notwithstanding the embargo, although he knew that the lumber was not war supplies specifically

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approved by the War Department, or other property excepted from the operation of the embargo; that as consignee of the lumber, which was transported under the circumstances before mentioned, in time of war, and while the embargo was in force, he "did knowingly accept and receive from said Pennsylvania Railroad Company, a discrimination in respect to the transportation by said Pennsylvania Railroad Company of said property in interstate commerce, as aforesaid, whereby a discrimination was practiced in favor of said Ira R. Crouse, and against the United States and all other shippers who desired to ship lumber and other commodities over said railway route of said Pennsylvania Railroad Company—among others" naming various concerns and individuals.

In five of the counts (this likewise applies to all of the indictments) he is charged under the same circumstances with having accepted and received "a concession in respect to the transportation" of lumber, "whereby an advantage was given to" him. Stated concisely, the charge is that the several defendants, by deceiving the railroad officials as to the character of the shipments, through the device of having lumber fraudulently consigned to themselves in care of various army officers, or directly to the latter, procured its transportation in interstate commerce over the lines of the Pennsylvania Railroad Company, while the embargo was in force, and thus procured transportation service which the embargo forbade, and which in some instances others, desiring to ship over the same route of the said Pennsylvania Railroad Company, were unable to procure because of the existence of the embargo, thereby receiving discriminations or concessions in respect to the transportation of such property in interstate commerce.

The indictments are attacked on numerous grounds, all of which, however, are fairly embraced within the fundamental objections which will hereafter appear. As the acts complained of occurred after the President had taken control of the railroads of the country, pursuant to proclamation of December 26, 1917, the objections may be divided primarily into two classes: (1) Those which are claimed to exist irrespective of any effect which the President's act may have had on the Interstate Commerce Acts, and the duties and liabilities of the Pennsylvania Railroad and the defendants thereunder; and (2) those based upon changes alleged to have been effected thereby. I will first consider the grounds of demurrer which fall within the first of the before-mentioned classes. Hereinafter, when the Elkins Act is spoken of, it will be understood, unless the contrary is indicated, that that act as it was amended by the Hepburn Act is meant.

[1] 1. It is primarily contended that section 1 of the Elkins Act—the criminal provisions—does not embrace the granting or receipt of a discrimination or concession such as the indictments allege that the defendants received, a discrimination or concession in transportation service exclusively, but contemplates only discriminations or concessions which in some way affect transportation rates or charges. Although my attention has not been directed to any reported decision wherein this precise question has been directly decided, neither it, nor some kindred questions to be hereafter discussed, are difficult of

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solution in the light of the development of the interstate commerce legislation and the objects which Congress had in enacting it. Section 2 of the original Act to Regulate Commerce of February 4, 1887, c. 104, 24 Stat. 379 (Comp. St. 1916, § 8564), provided that it should be unlawful for any common carrier to, directly or indirectly, receive a greater or less compensation for any service rendered in the transportation of passengers or property than it charged or received from any other person for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. It will be noted that the section referred only to compensation. Section 3 (Comp. St. 1916, § 8565), however, prohibited the making or giving of "any undue or unreasonable preference or advantage" to any person, locality, or any particular description of traffic "in any respect whatsoever," and the subjecting of any such person, locality or kind of traffic "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The last section is broad enough to embrace a discrimination in the matter of transportation service, as distinguished from the compensation to be paid for such service, and so it has been construed. See Interstate Com. Com. v. Ill. Cent. R. R., 215 U. S. 452, 475, 30 Sup. Ct. 155, 54 L. Ed. 280. Section 6 (Comp. St. 1916, § 8569) forbade any carrier to charge or receive a greater or less compensation for transportation than the rates, fares and charges specified in the tariffs, which the act required to be filed and published. This section was extended, by the Hepburn Act, to forbid the granting of any privileges or facilities in transportation except such as were specified in such tariffs.

By section 10 (Comp. St. 1916, § 8574) a criminal liability was imposed upon any common carrier who should willfully do or cause to be done, or suffer or permit to be done, "any act, matter or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein," etc. By the same section, as amended by the Act of March 2, 1889, c. 382, § 2, 25 Stat. 855, it was made a criminal offense for a carrier "by means of false billing, false classification, false weighing or false report of weight, or by any other device or means," to knowingly and willfully assist or suffer or permit any person to obtain transportation for property "at less than the regular rates then established," on the line of transportation of such carrier. The same section, as amended by the act last mentioned, also provided that any one for whom, as "consignor or consignee," property should be carried by a common carrier, who should knowingly and willfully, "by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier," obtain or attempt to obtain transportation for such property "at less than the regular rates then established," should be guilty of a crime, as should likewise any person who should, "by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier * * * to discriminate unjustly in his,

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its, or their favor as against any other consignor or consignee in the transportation of property."

It will thus be noted that, while the law made it unlawful and criminal for a carrier to give any unreasonable preference or advantage or to subject any person to an unreasonable prejudice or disadvantage in respect to transportation over its lines, and quite comprehensively prohibited and provided penalties for discrimination in the matter of compensation for transportation and from departing from the filed and published tariffs, it did not prohibit the receipt of discriminations in respect to transportation service, strictly speaking, by the shipper, nor make it criminal for him to accept transportation at a less compensation than was charged to others for a like service, or at less than the published tariffs, except when accomplished by false billing or bribery or something akin thereto, mentioned in section 10. In this condition of the law, the Elkins Act, which has been well described as "a 'catch-all' provision for any practice by either carrier or shipper which by any device whatever would tend to defeat the purpose of the law" (United States v. Vacuum Oil Co., 153 Fed. 604 [D. C. W. D. N. Y.]), was passed. The provision pertinent to these cases is as follows:

"It shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be guilty of a misdemeanor." Comp. St. 1916, § 8597.

The language used is sufficiently broad and comprehensive to embrace a discrimination in transportation service, as well as a discrimination in respect to rates. The purpose which Congress had in passing the various acts to regulate commerce has been often stated by the Supreme Court. For instance, Chief Justice White, in New Haven R. R. Co. v. Interstate Com. Com., 200 U. S. 361, 391, 26 Sup. Ct. 272, 277 (50 L. Ed. 515), expressed it as follows:

"It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, * * * and forbidding rebates, preferences and all other forms of undue discrimination. * * * If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all."

In Armour Packing Co. v. United States, 209 U. S. 56, 72, 28 Sup. Ct. 428, 432 (52 L. Ed. 681), Mr. Justice Day said:

"The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike."

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See, also, the remarks on page 80 of 209 U. S. (28 Sup. Ct. 428, 52 L. Ed. 681).

In Chicago, Indianapolis & Louisville Ry. Co. v. United States, 219 U. S. 487, 496, 31 Sup. Ct. 272, 274 (55 L. Ed. 305), Mr. Justice Harlan said:

"The legislative department intended that all who obtained transportation on interstate lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality."

And in Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 478, 31 Sup. Ct. 265, 269 (55 L. Ed. 297, 34 L. R. A. [N. S.] 671), the same distinguished Justice said:

"But the purpose of Congress was to cut up by the roots every form of discrimination, favoritism and inequality."

In United States v. Union Stockyard, 226 U. S. 286, 307, 33 Sup. Ct. 83, 89 (57 L. Ed. 226), Mr. Justice Day, in referring to the previous decisions of the Supreme Court respecting the purpose of Congress in enacting these laws, said that it was "to require equal treatment of all shippers and to prohibit unjust discrimination in favor of any of them," and on page 309 of 226 U. S., on page 90 of 33 Sup. Ct. (57 L. Ed. 226), he said:

"It is the object of the Interstate Commerce Law and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms."

Similar expressions in the reported cases could be multiplied, but it would serve no useful purpose to do so. Of course, as happens with almost every piece of remedial legislation, the accomplishment of the end sought was reached by degrees, as the practical operation of the act and the decisions of the courts developed deficiencies, and as one radical change resulted in a further step in advance. Finally in the development of the legislative object the Elkins Act was passed, which, by its language, seems to be all-embracing, and to cover the loopholes which the previous acts left open for discrimination and the exercise of favoritism. It also brought within the prohibition of the law many acts of the shipper which had not theretofore been criminal; thus making the law more effective to accomplish the object sought.

It needs no argument to demonstrate that there is fully as much room for the exercise of favoritism and resulting inequality in the granting or withholding of transportation service or facilities as there is in the matter of compensation to be paid for such service, for as was said by the Interstate Commerce Commission in the matter of The New England Investigation, 27 Interst. Com. Com'n R. 560, 616, "service is often of even greater importance than the rate itself." This is especially manifest when there exists an embargo, such as the indictments in these cases allege. Hence, bearing in mind that the purpose of Congress in passing the Elkins Act was to utterly eliminate every form or kind of discrimination, favoritism, and inequality, it is quite impossible to believe that when Congress used the broad and compre-

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hensive language which it did, "whereby any other advantage is given or discrimination is practiced," it intended to cover only advantages or discriminations in the matter of rates or compensation for transportation service. If discrimination in rates was the only evil aimed at, why were the words above quoted added? Discrimination in respect to rates had been as completely covered as the English language is capable of, by the use of the words "whereby any such property shall by any device whatever be transported at a less rate," etc.

The purpose of Congress being ascertained, and it being apparent that to permit discriminations in transportation service would thwart that purpose, and the language used in the act being amply sufficient to embrace such discriminations, it seems to me that the conclusion is irresistible that such a discrimination as is complained of in these indictments is within the criminal provisions of the Elkins Act. Indeed, although he was not passing upon the precise question here under discussion, Mr. Justice Day, in the Armour Packing Co. Case, supra, at page 74 of 209 U. S., at page 232 of 28 Sup. Ct. (52 L. Ed. 681), said:

"For the penal section is not only aimed at offenses whereby property is transported in interstate commerce at less than published rates, but in terms covers the offering, granting, giving, soliciting, accepting or receiving of rebates, concessions or discriminations, 'whereby any other advantage is given or discrimination is practiced' in respect of interstate transportation."

While the decisions which deal with the right of the government, through the instrumentality of the Interstate Commerce Commission or the courts, to restrain undue discrimination or preference in the matter of transportation facilities or service, such as Interstate Com. Com. v. Ill. Cent. R. R. Co., 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280, are not dispositive of the question under consideration, which has to do with the criminal provisions of the Elkins Act, they do illustrate the spirit in which the acts have been construed, and demonstrate that any practice which works a discrimination in respect to transportation service is within the general scope of the act. I cannot conceive, therefore, that it can be successfully maintained that Congress, when it used the broad language found in the Elkins Act, did not intend to make it a penal offense to give or receive a discrimination or concession in respect to transportation service or facilities, without regard to whether the same in any way affects the rate or compensation to be paid therefor. This conclusion seems also to be in harmony with the views of Judge Mayer, as expressed in his decision in United States v. Lehigh Valley Ry. Co. et al. (D. C. S. D. N. Y.) 254 Fed. 332.

[2] 2. The allegations of the indictments forbid the possibility of drawing an inference that the discriminations or concessions which the defendants are alleged to have received were procured with the knowledge, acquiescence, or connivance of the carrier. It is defendants' contention that such knowledge, acquiescence, or connivance is essential before the acceptance or receipt of a discrimination or concession is criminal under the Elkins Act. While it is admitted that there is nothing in the act which specifically makes the knowledge or connivance of the shipper an essential element of the crime, yet it is argued that the words "to give or grant" are correlative with the words "to accept

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or receive," and that a discrimination cannot be accepted or received unless it has been given or granted. That is, of course, true; but it by no means follows therefrom that a discrimination may not have been knowingly received by the shipper and unconsciously given or granted by the carrier.

Bearing in mind the purpose which Congress had in mind in enacting the Elkins Act, as before set forth, and considering, as will be hereafter shown, that a construction such as defendants urge would in many cases defeat that purpose, and further bearing in mind that one of the ways in which it was sought to eliminate all favoritism and inequality of treatment was by visiting criminal punishment on those who would be the beneficiaries thereof, it would be unjustifiable, I think, in the absence of language from which it can be clearly found, to attribute to Congress an intention to limit the operation of the act to only such transactions as are consciously participated in by both the shipper and the carrier. Such a construction would free from criminal responsibility both the carrier and the shipper in all those cases where the shipper could, without the knowledge of the carrier, secure advantages and discriminations in transportation service, by means which do not fall within the provisions of section 10 of the Act to Regulate Commerce, as it was amended by the Act of March 2, 1889, c. 382, § 2, 25 Stat. 855, and the Act of June 18, 1910, c. 309, § 10, 36 Stat. 539. The provisions of that section, except as to the acts interdicted in the last paragraph, deal only with the procuring of transportation at less than the established rates. The last paragraph seems clearly to deal only with cases in which the carrier knowingly participates, or in which an attempt is made to secure the discrimination by means which would acquaint the carrier with the object sought. The language of that paragraph is:

"If any * * * person * * * shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce"

—any carrier to discriminate in its favor. Under the settled rule of construction, the word "otherwise" should be construed to include offenses which are akin to those specifically mentioned; that is to say, bribery and solicitation, both of which would, of course, necessitate acquainting the carrier with the object sought to be accomplished. The use of the word "induce" would also seem to lead to the same conclusion. Hence, section 10, as amended and supplemented, would not cover cases such as these or many others which may be readily imagined. Moreover, if it was intended to cover, by section 1 of the Elkins Act, only the receipt of discriminations which are granted with the carrier's knowledge, that part of the act was quite unnecessary, because it was for all practical purposes already covered by the last paragraph of section 10 of the Act to Regulate Commerce. It was held by the Circuit Court of Appeals of the Sixth Circuit, in Nichols & Cox Lumber Co. v. United States, 212 Fed. 588, 590, 129 C. C. A. 124, that the amendment made to that section by the Act of June 18, 1910, did not repeal the Elkins Act, because they were aimed at different evils.

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While the remarks of Mr. Justice Lurton in Mo., Kan. & Tex. Ry. Co. v. Harriman, 227 U. S. 657, 671, 33 Sup. Ct. 397, 57 L. Ed. 690 (second paragraph), are susceptible of the inference which the government seeks to draw from them, and, if interpreted in that light, would fully support the views here expressed, I am not, owing to the facts of that case, sufficiently persuaded that they may be properly considered as an expression of an opinion of the Supreme Court on the point in question. I incline to the belief that the court had reference rather to the fact that the acts therein referred to produced a discrimination which the Elkins Act prohibited, rather than that such acts were necessarily criminal under that statute. Nor do I think that the remarks of the same Justice in Kans. Southern Ry. v. Carl, 227 U. S. 639, 652, 33 Sup. Ct. 391, 57 L. Ed. 683 (referred to by counsel for one of the defendants), is susceptible of the meaning which it is sought to attribute to it. In speaking of connivance, the court did not refer to that as a fact necessary to bring the discrimination or preference within the "act of Congress," but rather referred to the effect of connivance of the carrier on the estoppel which underlay the decision of the case.

It is further urged that the views expressed by Judge Holt in United States v. N. Y. Cent. & H. R. R. Co., 146 Fed. 298, 303 (C. C. S. D. N. Y.), are opposed to those above expressed. It is true that Judge Holt said in that case:

"I think that the offense of giving or receiving rebates is such an act. It requires the concurrence of two persons. A rebate cannot be given unless there is some one who agrees to receive it and who does receive it, and cannot be received unless there is some one who agrees to give it and who does give it."

These remarks may be entirely correct so far as rebates are concerned (and they related only to rebates), because a rebate (a giving back) may very properly imply a consciousness on the part of the carrier of what it was doing. That may have been the reason for the amendment made to section 10 of the Act to Regulate Commerce by the Act of June 19, 1910, which prohibits the procuring of refunds by false statements and representations as to value, injury, etc., of property theretofore transported. But because it may be that the giving and acceptance of a rebate requires the conscious participation on the part of the carrier, it does not follow that every discrimination or concession must also require a like participation. My conclusion therefore is that the receipt of a discrimination or concession such as the indictments in this case allege that the defendants received, is made criminal by the provisions of the Elkins Act, irrespective of whether the carrier consciously and knowingly participated therein.

[3] 3. The next contention of defendants, in orderly sequence, is that the indictments do not allege any such discrimination as is contemplated by the Elkins Act, because they do not show that any other persons were denied the same transportation service as the defendants received. In other words, the objection is, as I understand it, that the indictments do not allege that any other persons, who caused lumber to be consigned in the fraudulent manner that the defendants

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did, were denied like transportation facilities. The mere statement of the proposition would seem to be quite sufficient to refute its soundness. In its final analysis it is this: Because the indictments do not allege that others, desiring to avail themselves of transportation service while the embargo was in effect, did not attempt to or were unsuccessful in inducing the railroad company to believe that their particular shipments were within the exceptions of the embargo, when they were not, the indictments do not show that the defendants, who were successful in doing so, received a discrimination. But that, as I conceive it, is not the test; but it is whether the defendants received transportation of lumber which was not within one of the exceptions of the embargo, when others who desired like service could not procure it. In that view full effect can be given to the decision in United States v. Hanley, 71 Fed. 672, 673 (D. C. N. D. Ill.), and the indictments will still be good. They allege that there were others (who are named, including the United States) who desired to avail themselves of the transportation privilege which the defendants secured. The necessary effect of the allegations of the indictments is that such persons were denied what the defendants, by their fraudulent practices, procured. If that does not constitute the receipt of a discrimination, it is difficult to understand what does. This was the view entertained, I think, by the Circuit Court of Appeals of the Sixth Circuit in Hocking Valley Ry. Co. v. United States, 210 Fed. 735, 745, and 746, subdivision 8, 127 C. C. A. 285. At the conclusion of the part of the opinion just referred to Judge Denison pertinently said:

"It cannot be necessary that others should have known of the partiality and should have demanded equal treatment. Such concessions are naturally not made generally known."

Moreover, when the embargo was laid, every person desiring to avail himself of transportation facilities within the area of the embargo had a right to presume that it would be enforced. I do not think, therefore, that it would be necessary, in order to show the receipt of discriminations on the part of the defendants, that others had actually applied for transportation service similar to that which the defendants received, and had been denied it; it would be sufficient to show the promulgation of the embargo, the desire of the others to ship, the fact that they did not do so, or attempt to do so, by reason of the embargo, and the method by which the defendants procured transportation service in violation of the embargo. I think the remarks of Judge Hazel, in United States v. Vacuum Oil Co., 153 Fed. 598, 607 (D. C. W. D. N. Y.), support this view. The indictment in United States v. Hanley, supra, was framed under section 2 of the Act to Regulate Commerce, long before the Elkins Act was passed, and the objection was that it did not allege that the rebate which had been given to the defendant had been denied to others similarly situated. The fact that there were other shippers of lumber, who desired to avail themselves of transportation facilities while the embargo was in force, and who did not do so by reason of the embargo, coupled with the means by which the defendants did procure such service, readily distinguishes this case from the Hanley Case.

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All that has just been said has reference to a discrimination, strictly speaking. Some of the counts of the indictment are based on the proposition that what the defendants received were discriminations, while others proceed on the theory that they were concessions. The fact that the indictment characterizes what the defendants did receive as "concessions" or "discriminations," as the case may be, does not make them such. What the defendants actually received, under all the facts and circumstances, will determine whether they were concessions or discriminations. While there undoubtedly is in some classes of cases a real distinction between a concession and a discrimination, there would seem to be no difference in a case where the act consists in conceding to one a transportation privilege which is denied to another because of a general rule or regulation. Whether the defendants in this case received a discrimination or a concession (a discrimination may readily include a concession) would seem to depend upon whether they secured something which others similarly situated could not, without regard to any general rule or regulation, or whether they received something more favorable than an established rule or regulation, such as the embargo, entitled them to, irrespective of whether others were denied the same concession or not. In either case what they did receive the Elkins Act forbade them to receive, and made their act in receiving it a criminal offense.

[4] 4. It is further urged that the indictments do not charge a crime, because the allegations thereof demonstrate that the defendants were not "shippers" within the meaning of the Elkins Act. I will assume, for the purpose of argument, that only "carriers" and "shippers" are within the provisions of section 1, as defendants forcibly contend. It is true that the indictments set forth that the defendants were "consignees" of the lumber which was transported in violation of the embargo; but they further allege that the respective defendants, for the purpose of obtaining transportation, caused the property to be fraudulently consigned, etc. Thus it appears that the defendants were the actors in the illegal transactions; and, so far as the indictments show, they were the persons to be benefited by the discriminations or concessions. The question then is: Were they, under such circumstances, "shippers," within the meaning of the act? I have no doubt that they were. To give to the word "shippers" the narrow meaning sought by defendants, and thus to hold that a consignee, when a different person than the consignor, could under no circumstances be a shipper, would, in many cases, defeat the main purpose of the act. For instance, very frequently the consignee, although he does not initiate the shipment, pays the freight, and the goods are in reality transported for him. Furthermore, in such cases he is the only person benefited by or interested in concessions or rebates. For obvious reasons, unless the very purpose of the act is to be nullified, such a consignee is a shipper, within the meaning of the act, as he is in fact.

That it was the intention of Congress that the criminal provisions of section 1 should reach consignees under such circumstances, is made more manifest when they are read in connection with the last paragraph of that section and section 10 of the Act to Regulate Com-

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merce, and in the light of the purposes sought to be accomplished by the Elkins Act, as hereinbefore expressed. In the latter section, the obtaining of transportation, at less than the regular rates, by either the "consignor or consignee," through false billing, etc., is made a crime; and by the last paragraph of section 1 of the Elkins Act, "in addition to any penalty provided by" that act, a "consignor or consignee," "for whom" property is transported and to whom a rebate is given, is made liable to a forfeiture of three times the rebate. Bearing in mind the purpose which Congress had in passing the Elkins Act and the comprehensive language used, it cannot be that it was intended to punish the consignee only in cases falling directly within those provisions, and to leave him unscathed or without criminal responsibility in all other cases, which would undoubtedly constitute the majority. There is no conceivable reason for any such distinction and every reason to the contrary.

The context of the paragraph in which the words "whether carrier or shipper" are found must not be overlooked. "Every person or corporation, whether carrier or shipper," who knowingly gives, accepts, etc., are made thereby guilty of a crime. The use of the words "every person" would seem to indicate that Congress never intended to limit the application of that part of the act to only such shippers as occupy the position of consignors. Hence, without attempting to lay down any general rule applicable to all cases, I think that in a case such as these, where the consignees, as is alleged, exercised such direct control over the shipments as enabled them, by their own acts, to procure for themselves discriminations in respect to transportation service, they are clearly "shippers," within the meaning of the act. In such a case the transportation service is really rendered for them, not for the consignors, and they are in reality the shippers. The view above expressed finds direct support in the remarks of Judge Landis in United States v. Standard Oil Co. (D. C.) 148 Fed. 719, 722, and some support, I think, in that part of the opinion in United States v. Milwaukee Refrigerator Transit Co., 145 Fed. 1007, 1012 (C. C. E. D. Wis.), which deals with the defendant's contention that the Elkins Act touched only the carrier and the shipper, and not to the part of the opinion which construes the words "parties interested in the traffic," as it does also in the decision of the Interstate Commerce Commission in St. Louis Terminal Case, 34 Interst. Com. Com'n R. 453, 460, 461.

[5, 6] 5. It is further urged that the defendants cannot be prosecuted in the absence of proceedings before or previous action by the Interstate Commerce Commission. This proposition seems to be based on two theories. It is first claimed that the embargo should have been submitted to the Interstate Commerce Commission, and its reasonableness ascertained and adjudicated by that body. The obvious answer is that the reasonableness of the embargo is not in issue in these cases; but the question is whether the defendants have knowingly received a discrimination or concession in transportation service which a strict and impartial enforcement of the embargo would not have permitted them to receive. If the railroad company were being prosecuted for

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having given, or the defendants for having received, discriminations by means of or through the embargo rather than by violating it, in all probability the defendants' contention would be well taken, for in such a case the question would be whether the embargo was reasonable, or whether it produced unjust and unreasonable discriminations among shippers. In that event an administrative question would probably be presented, which, under the decisions of the Supreme Court, must be passed on by the Interstate Commerce Commission prior to the institution of either civil or criminal proceedings. See Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Balt. & Ohio R. R. Co. v. Pitcairn Coal Co., 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292; United States v. Pacific & Arctic Co., 228 U. S. 87, 106, 33 Sup. Ct. 443, 57 L. Ed. 742; Penna. R. R. Co. v. International Coal Co., 230 U. S. 184, 196, 197, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; Mitchell Coal Co. v. Penna. R. R. Co., 230 U. S. 247, 256, 257, 33 Sup. Ct. 916, 57 L. Ed. 1472.

In the cases at bar the defendants are charged, not with having secured discriminations through or by means of the embargo, but in violation of it; therefore, the reasonableness of the embargo is not in question. There would be nothing for the Interstate Commerce Commission, so far as any action on their part could affect the issues in this case, to pass upon. The distinction between the cases at bar and the supposed case is pointed out in Penna. R. R. Co. v. International Coal Co., supra, and in Mitchell Coal Co. v. Penna. R. R. Co., supra, where the two classes of cases are specifically dealt with, and particularly in Penna. R. R. Co. v. Puritan Coal Mining Co., 237 U. S. 121, 131, 35 Sup. Ct. 484, 59 L. Ed. 867, as it is also in Penna. R. R. Co. v. Stineman Coal Co., 242 U. S. 298, 37 Sup. Ct. 118, 61 L. Ed. 316, Penna. R. R. Co. v. Sonman Coal Co., 242 U. S. 121, 37 Sup Ct. 46, 61 L. Ed. 188, and Hocking Valley R. R. Co. v. United States, 210 Fed. 735, 745, 127 C. C. A. 285 (C. C. A. 6th Cir). The right of a carrier to lay embargoes for the proper conduct of its business is not, and I do not think could be successfully, contested. This right, wholly or partially, is recognized in nearly all of the cases last above cited, and especially in the decision of the Interstate Commerce Commission in Baltimore Chamber of Commerce v. Baltimore & Ohio Railroad, 45 Interst. Com. Com'n R. 40. If the defendants conceived that the embargo was unreasonable, or unjustly discriminatory, so far as they were concerned, they should have applied to the Interstate Commerce Commission for its vacation or modification, as was done in the case last cited, rather than to endeavor to evade it, and thus procure a discrimination over other shippers who were in the same class as themselves.

[7] It next seems to be contended that the Interstate Commerce Commission should first have determined whether the actions of the defendants constituted violations of the Elkins Act, because one court might hold that they did and another that they did not. This contention is based on an entire misapprehension of the doctrine above discussed. The proposition that the construction of a penal statute must

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be first submitted to an administrative body before the courts can proceed to enforce it—and that is what defendants' contention amounts to—is so utterly without merit as to need no discussion.

[8, 9] 6. I am now brought to a consideration of such of the defendants' contentions as are based on the proposition that the act of the President in assuming control of the railway systems of the country, by virtue of that part of section 1 of the Act of August 29, 1917, c. 418, 39 Stat. 645, which authorized him to do so in time of war, suspended the operation of the Interstate Commerce Acts, including the Elkins Act, while such systems remained under his control. When the expression "Interstate Commerce Acts" is hereinafter used, it will be understood as including the Elkins Act. It should be observed at the outset that the President's proclamation of December 26, 1917, specifically provided that:

"Until and except so far as said director [the Director General of Railroads] shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission"

—and that by section 10 of the subsequent Act of Congress of March 21, 1918, c. 25, commonly known as the Federal Control Act, it was provided:

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President."

There was no express provision in the before-mentioned Act of August 29, 1917, repealing, suspending or providing for the suspension of any of the Interstate Commerce Acts; therefore, if that act did bring about or authorized any such suspension (which I do not attempt to decide), it would have to be implied from the fact that control by the President would be inconsistent with all or some of the provisions of the Interstate Commerce Acts. However, it is clear that the President did not consider that his control was thus inconsistent, because, as appears from the above-quoted extract from his proclamation, he specifically provided that the railroads should remain subject to all existing statutes and orders of the Interstate Commerce Commission until the Director General of Railroads should, by general or special order, otherwise provide. To the same effect is the subsequent Act of Congress of March 21, 1918. I do not think that it needs any argument to demonstrate that if the official to whom the law committed the possession and control of the railroads did not deem such possession and control, except as occasion might arise thereafter, so inconsistent with the Interstate Commerce Acts as to necessitate a suspension of them, that any court would be justified in holding to the contrary. Especially is that true when Congress by its later act, in effect gave the same interpretation, as I think it did, to its prior act. If it be assumed that the President could, by special or general order, under either of the Federal Control Acts, authorize discriminations in transportation serv-

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ice, among persons similarly situated, of other than war material, supplies, and equipment, and other commodities essential to the prosecution of the war, no such order has been brought to my attention. Thus it follows that the provisions in question of the Elkins Act were not affected by the act of the President in assuming control of the railroads, and the unlawfulness of the discriminations alleged to have been received by the defendants was not removed thereby.

It may be readily conceded that the act, by virtue of which the President first assumed control, was passed pursuant to the "war power" of Congress (article 1, § 8, pars. 11, 12, 13, of the Constitution), as defendants contend; but that in no way affects these cases, because the provisions of the Interstate Commerce Acts, pertinent to them, were, at the time the offenses are alleged to have been committed, in full force and effect, as I have heretofore found. The embargo was not, as some of the counsel for the defendants seemed to assume, promulgated "under the war power of Congress." Even though it gave preference to war material and supplies, it was nothing more than a regulation incident to the proper conduct of the business of the railroads. The President had assumed control by virtue of an act passed under the war power of Congress; but the embargo was only an incident of the control, in the same sense that any embargo laid by a carrier, while a railroad was under its control, would be incidental to the proper conduct of its business.

[10] It is further contended that as there was no statute, when the embargo was promulgated, making it criminal to fail to comply with such "a regulation," the defendants' act in violating the embargo could not constitute a crime. This contention is based on the assumption that when the President took possession of the railroads, the Elkins Act was suspended. As I have heretofore found that there was no such suspension, it of course follows that the conclusion falls with the premise on which it is based. The crime charged is not that the defendants violated a regulation, but that they were recipients of discriminations which the Elkins Act forbade them to receive.

[11] It is also urged that the railroad officials were without authority to lay the embargo, because the railroad had passed under the control of the President, and that the Pennsylvania Railroad was thereafter, as a corporate entity, powerless to act either in respect to laying an embargo or in granting discriminations or concessions. Hence it is argued that the indictments are defective, because they allege that the discriminations were received from the "Pennsylvania Railroad," and because the embargo was laid by it, notwithstanding that they also allege that the embargo was authorized by the Director General. It was, of course, intended by Congress that the President should, in the performance of the duties imposed upon him by the Act of August 29, 1917, act through agents. In the proclamation of December 26, 1917, he provided that the Director General of Railroads should perform the duties imposed upon him (which were the duties imposed upon the President, after he had assumed control) "so long and to such extent as he shall determine, through the boards of directors, receivers, officers and employés of said systems of transportation." The embargo, therefore,

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was laid through the agency which the President had created, and the discriminations or concessions were given or granted by those charged by him with the conducting of the Pennsylvania Railroad system of transportation, and that is what I construe the indictments to charge. They are entitled to receive a fair and reasonable construction.

7. I think that all of the objections to the indictment, which need more than a passing remark, are embraced within the points that have been discussed. There are one or two minor ones, of a very technical nature, which I think are deserving of no more discussion than that I have examined them and find them without merit.

My conclusion therefore is that the demurrers should be overruled.

JOHN LYSAGHT, Limited, v. LEHIGH VALLEY R. CO.

(District Court, S. D. New York. December 20, 1918.)

1. CARRIERS ⟸177(3)—LIABILITY OF INITIAL CARRIER—INTERSTATE COMMERCE LAW—"EXISTING LAW."

In Interstate Commerce Act, § 20, as amended by Act June 29, 1906, § 7 (Comp. St. 1916, § 8604a), regulating liability of initial carriers, the proviso that nothing in the section shall deprive the shipper "of any remedy or right of action which he has under the existing law," means the common law as understood in the federal courts, and excludes changes made by state statutes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Existing Law.]

2. CARRIERS ⟸177(4)—LIABILITY TO SHIPPERS—INTERSTATE COMMERCE LAW.

Under Interstate Commerce Act, § 20, as amended by Act June 29, 1906, § 7 (Comp. St. 1916, § 8604aa), the liability of a connecting or terminal carrier for property lost or damaged while in its custody is the same as that of the initial carrier.

3. CARRIERS ⟸119—LOSS OF PROPERTY—DEFENSES—"ACT OF GOD."

Loss or damage to property in course of transportation through explosion of war munitions, also in transit, cannot be considered in a legal sense an "act of God."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Act of God.]

4. CARRIERS ⟸177(3)—LIABILITY OF INITIAL CARRIER—INTERSTATE COMMERCE LAW.

Interstate Commerce Act, § 20, as amended by Act June 29, 1906, § 7 (Comp. St. 1916, § 8604a), providing that a carrier receiving property for interstate transportation shall be liable for "any loss, damage or injury to such property caused by it," is not a limitation of the carrier's pre-existing common-law liability.

5. CARRIERS ⟸115—LIABILITY FOR LOSS OF PROPERTY—EXPLOSION OF MUNITIONS.

Compliance by a carrier in the carriage of war munitions with the requirements of Criminal Code, §§ 232–235 (Comp. St. 1916, §§ 10402–10405), does not affect its civil liability in respect to loss or damage to property of other shippers through an explosion of such munitions.

At Law. Action by John Lysaght, Limited, against the Lehigh Valley Railroad Company. On demurrer to pleas. Demurrer sustained.

Demurrer to three pleas interposed to a complaint.

The complaint alleged: That on June 17, and June 22, 1916, the plaintiff caused to be delivered to the receiver of the Missouri, Kansas & Texas Rail-

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way two carloads of spelters to be transferred from the state of Kansas to the state of New York for export, consigned to the Iola Zinc Company, New York, and that for each carload the Missouri, Kansas & Texas Railway issued a bill of lading in standard form as approved by the Interstate Commerce Commission. That the defendant as connecting carrier received these two carloads for the completion of the transportation through the states of New York, Pennsylvania, and New Jersey, and to the city of New York. That thereafter, and on the 30th day of July, 1916, while in possession of the defendant, and at the port of New York, the carloads were destroyed by fire, to the damage of the plaintiff in the sum of $15,544.23.

The second cause of action repeats the allegations of the first, and adds that the loss of the spelters was due to the negligence of the defendant. This cause of action is not the subject of the present controversy.

The defendant pleaded, for a first plea: That the spelters were destroyed as the natural result of certain explosives and munitions of war, in the course of transportation in interstate and foreign commerce as a necessary incident to the great European war, and that they exploded without fault of the defendant, for reasons beyond its control. That such explosion was a great public calamity, of which both the plaintiff and the defendant were innocent victims, and for which the defendant was in no wise responsible.

The second plea alleges: That the defendant and its connecting carriers were common carriers of freight and passengers in interstate commerce, and as such subject to the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379). That the defendant and its connecting carriers duly published as required by law their rates, charges, bill of lading provisions, and rules and regulations for the transportation of freight, including explosives and munitions of war. That on July 30, 1916, a large amount of explosives and munitions of war were in the possession of the defendant at Jersey City, N. J., in the course of transportation in interstate foreign commerce, and that the spelters mentioned in the complaint were destroyed without any fault or negligence of the defendant, and as the proximate and natural result of the explosion on the date in question of certain of the aforesaid explosives and munitions of war. That the defendant, in the course of its handling and transportation, and while holding the aforesaid explosives and munitions of war, had fully complied with all the requirements of the act of Congress and the rules of the Interstate Commerce Commission applicable, as well as with its own tariffs, classifications, and bill of lading provisions for the transporting of such explosives and munitions of war.

The third plea alleges the same facts as the second, and in addition that the damage resulted from certain explosives and munitions of war, which were not in the possession or under the control of the defendant, but were on barges lying in the waters of New York Bay in the vicinity of defendant's terminal at Jersey City, N. J., which were wholly out of the control of the defendant.

The defendant by the three pleas raises the following points: First. That the "Black Tom explosion," which did immense damage in the neighborhood, was a great public calamity, for which the defendant should not be charged, but which should be regarded as an exception to its liability as a common carrier. That the conventional rule governing carrier's liability will not withstand the results of inquiry into the sources of such liability as found in the history of the subject, and that a carrier should not in law be liable therefor. Second. That the whole subject is regulated by the Interstate Commerce Act and those sections of the Criminal Code, §§ 232–235 (Act March 4, 1909, c. 321, 35 Stat. 1134 [Comp. St. 1916, §§ 10402–10405]), which regulate the carriage of explosives by common carrier. That under this legislation Congress has provided the precautions which carriers shall exercise, and which, if they do, shall exempt them from responsibility in the carriage of explosives. That, furthermore, the liability of a common carrier is only for damages caused by it, and does not include any liability for explosions in which neither it nor its servants can be shown to have any part. Third. That, if the explosion was due to materials not in possession of the defendant, it is not responsible for the same, as in no aspect can it be said to be caused by the carrier itself.

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W. K. Post, of New York City, for plaintiff.
Lindley M. Garrison and Charles A. Boston, both of New York City, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] This case depends directly upon the Carmack Amendment of the Interstate Commerce Law, which the Supreme Court has many times declared completely to regulate all the liabilities of common carriers engaged in interstate commerce. Adams Express Co. v. Croninger, 226 U. S. 491, 505, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Erie R. R. Co. v. New York, 233 U. S. 671, 681, 34 Sup. Ct. 756, 58 L. Ed. 1149, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D, 138; N. Y. & Norfolk R. R. Co. v. Peninsula Exchange, 240 U. S. 34, 36 Sup. Ct. 230, 60 L. Ed. 511, L. R. A. 1917A, 193; Southern Express Co. v. Byers, 240 U. S. 612, 614, 36 Sup. Ct. 410, 60 L. Ed. 825, L. R. A. 1917A, 197; Southern Railway v. Prescott, 240 U. S. 632, 639, 36 Sup. Ct. 469, 60 L. Ed. 836; Georgia, Florida, etc., Ry. v. Blish Milling Co., 241 U. S. 190, 194, 36 Sup. Ct. 541, 60 L. Ed. 948; Cincinnati, etc., Ry. v. Rankin, 241 U. S. 319, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265; Atchison, etc., Ry. v. Harold, 241 U. S. 371, 378, 36 Sup. Ct. 665, 60 L. Ed. 1050. The Interstate Commerce Law, § 20, as now amended (Act Feb. 4, 1887, c. 104, 24 Stat. 386, as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [Comp. St. 1916, §§ 8604a, 8604aa]), provides that an initial carrier shall be liable for all loss or damage "caused by it," but that the section as a whole shall not affect "any remedy or right of action" which the shipper shall have "under the existing law." The phrase "existing law" means existing common law as understood in the federal courts, and excludes changes effected by state statutes. Adams Express Co. v. Croninger, supra, 226 U. S. 504, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Southern Express Co. v. Byers, supra, 240 U. S. 614, 36 Sup. Ct. 410, 60 L. Ed. 825, L. R. A. 1917A, 197; Southern Railway Co. v. Prescott, supra, 240 U. S. 639, 36 Sup. Ct. 469, 60 L. Ed. 836. A connecting or terminal carrier's liability is subject to the same rules as the initial carrier's. Georgia, etc., Ry. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948.

[3] The question, therefore, becomes whether the "federal law" as so understood excuses the defendant in such circumstances as the pleas allege. That the explosion of the substances carried by the defendant can be regarded as in any sense an "act of God," cannot be supported, as that phrase has always been understood. They were inherently unstable compounds, not combined by spontaneous processes of nature, but under human direction, and from no point of view could the release of energy attendant upon their resumption of stable chemical conditions fall within the definition of that phrase. Even though the conventional limits of an "act of God" be vague and irrational, and though there may be still some latitude for interpretation which did not seek to make the definition turn upon the degree

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of violence of the elements, there is a clear difference between the acts of the elements which all must endure, and the results of human contrivance like this. If it be urged that the affinity of the dissociated atoms of an unstable chemical compound be a force of nature, the fact is true; but it is quite irrelevant, for the laws of nature attend every action of man, including even the operation of his consciousness. The distinction was devised, not for chemists, but for common men, and must be read in their terms. So viewed, the elements had nothing to do with the calamity, but only the hand of man. Nor can the damage be attributed to any "vice" of the plaintiff's goods, however that word be construed. They were injured by the "vice" of other goods in the carrier's or others' custody, and not by their own.

[4] If, then, the common expressions of carrier's liability be accepted, there is no escape here for the defendant, and so it insists that these are only loose and ill-founded formulas, which will not endure historical analysis. The answer is, I think, to be found, not there, but in the definite purposes of the statute which covers the whole subject. There cannot be any doubt, from the latest expression of the Supreme Court (Cincinnati, etc., Ry. Co. v. Rankin, 241 U. S. 319, 326, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265), that section 20 was intended to adopt the carrier's liability as it was understood at that time, and that the language of Mr. Justice Lurton in Adams Express Co. v. Croninger, 226 U. S. 491, 506, 507, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, is not to be taken as interpreting the phrase "caused by it" as in limitation of any pre-existing liability. He was indeed discussing, not that question, but only whether the language extended the carrier's liabilities as fixed at common law, which he thought it did not, but that rather it implied "a liability for some default in its common-law duty as a common carrier." It may, perhaps, be too much to assert that the proviso of section 20 incorporates unyieldingly the exact status of the federal common law into the statute in its whole concreteness, yet it certainly does affirm in general the liability of carriers so derived as a part of the statute itself. Any radical departure from that law would violate the fair import of the phrase, and if there is to be any such it must be by express act of Congress. So much follows from the scheme of the section, which since 1906 has been obviously molded with an eye to the generally accepted liabilities of carriers as a foundation for the very specific changes prescribed from time to time.

It is, of course, possible to conceive the common law so incorporated to be such only as the courts might after a historical scrutiny accept, leaving them free even for radical modifications in the doctrine as generally expressed when the language first appeared in section 20. But I do not so understand the substance of the matter. Whether ill or well founded historically, the exceptions to a carrier's absolute liability had come to have a classic form, and I do not agree that a nice inquiry into the foundations of the current doctrine was contemplated by the statute. The section incorporated what was generally accepted in the form in which it had become accepted, and ren-

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dered irrelevant the conclusions at which historical scholarship might arrive as to its justification. The structure of the system created by the act presupposed the existing law as then understood, and if it bears too heavily on the railroads their only relief is by an application to the Commission or to Congress. The courts have no such powers.

Therefore it seems to me quite beside the mark to engage in the examination which the defendant invites. Moreover, the implicit assumption of its case I do not accept, that justice necessarily lies on its side. I am aware of no long-accepted convention, which usage has made into an axiom of justice, and which throws a loss like this upon the shipper as against the carrier. Each party is quite innocent, and while it may be that the ordinary risks of ownership should fall upon the shipper, it is not apparent to me that the custody of the carrier may not be thought to modify those risks as between the two. The fact seems rather to be that all such a priori considerations are in vacuo, and that the relative rights of the parties may be only settled in the light of the function assigned to the carrier in the economic system of the country. That is a matter so obviously out of the province of a court and within that of Congress, where the conflicting economic interests may exert their mutual political powers, that I need hardly express any opinion upon it, even if I were in any position to do so. Whatever may be the debatable limitations of a carrier's liability still left open within the accepted general formulas, they do not raise any questions here.

[5] Sections 232–235 of the Criminal Code do not concern the regulation of the carrier's civil liability. They are intended to provide against the carriage of explosives generally on passenger vehicles or vessels, and otherwise to impose conditions upon such carriage as the Interstate Commerce Commission shall prescribe. It may be that their violation might entail a civil liability in addition to that imposed at common law, but upon that I need express no opinion. That they serve as a limitation upon the common-law liability is not suggested in the text of the statute, and is not to be inferred from its purpose. It in no sense follows because shipments are lawful, when they conform to the rules, that there is no responsibility inter partes which arises from their possession. The law has always recognized liabilities which do not depend upon any fault, if that be understood to involve a failure to respond to a conventional standard of foresight. The master's responsibility for his servant is, for example, derived from quite another basis. Recently, as in Workmen's Compensation Laws, the same principle has again appeared. Now, it is true that a carrier is obliged to receive the goods upon fixed terms, and cannot escape the liability after once engaging in the business; but there is no implication from this that a law which establishes minimal requirements for their receipt intends to relieve the carrier of any consequences except those arising from its fault, and in any aspect the Interstate Commerce Law contradicts such a broad result.

The third defense adds nothing to the others, since the carrier's liability is not limited to damage arising to goods received, by oth-

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er goods in its possession. If it would be a desirable innovation so to prescribe, it would be an innovation nevertheless. More can be said for it than for a similar exception for damage arising from goods within the carrier's possession, but it involves a radical readjustment of what has long been accepted, and it is not for the courts.

None of the pleas is valid in law, and the demurrer will be sustained. As I understand that the defendant does not wish to plead over, no such leave will be granted.

Demurrer sustained.

PELL et al. v. McCABE et al.

(District Court, S. D. New York. October 21, 1918.)

1. BANKRUPTCY ⟸391(3)—FEDERAL COURTS—STAY OF SUITS AGAINST BANKRUPT.

The power of a bankruptcy court to stay suits against the bankrupt is expressly confined to the period before determination of discharge proceedings, and a District Court can have no wider power to stay suits in a state court on an auxiliary bill dependent upon the bankruptcy proceedings.

2. INJUNCTION ⟸26(5)—RESTRAINING ACTION—ADEQUATE REMEDY AT LAW.

A debtor, released from his debts by the judgment of a court having jurisdiction, to avail himself of the judgment when sued upon a prior debt, may plead it as a defense, and it affords no basis for an injunction to stay the action.

3. EQUITY ⟸51(3)—MULTIPLICITY OF SUITS—BILL "QUIA TIMET."

A bill "quia timet" is very limited, and goes to protect an existing possession which has been already established once after an attack at law, and which is again threatened, thereby threatening such a multiplicity of suits as equity will recognize.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Quia Timet.]

In Equity. Suit by Stephen H. P. Pell and others against W. Gordon McCabe, Jr., and others. Decree for defendants.

Emanuel J. Myers, of New York City, for plaintiffs.

William St. John Tozer, of New York City, for defendants.

LEARNED HAND, District Judge. This complicated bill of complaint raises a number of questions which I do not find it necessary to determine. For example, had the bankruptcy court any jurisdiction whatever in the order of composition to do more as to Thompson than to settle claims against the estate? If it had such jurisdiction, did it attempt to exercise it quoad Thompson's creditors, who did not formally accept the composition? Could a composition in any case affect the rights of creditors of Thompson, who was not a bankrupt, who offered no composition, and whose creditors were not before the court? If so, could it affect creditors not mentioned in the schedules, who did not know of the existence of their claims, because they had not yet discovered a fraud practiced upon them by the bankrupts and Thompson? These questions all go to the effect of the order or decree

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of January 25, 1915, and as, in the view I take, that order must be pleaded in bar in South Carolina, it is obviously more orderly to avoid any discussion of them beyond the caution that my silence must not be taken as intimating that I should answer any one of them in the plaintiff's favor. Similarly, I pass the question whether this bill is within the ancillary jurisdiction of a court of bankruptcy, or of the District Court as ancillary to the court of bankruptcy.

[1] That the bill cannot succeed as to the bankrupts is too clear to justify much discussion. They got a discharge under the order of confirmation, and that discharge is a bar to certain of their debts, under section 17. The power of bankruptcy courts to stay suits brought against the bankrupt on dischargeable debts is regulated by section 11a, and is expressly confined to a period up to the determination of the discharge proceedings. In re Federal Biscuit Co., 214 Fed. 221, 225, 130 C. C. A. 635. By no "auxiliary bill" dependent upon the bankruptcy proceedings does the District Court get a wider power to stay suits in a state court than it would have had as a court of bankruptcy. Indeed, I do not understand that the plaintiffs so contend. As to the bankrupts, the bill must in any event be dismissed.

[2] As to Thompson the position, if I understand it, is this: The bankruptcy court, having jurisdiction to release Thompson of his debts, undertook to do so. That release, being an adjudication, is property, property within the jurisdiction of the court, and the court by ancillary bill will protect it from attack elsewhere by injunction. As I have said, I shall treat the order as though it effectively released Thompson from such a claim as that set up in the South Carolina action. The first question is whether a judgment releasing a debtor can be the basis of a subsequent suit to enjoin the debt. That, I take it, is at most only one form of the general question whether the plaintiff has an adequate remedy at law. I do not mean that it presents the case as strongly as where there has been a judgment upon a claim sued on and a merger, but only that it is no better for the plaintiff than such a situation. Normally, when any defense is available at law, he must plead it there. Grand Chute v. Winegar, 15 Wall. 373, 21 L. Ed. 170. And this applies as well to the defense of discharge of the liability as to any other defense. Fowler v. Palmer, 62 N. Y. 533; Saunders v. Huntington, 166 Mass. 96, 44 N. E. 127. The same rule generally applies when the defense is of merger or estoppel by judgment. Chicago, etc., Co. v. Chicago, 143 Ill. 641, 647, 32 N. E. 178; Palmer v. Hayes, 93 Ind. 189; Gray v. Coan, 36 Iowa, 296; Bowen v. Gent, 54 Md. 555; B. & O. R. R. Co. v. Latimer, 118 Md. 183, 84 Atl. 377; Chicago, etc., Co. v. St. Joseph, etc., Co. (C. C.) 92 Fed. 22, 26. Now, it is, of course, true that the right to plead in bar may not be sufficient; so much was indicated in Foltz v. St. Louis, etc., R. Co., 60 Fed. 316, 322, 8 C. C. A. 635, where the point was not raised in time. Field v. Early, 167 Mass. 449, 45 N. E. 917, partook of the nature of an interpleader.

[3] A bill quia timet is in this last category, and the plaintiffs seem to suppose that this is such; but a bill quia timet is a very limited affair. It goes to protect an existing possession, which has been al-

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ready established once after an attack at law, and which is again threatened. In such a case there is threatened such a multiplicity of suits as equity will recognize. Here there has never been any suit at all between the parties; at best the defendants are concluded by some kind of vague constructive consent, or whatever it may be. There is no property in possession of the plaintiffs, whose title has already been assailed and defended; there is no threatened repetition of any issues ever litigated before. It escapes me upon what possible theory it is supposed that bills quia timet are pertinent.

The same observations apply to those other cases cited in quantity under which courts have protected property once in their custody from becoming the subject of litigation elsewhere. It is not necessary to consider them in detail for they are endless, but they all rest upon the custody, actual or prospective, of a court. Now, a release is not property, and, if it were, it would not, under these circumstances, be property of which the court has taken custody for the purpose of distribution. The mere statement of the supposed analogy shows how remote it is. Whatever rights Thompson got were to be used like a discharge, wherever he was sued. There is no possible reason why his supposed release should stand upon any different footing from the discharges in bankruptcy. And there is no escape from the conclusion that, if this court draw to itself under the guise of an ancillary jurisdiction, every litigation, wherever it occurs, which may be commenced against Thompson, the bankruptcy proceedings can never come to a conclusion.

Seeing no ground for equitable intervention, even if all be true that the plaintiffs allege, it follows that the bill is without equity, and as such it will be dismissed, with costs.

BAILEY v. MISSISSIPPI HOME TELEPHONE CO.

(District Court, M. D. Pennsylvania. December 18, 1918.)

No. 879.

1. Costs ⟸254(1, 5), 258—Federal Courts—Costs Awarded on Reversal.
Under rule 29, par. 3, and rule 23, par. 7, of the Circuit Court of Appeals (224 Fed. xix, xvi, 137 C. C. A. xix, xvi), when a judgment is reversed, with costs, plaintiff is entitled to costs of the appeal, including actual cost of printing the record, but not including cost of printing briefs, nor cost of transcript, which must be taxed in the District Court as costs in the case.

2. Costs ⟸247—Costs Awarded on Reversal.
A mandate from the Circuit Court of Appeals, reversing a judgment with costs "in the sum of $50.10," *held* not to entitle plaintiff to execution for costs incurred by him in the District Court, but only for costs of the appellate proceedings, including those specified in the mandate.

Action by John R. Bailey against the Mississippi Home Telephone Company. On rules to set aside writs of fi. fa. and attachment execution. Granted conditionally.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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John J. Reardon, of Williamsport, Pa., for plaintiff.
J. Fred Schaffer, of Sunbury, Pa., for defendant.

WITMER, District Judge. The plaintiff, John R. Bailey, sued the defendant, the Mississippi Home Telephone Company, in an action of assumpsit. The case was tried in the District Court, and plaintiff was nonsuited. Upon refusal to take off the nonsuit, he appealed, and the Circuit Court of Appeals (252 Fed. 581, — C. C. A. —) reversed the judgment, with costs, and ordered a new trial.

On the 12th day of August, 1918, plaintiff filed the following bill of costs in the District Court:

J. P. Helfenstein, a witness duly subpœnaed in behalf of plaintiff and present at the trial 140 miles circular @ 5¢	$7.00	
4 days' attendance @ 1.50	6.00	$ 13.00
Serving subpœna		2.40
Stenographer's fees (½) for taking, transcribing, and certifying testimony		55.68
Actual cost of printing appellant's paper books		104.70
Clerk's costs paid by plaintiff		11.25
Marshal's costs paid by plaintiff		9.97
Cost of appeal bond		10.00
Atty. fee in District Court		10.00
		$217.00

On the 5th day of September, 1918, the mandate from the appellate court, dated the 3d day of September, 1918, was filed in the District Court. The mandate, inter alia, provides:

"That the said plaintiff in error, John R. Bailey, recover against the said defendant in error, the Mississippi Home Telephone Company, in the sum of fifty dollars ($50.00) for his costs * * * and have execution therefor."

The costs appearing upon the mandate and for which Bailey was awarded execution by the Circuit Court of Appeals, are as follows:

Clerk	$30.00
Attorney	20.00
Total	$50.00

Thereafter Bailey caused a writ of fi. fa. and a writ of attachment in execution to issue for the collection of $267, being the whole of the plaintiff's bill filed in the District Court as indicated, plus the costs appearing upon the mandate. Thereupon defendant obtained these rules to set aside the writs. The dispute between the parties raises the question as to what costs the appellant is entitled to recover at this time from the appellee. He insists upon recovering all the costs embraced in his bill filed in the District Court, which upon examination covers all costs of the plaintiff in the District Court, while the Mississippi Home Telephone Company contends that the appellant is only entitled to recover the costs of appeal, as per the award of costs in the mandate, $50.

[1] The Pennsylvania rule, that costs on a reversal are to abide the event of the suit (Wright v. Small, 5 Bin. 204; Hamilton v. Aslin, 3 Watts, 222; Smith v. Sharp, 5 Watts, 292), does not obtain

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in the federal courts (Berthold v. Burton [C. C.] 169 Fed. 495; Jennings v. Burton [C. C.] 177 Fed. 603). When judgment is reversed, with costs, it includes all the costs of the appeal, no matter how or when taxable. Berthold v. Burton (C. C.) 169 Fed. 495.

Rule 29, par. 3, of the Circuit Court of Appeals (224 Fed. xix, 137 C. C. A. xix) provides:

"In cases of reversal of any judgment or decree in this court costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case."

Under this rule the costs of transcript of the record cannot be taxed in the Circuit Court of Appeals, but must be taxed in the court below. Lee Injector Mfg. Co. v. Penberthy Injector Co., 109 Fed. 964, 48 C. C. A. 760. In the same case it is also decided that money paid to a surety company for an appeal bond is not taxable as costs in either court.

Rule 23, par. 7, of the Circuit of Appeals (224 Fed. xvi, 137 C. C. A. xvi) provides:

"In case of reversal, affirmance or dismissal, with costs, the actual cost paid for printing the record by the party in whose favor costs are awarded, and the clerk's fee for supervising the printing, etc., where such fee is paid by the party in whose favor costs are awarded shall be taxed against the party against whom costs are given and shall be inserted in the body of the mandate or other proper process."

The cost of printing briefs is not included. Ex parte Hughes, 114 U. S. 548, 5 Sup. Ct. 1008, 29 L. Ed. 281; Kursheedt Mfg. Co. v. Naday, 108 Fed. 918, 48 C. C. A. 140; Lee Injector Mfg. Co. v. Penberthy Injector Co., supra.

It will be noted that, while plaintiff's bill filed in this court contained some items that, as a whole or in part, are allowed as costs of the appeal the greater portion of such cannot be so regarded; nor is it possible, from the information the bill carries upon its face, to determine to any degree of accuracy what portion should be allowed. The item "actual cost of printing appellant's paper books, $104.70," no doubt embraces "the printing of the record," for which, under the rule, appellant may recover; but it is equally certain that it includes as well the cost of his brief of argument, which may not be included, as appears supra. And the same also in turn applies to the item "Stenographer's fee for taking, transcribing, and certifying testimony," "Clerk's costs," etc.

Under the rule the costs paid the clerk for preparation of the transcript of the record in the court below, while taxable as costs, does not include the payment of stenographer's fees incurred previous to the appeal in taking and transcribing notes of testimony used by the clerk in making up the record. The purpose and the end to be obtained by the rules promulgated by the appellate court is to make the appellee whole by way of reimbursement for costs necessarily laid out in bringing his case before the court when and where he is entitled to relief. The costs so far incurred, previous to the appeal, in this court such as "Costs paid marshal," "Attorney's fee allowed in

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District Court," "Witness fees," etc., are clearly not recoverable as costs under the order of the appellate court and its recited rules. These will abide the ultimate result and termination of the case.

[2] The orderly way to dispose of this muddle is to have the clerk tax the costs of the appeal including the costs returned by the clerk of the District Court, upon notice to the parties, and if, without appeal of either party, the costs so taxed, together with the costs of the fi. fa. stayed, are not paid within 30 days of notice to the appellee, the defendant herein, the rule to stay is dismissed. If paid, the rule is made absolute, and the attachment and interpleader proceedings are dismissed.

SULLIVAN v. NITRATE PRODUCERS' S. S. CO., Limited.

(District Court, E. D. New York. November 19, 1918.)

1. JUDGMENT ⇐812(3)—CONCLUSIVENESS—RES JUDICATA.
Where libelant had previously libeled a vessel in rem for personal injuries, and the vessel had been claimed by respondent through its agent, *held*, that the judgment rendered in the first proceeding might be pleaded by respondent as res judicata.

2. JUDGMENT ⇐713(2)—CONCLUSIVENESS—RES JUDICATA.
Where the parties to a libel against a vessel in which respondent appeared by its agent and claimed the vessel were the same as those to the second, any issue which could have been determined in that proceeding is res judicata in the later proceeding.

3. JUDGMENT ⇐588—CONCLUSIVENESS—RES JUDICATA.
Where libelant had previously libeled a vessel, and respondent, by its agent, appeared and claimed the vessel, *held* that, as both proceedings were intended to enable libelant to recover for personal injuries, the fact that libelant alleged additional acts of negligence in the second does not of itself prevent the first judgment from being a bar to the second libel.

4. JUDGMENT ⇐812(2)—CONCLUSIVENESS—RES JUDICATA.
Where a libel in rem, in which libelant sought to recover for personal injuries, set up as part of the damages the expenses of care while a cure was being effected, *held*, that a judgment dismissing the libel against the vessel was a bar to a later libel in personam against respondent, which appeared and claimed the vessel in the first proceeding.

In Admiralty. Libel by John Sullivan against the Nitrate Producers' Steamship Company, Limited. Libel dismissed.

Silas B. Axtell, of New York City, for libelant.

Kirlin, Woolsey & Hickox, of New York City (L. De Grove Potter, of New York City, of counsel), for respondent.

GARVIN, District Judge. When this action came on for trial, both parties requested the court, before going into the merits, to determine whether the libelant was barred from a recovery herein on the ground of res adjudicata by reason of a decision of the United States Court for the Southern District of New York, upon which a judgment was entered on or about July 9, 1917, dismissing a libel filed by the libelant

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herein against the steamship Anglo-Patagonian, owned by the respondent.

The libelant, a horse handler, one of the caretakers in charge of a cargo of horses being carried by the Anglo-Patagonian, en route from Philadelphia to France, met with an accident as a result of which he lost two fingers of his left hand. For this he brought suit in the Southern district bringing an action in rem, against the Anglo-Patagonian. Barber & Company, Incorporated, filed an answer as agents and claimant of the boat. The libel in that case set forth the particulars of the accident and then alleged:

"Seventh. That by reason of the foregoing, your libelant has been damaged in the sum of five thousand dollars ($5,000.00)."

The libel concludes with the following prayer for relief:

"Wherefore your libelant prays that process in due form of law according to the course of this honorable court in causes of admiralty and maritime jurisdiction may issue against the steamship Anglo-Patagonian, her tackle, apparel, etc., and that all persons claiming any right, title, or interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this honorable court may be pleased to decree the payment of your libelant's claim in the sum of five thousand ($5,000.00) dollars, and that said vessel may be condemned and sold to pay the same, and in the event that he should fail to prove said vessel was unseaworthy for the reasons aforesaid, that he be awarded the expense of his maintenance and cure and wages to the end of the voyage for which he signed, and such other and further relief as to the court may seem just and proper."

The present libel is based upon the same accident, and sets forth two alleged causes of action arising therefrom: First, libelant's right to recover the reasonable expense of his maintenance and cure $1,000; and, second, because of the failure of the respondent and master and officers of the ship to provide libelant with prompt and proper medical care and attention, damages in the sum of $3,000 are demanded.

[1] While the action in the Southern district was in rem and the suit at bar is in personam, nevertheless in the former the respondent here appeared through its agents and claimed the vessel. The respondent may therefore plead res adjudicata. Bailey v. Sundberg (D. C.) 43 Fed. 81.

[2] Therefore any issue that was or could have been determined in the first action is res adjudicata in the case now before the court. Beloit v. Morgan, 74 U. S. (7 Wall.) 619, 19 L. Ed. 205; Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co., 95 Fed. 457, 37 C. C. A. 146.

[3] In the second action libelant has alleged additional acts of negligence. That of itself does not prevent the first judgment from being a bar to the second action. Columb v. Webster Mfg. Co., 84 Fed. 592, 28 C. C. A. 225, 43 L. R. A. 195, and cases therein cited.

[4] The decision by Judge Learned Hand in the first action, which has not been reversed, disposed of the question of negligence on the merits.

In the suit at bar the libelant seeks to recover in his first cause of action the expenses of his maintenance and care. These he sought to recover in the action in the Southern district. If he had proved his

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claim, he might have recovered them. The Vestris (D. C.) 252 Fed. 201.

The court holds therefore that libelant's claims are res adjudicata. The libel is dismissed.

GERSON v. IOWA PEARL BUTTON CO., Inc.

(District Court, S. D. New York. June 18, 1918.)

TRADE-MARKS AND TRADE-NAMES ⊂=95(2)—UNFAIR COMPETITION—PRELIMINARY INJUNCTION.

Where plaintiff, an individual dealer, in accordance with the New York statute filed a certificate showing his adoption of the name "Iowa Button Company" as a trade-name, and defendant, which was later incorporated under the laws of Iowa, adopted the same in ignorance of plaintiff's action, *held* that, as buttons from fresh-water shells are known to the trade as "Iowa pearl buttons," and neither party was entitled to the exclusive use of the name, plaintiff's motion for a preliminary injunction, restraining defendant, which had begun to do business in New York, from using such name, will be denied.

In Equity. Suit by Stanley Gerson against the Iowa Pearl Button Company Incorporated. On motion for preliminary injunction. Motion denied.

Emanuel S. Cahn, of New York City, for the motion.
Joseph A. Arnold, of New York City, opposed.

MAYER, District Judge. The application is for a preliminary injunction to restrain defendant from using the words "Iowa Pearl Button Company" within the state of New York, or, in any event, within the county of New York.

Plaintiff has used the name since December 2, 1913, having filed a certificate in the office of the New York county clerk in accordance with the statute permitting individuals, as distinguished from corporations, to use the designation of "Company" after compliance with statutory requirements and procedure.

Defendant corporation was organized under the laws of Iowa in 1916, its place of business being in Muscatine, in that state, and, on January 5, 1917, it obtained the usual certificate of authority to do business in the state of New York.

Bishop, the president of defendant, states that after a careful investigation, to ascertain whether the name "Iowa Pearl Button Company" had been used in the United States, he was unable to find that the name was in use. There is no reason to doubt this statement, as it is quite likely that such a search would be confined to inquiry of state secretaries or like state officials, rather than of innumerable county clerks or similar officials. According to Bishop, neither he nor any one else connected with defendant knew of the existence of Gerson's trade-name.

Gerson is a dealer, and trades, not only in Iowa pearl buttons, but also in other kinds of buttons. Defendant is a large manufacturer

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of "Iowa," or fresh-water pearl buttons. Nothing in the way of wrongdoing, nor deception, nor unfair trade methods, is shown against defendant. Plaintiff's sole reliance is on the liability to deception and confusion which is likely to result from the use by defendant of a name substantially identical with that of plaintiff's trade-name.

It is unnecessary to analyze at length the cases which deal with this frequently litigated subject, for the motion may be disposed of on the authority of Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535.

It seems—rather interestingly—that "Iowa pearl button" is a well-known product, which has grown to have a name as generic as "cotton" or "grain," to use the illustration of the Goodyear Case, supra. In other words, "Iowa pearl button" means a button made out of fresh-water shells. According to defendant, about 25 years ago the manufacture of pearl buttons out of fresh-water shells originated in Muscatine, Iowa. Up to that time there had never been any pearl buttons made out of fresh-water shells, in the United States or elsewhere. Machines for finishing pearl buttons made out of these shells were invented and developed at Muscatine, where the industry started, and the industry has grown large, and especially at Muscatine and other towns in Iowa. Iowa pearl buttons are known exclusively in the button trade as the equivalent of sweet-water buttons made from shells which are found in streams adjacent to Iowa, and many of the prominent firms manufacturing fresh-water pearl buttons are located in Iowa.

Under the heading "Button," it is stated in the Encyclopedia Britannica (volume IV, page 891):

"Pearl buttons were made (in the United States) on a small scale in 1855, but their manufacture received an enormous impetus in the last decade of the nineteenth century, when J. F. Boepple began, at Muscatine, Iowa, to utilize the unio or 'niggerhead' shells found along the Mississippi. By 1905 the annual output of these 'fresh-water pearl' buttons had reached 11,405,723 gross, worth $3,359,167, or 36.6 per cent. of the total value of the buttons produced in the United States. * * * (See U. S. A. Census Reports 1900, Manufacturers, part iii, pp. 315-327)."

Muscatine, Iowa, is mentioned in volume XIX of the same work (page 44) as:

"The center of a pearl-button industry introduced in 1891 by J. F. Boepple, a German; the buttons being made from the shells of the fresh-water mussel found in the neighborhood. * * *"

From the foregoing it is plain that neither plaintiff nor defendant is entitled to the exclusive use of the name "Iowa Pearl Button," nor, under the Goodyear Case, supra, can such use be acquired by adding the word "Company."

In any event, whether this conclusion is right or not, a preliminary injunction should not be granted. The cause can be tried early in the fall, and, meanwhile, an injunction might do great injury to defendant, if improvidently granted; whereas, there is no showing of any real injury to plaintiff at this time, but only a possible injury. Defendant has had the certificate to do business in this state under

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the name complained of for over a year, and this motion was only recently made, and the controversy may be safely left for determination upon the trial of the suit.

Motion denied.

UNITED STATES ex rel. DOUGHTY v. HUNT.

(District Court, S. D. New York. December 9, 1918.)

1. WAR ⇐32—COURTS-MARTIAL—REVIEW BY CIVIL COURTS.
A civil court has no power to interfere with the conduct of a court-martial, except where that court has exceeded its jurisdiction, and, if it originally had jurisdiction, it must be shown that, at some point in the proceedings under its governing law, it lost such jurisdiction.

2. WAR ⇐32—COURTS-MARTIAL—JURISDICTION.
That a defendant, on trial for desertion before a court-martial, was shown to have been in a "haze" or "stupor" at the time in question, *held* insufficient, under a plea of not guilty, to raise an issue of insanity, which deprived the court of jurisdiction under section 219 of the Manual of Courts-Martial.

Petition of the United States, on relation of Warren Sandford Doughty, directed to Colonel John E. Hunt, for writ of habeas corpus. Dismissed.

Sidney Lash, of New York City, for relator.
Francis G. Caffey, U. S. Atty., of New York City, for respondent.

LEARNED HAND, District Judge. In this case a writ of habeas corpus was issued to the detaining officer of a disciplinary barracks of the United States, inquiring into the detention of the relator, Warren Sandford Doughty. The respondent justifies under a commitment issuing from the headquarters of the port of embarkation at Newport News, Va., on August 24, 1918. This commitment is signed by the colonel, chief of staff, and recites the proceedings at which a general court-martial convicted the relator for desertion from the army and sentenced him to four years at hard labor in the custody of the respondent. The record on the court-martial has been made a part of the papers by way of traverse to the return, and the question comes up as to whether the court-martial was without jurisdiction.

[1] Every one agrees that a civil court has no power whatever to interfere with the conduct of a court-martial, except in a case where that court has exceeded its jurisdiction. There is no question here but that the relator was within the jurisdiction of the court-martial, and that the charge was such as was within the competency of that court, so that the sole question which can be raised is whether during the conduct of the proceedings the court-martial lost its jurisdiction. As we all know, the cases have held that a court does not lose jurisdiction by any mistake in the general conduct of the cause; you must go further, and show that there is some point in the proceedings at which, under its constituent law, the court actually lost entire jurisdiction over the case. That is a strong position, in any event; but it has been held

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in this case (and by that decision I am bound) that under section 219 of the Manual of Courts-Martial the court might lose jurisdiction if the issue of the mental disease, or derangement, of the accused was imported into the trial. So I am disposing of this case upon that issue alone. Was the issue of mental disease or derangement imported into the trial of the case? Did it become an issue?

[2] The plea was "not guilty," under which, by section 154 of the Manual, evidence of insanity might be admitted. The evidence itself was no more than that the accused seemed nervous and not himself at the time in question, and it would not have justified any finding of mental derangement; but it is not upon the evidence, but upon the assertions of the counsel for the defense, Mr. Lash, that the relator now relies. At the time of filing the plea Mr. Lash said:

"I intend to show from my testimony that three days prior to the prisoner's coming to Texas he was in a mental stupor."

In opening he said:

"I hope to show that he had been acting peculiarly, sort of stupor like. * * * He was hazy, and did not know what he was doing. While in Texas, he did not realize he was there."

This language is indeed consistent with mental derangement, but it is not of itself necessarily an assertion of mental derangement. Of course, if the word is to be taken to include every form of confusion of the mental faculties, perhaps it would include so much; but it is not reasonable to give it such a wide scope. The purpose of the section appears to me to require the distinct assertion that the accused was suffering from some form of mental disorder to which normal people are not subject. Any one may be in a "haze," or a "sort of stupor like," whose moral responsibility is not affected in any way which the criminal law will recognize. If the jurisdiction of a court is to be ousted, while it may not be necessary to challenge that jurisdiction formally, the condition upon which it ceases must be distinctly raised. It must appear that the disorder is not one which is consistent with what healthy people are subject to; it is an issue of disease, not of a variation from the complete possession of one's powers. I own that the distinction is not susceptible of accurate definition, because the fact of mental derangement is not so definable; but for that very reason the issue should be presented with certainty, else an accused can secure two trials upon vague assertions of some temporary diminution in the clarity of his mind. This was not what the section intended; the issue must be of the existence of the "necessary criminal mind," as the later parts of the section show. It is clear that the court did not understand that the accused's responsibility was at issue, in this sense, or beyond the general palliation of his offense. It is also clear, from Mr. Lash's summing up, that he did not suppose that his client was criminally irresponsible, in such sense as relieved him in general of moral responsibility.

I have assumed throughout that the issue, within the meaning of the section, involves only the formal issues as made, either by the pleadings or by subsequent assertion. This does not necessarily follow,

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especially when a defense such as insanity may be put in without further plea, under the plea of "not guilty." I do not, therefore, necessarily mean that the case is to be determined, except by the evidence actually adduced. The evidence of mental derangement was, however, even slighter than the assertions of counsel, and upon either aspect the court-martial had jurisdiction.

The writ is dismissed.

In re JOHN B. ROSE CO. In re ROSE BRICK CO. In re CORNELL STEAMBOAT CO.

(District Court, S. D. New York. December 26, 1918.)

1. ADMIRALTY ⊂=57—ARREST—RELEASE—RE-ARREST.
While normally a vessel, once arrested and discharged, may not be re-arrested for the same cause of action, yet if the stipulation was entered into improvidently, or through fraud or mistake, the court may order a new arrest; so, where vessels libeled for towage service were released, they may be re-arrested on an amended libel setting forth other items, provided such items constitute separate causes of action, but not if the items which were omitted from the original libel were part of the several breaches of a single contract.

2. ADMIRALTY ⊂=57—ARREST—RE-ARREST.
The rule that a vessel, once arrested and discharged, may not be re-arrested for the same cause of action, unless the stipulation was entered into improvidently, or through fraud or mistake, is designed to compel the libelant to state his cause once for all, and the mistake, etc., must go to the supposed value of the vessel to warrant re-arrest.

In Admiralty. Libels against certain canal boats, which were claimed by the John B. Rose Company, the Rose Brick Company, and the Cornell Steamboat Company. On libelant's motion to amend the libel and re-arrest the boats. Motion to re-arrest denied.

The case came up on a motion to amend a libel in rem against certain canal boats for towage charges and to re-arrest the boats. The original libel set forth a series of charges for towage of the several boats at different times; they were arrested, and released on stipulations for the amounts claimed. It then transpired, as this petition asserts, that the libelant had, "through error and the inadvertent omission of items," erroneously stated the amount of the claims, and that there were due largely increased bills for towage.

Kirlin, Woolsey & Hickox, of New York City (Victor W. Cutting, of New York City, of counsel), for libelant.

George E. Hargrave, of New York City, for claimants.

LEARNED HAND, District Judge. [1, 2] Normally a vessel, once arrested and discharged, may not be again arrested for the same cause of action. The Union, 4 Blatchf. 90, Fed. Cas. No. 14,346; The White Squall, 4 Blatchf. 103, Fed. Cas. No. 17,570; The Thales, 3 Ben. 327, Fed. Cas. No. 13,855; Id., 10 Blatchf. 203, Fed. Cas. No. 13,856; The William F. McRae (D. C.) 23 Fed. 557; The Mutual (D. C.) 78 Fed. 144. There has always been a condition imposed upon the rule that if the stipulation was entered into "improvidently,"

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or through "fraud or mistake," the court might order a new arrest, and Justice Clifford approved that condition in U. S. v. Ames, 99 U. S. 35, 25 L. Ed. 295. I have no doubt that it exists. It was extended in The I. F. Chapman, 241 Fed. 836, 154 C. C. A. 538, by the Circuit Court of Appeals for the First Circuit to a case where, in a libel for personal injuries, the libelant later raised his damages, and upon trial recovered more than he had originally claimed. The circumstances justifying the re-arrest were held in that case to be matter of discretion for the District Court, and an order was affirmed, though the first stipulation covered the damages then claimed.

In the case at bar there is no suggestion that the sum fixed in the stipulation was wrong through "fraud or mistake," nor was the amount "improvidently" reached. The trouble was in stating the original items in the libel. Apparently some of the towage services were omitted; at least, that is the more reasonable explanation of the language. Each of these may have constituted a separate cause of action, being by separate contract. If so, I know of no obligation on the part of the libelant to join them all in one libel. In such case it would not be as though they had constituted several breaches of a single contract. If they really are each several separate engagements, I think the rule does not apply.

If, on the other hand, the errors were those of incorrect statement of the amount of the several services, I apprehend that the rule would prevent any re-arrest. It is designed to compel the libelant to state his claim once and for all, and to discharge the vessel finally of the lien, and the mistake or the like, as I read the cases, must go to the supposed value of the vessel, not to the statement of the claim. The I. F. Chapman, supra, does, indeed, extend the rule further; but the cases in this circuit do not go so far.

Hence, if the libelant had a series of independent contracts, so that it need not have joined all in one libel, I see no objection, by way of amendment here, to allow them to be set up and to allow a re-arrest; but, if the correction be in the amount of the several services originally pleaded, I shall not allow it. The papers do not show these facts, and the motion to re-arrest must be denied, but with leave to file further affidavits, if the libelant be so advised.

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PEOPLE OF PORTO RICO et al. v. AMERICAN R. CO. OF PORTO RICO.

(Circuit Court of Appeals, First Circuit. December 4, 1918.)

No. 1321.

1. TERRITORIES ⟸20—INSULAR POSSESSIONS—PORTO RICO—POWERS OF LEGISLATIVE ASSEMBLY.
Under Organic Act of Porto Rico (Act Cong. April 12, 1900) establishing a civil government, and which creates a legislative assembly, with authority extending to "all matters of a legislative character not locally inapplicable" (section 32 [Comp. St. 1916, § 3781]), the exclusive control of the Interstate Commerce Commission over railroad rates did not extend to local tariffs of the intra-island railroads of Porto Rico, but such control was vested in the legislative assembly.

2. STATUTES ⟸56—INSULAR POSSESSIONS—PORTO RICO—VALIDITY OF LEGISLATIVE ACTS.
Under Organic Act of Porto Rico (Act Cong. April 12, 1900) § 31 (Comp. St. 1916, § 3780), requiring all laws enacted by the legislative assembly to be reported to Congress, which reserved the power to annul the same, it is to be presumed, in the absence of proof to the contrary, that a law was so reported and that it was acquiesced in by that body.

3. CARRIERS ⟸1—POWER—REGULATION OF RATES—STATUTE OF PORTO RICO.
Act Porto Rico March 12, 1908, § 7 (Comp. St. 1913, § 844), making it unlawful for a railroad company to charge other or different rates than those specified in a tariff schedule approved by the executive council, was within the powers of the legislative assembly and valid.

4. CARRIERS ⟸18(6)—VIOLATION OF REGULATIONS—RATES—INJUNCTION.
The violation by a railroad company of a statute of Porto Rico regulating rates affords ground for injunctive relief, and the federal District Court for Porto Rico, where it has jurisdiction of the parties, has power to grant such relief.

Appeal from the District Court of the United States for the District of Porto Rico; Peter J. Hamilton, Judge.

Suit in equity by the People of Porto Rico and others against the American Railroad Company of Porto Rico. Decree for defendant, and complainants appeal. Reversed.

Col. Edward S. Bailey, Asst. Judge Advocate General, of Washington, D. C. (Howard L. Kern, Atty. Gen., on the brief), for appellants.

Francis H. Dexter, of San Juan, P. R., for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. [1] The central and substantial question in this case is whether, at the time in question, the supposed regulatory provision of section 7 of an act of the legislative assembly of Porto Rico dated March 12, 1908, and entitled "Public Service Corporations" (Comp. Stat. Porto Rico, p. 72), was operative and prohibitive of railroad rate raising without the consent or approval of the executive council of Porto Rico, and we think it was.

The Act of Congress of April 12, 1900, c. 191, 31 Stat. 77, entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," now known as the Foraker Act,

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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and recognized as the Organic Law of the island, created a local legislative assembly, to consist of two houses, and designated the two houses thus constituted as "the legislative assembly of Porto Rico," and provided the manner in which the members should be elected.

As Congress might well do, under its plenary power in respect to territories and possessions of the United States (Clinton v. Englebrecht, 13 Wall. 434, 441, 20 L. Ed. 659; National Bank v. Yankton County, 101 U. S. 129, 25 L. Ed. 1046; Mormon Church v. United States, 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 481; Dorr v. United States, 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697), it broadly and plainly delegated local legislative powers to the assembly which it thus created. The purpose is gathered from sections 8, 14, 15, 27, 32 (Comp. St. 1916, §§ 3755, 3762, 3763, 3776, 3781), and from the rather general scope of what was intended as an organic law, creating a temporary civil government to be administered under the auspices of the United States, and we think the plan of government contemplated that the legislative assembly which it created should take the initiative in respect to questions like those relating to local freight rates. Indeed, through section 32 of the act it is expressly declared "that the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable."

In a period in which considerations of public policy required government restraint and control in respect to railway rates, and acting under supposed delegated authority to legislate with respect to such a subject, the assembly of Porto Rico through the act of March 12, 1908, which was an act for the regulation of public service corporations in Porto Rico, through section 7, declared that—

> "It shall be unlawful for any public corporation to charge, demand, collect or receive a greater or less compensation for any service performed by it than is specified in the tariff or schedules, rules and regulations approved by the executive council." Comp. Stat. Porto Rico, p. 72.

The railroad in question was a New York corporation and was operating a railway in Porto Rico, and although it had theretofore submitted its schedules to the executive council, rather than to the Interstate Commerce Commission, and had been going along under a schedule of freight rates which had been approved by the executive council of Porto Rico, without authority from that body, and while its petition for permission and authority to increase its schedule of rates was pending before it, put into effect a schedule of freight tariffs for the transportation of sugar cane and its products, which increased the rates twenty per cent. above the schedule which had been approved and under which it had been operating. And the Porto Rican executive council thereafter, in the pending proceeding of the railroad for permission to increase, ordered that no change should be made without its approval.

Upon the general question as to what of the general laws, if any, and upon the question as to which of the acts of Congress having particular reference to a civil government in Porto Rico were exclusively operative and effective there, there was considerable discussion at the arguments in respect to the character of the relation which the island

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of Porto Rico sustains to the United States—whether it is that of a territory or that of a possession.

In Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088, which was a customs case, and in Kopel v. Bingham, 211 U. S. 468, 29 Sup. Ct. 190, 53 L. Ed. 286, which was a case for the extradition of a fugitive criminal, the relationship of Porto Rico apparently is not recognized as that of a territory fully incorporated into the United States. In Dorr v. United States, 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697, it was decided that the Philippine Islands were not incorporated into the United States, and it was said that until territory ceded by treaty has been incorporated into the United States, it is to be governed under Congress, without the restrictions which are imposed upon it when passing laws for the United States as a political body of states in union.

To sustain its contention that jurisdiction of the Interstate Commerce Commission was exclusive in the island of Porto Rico under the general provision of section 14 of the Foraker Act of April 12, 1900, which declares that the statutory laws of the United States, not locally inapplicable, have the same force and effect in Porto Rico as in the United States, the appellee chiefly relies upon American Railroad Co. v. Birch, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879, and American Railroad Co. v. Didricksen, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456.

The first of these was a case under the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]), and the decision was upon the ground that the act expressly applies to Porto Rico, and this, as we understand, was upon the theory that the act by its terms not only included all common carriers in the states, in the territories, the District of Columbia, the Panama Canal Zone, but "other possessions of the United States." Thus the decision was based upon the scope of the statute rather than upon any strict interpretation of the question whether Porto Rico is a territory of the United States, or a possession.

And in the second of these cases, that of Didricksen, involving the question whether the Safety Appliance Act of March 2, 1903 (Act March 2, 1903, c. 976, 32 Stat. 943 [Comp. St. 1916, §§ 8613–8615]), was in force in Porto Rico, though it did not expressly extend to possessions, it was held that it was; and upon the ground that, while it was not in all respects a territory, that its organization was in most essentials that of political entities known as territories, and upon the theory, as we suppose, that the Safety Appliance Act related to the same subject-matter as that covered by the Employers' Liability Act, which expressly extended to Porto Rico, and was in aid of the protection to life and limb sought to be afforded through legislation upon the subject of the liability of railway common carrier employers. Nor do we consider the Alaska Case, 224 U. S. 474, 32 Sup. Ct. 556, 56 L. Ed. 849, in point, because that involved a continental situation, and a territory acquired by purchase, and a continuous carriage from the state of Washington to a point within Alaska—a territory which, by an act providing for its government, was designated as one which was to

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constitute a civil and judicial district, the government of which should be organized and administered as was provided by the act. Moreover, the opinion in that case was written by the same justice who handed down the opinion in the Employers' Liability Case, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879, a month later, in which the Alaska Case was not referred to as having any bearing.

We do not consider, however, that the solution of the question whether Porto Rico is in all respects a "territory" of the United States, in the strict sense, or whether it is "a possession of the United States," in the strict sense in which that term is used, would be altogether controlling upon the question of statutory construction involved in this case. It is not so much a question whether Porto Rico is, or is not, a "territory" of the United States, to be regarded critically, as an apt question, to be decided with legal exactness under refining rules, as it is the broader and more substantial question, whether, under the actual situation of remoteness, and the character of the relationship, Congress intended to carry the Interstate Commerce Commission powers to the island, to be exercised independently and exclusively of the local assembly.

Porto Rico is at least a "possession," and through its organized government, and under the Organic Act of April 12, 1900, has many of the essentials of those political entities known as territories, but, notwithstanding that, the substantial fact remains that it is an insular piece of ground, with a considerable population, many miles at sea and widely separated from the states and territories of the government which is charged with the responsibility of seeing that there is a civil government in the island. Therefore, without much regard to a refinement of the question as to which it is, it is the fact that it is an insular possession, or an insular territory, whichever it is, far removed from physical relations with other territories, and possessions, and with no physical relation to any of the states—with no interstate, interterritorial, or interpossession railroads, and the fact that the legislation of Congress and that of the local insular assembly had reference to such a situation, one in which the railroads were not operated beyond the boundaries of the island, which bears upon the question whether the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379), through no expression of its own, but under the general provision of section 14 of the Act of April 12, 1900, that the statutory laws of the United States, not locally inapplicable, shall have the same force and effect in Porto Rico as in the United States, should be accepted as comprehensively applying to such local conditions as are in question here, and to the exclusion of the comprehensive local legislative power delegated by Congress to be exercised under its eye and subject to expressly reserved power to approve or annul.

The District Court seems to have accepted the decisions in the Didricksen Case, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456, and the Birch Case, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879, as a ground for reasoning, and as quite controlling, that the general provision of section 14 of the Act of April 12, 1900, carried bodily to Porto Rico

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the Interstate Commerce Act and the exclusive jurisdiction of the Interstate Commerce Commission.

Section 14 expressly qualifies itself by excepting laws locally inapplicable and as "hereinbefore" or "hereinafter" otherwise provided, and in view of the scope of the whole act and of the manifest intention to give the local government a broad power in respect to legislation upon local subjects, we cannot accept the view that Congress intended exclusive Interstate Commerce Commission jurisdiction over local railroad rates in Porto Rico, or that the Supreme Court decisions referred to support that idea.

There is a wide difference between the question of congressional intention involved in the exercise of the national function to protect life and limb, like that in the Employers' Liability and the Safety Appliance Acts—like that in the Bill of Rights of the Jones Act in respect to the protection of life and liberty against undue process of law, or that of the Kopel Case, 211 U. S. 468, 29 Sup. Ct. 190, 53 L. Ed. 286, which was for the extradition of a fugitive criminal—and that of the intention involved in the question whether the Organic Porto Rican law, under its general terms, intended exclusive Interstate Commerce Commission control over the local tariffs of the intra-island railroads of Porto Rico.

This general view, however, in respect to difference of subject-matter, is quite independent of, and aside from, the broad distinction between the apt words of the Employers' Liability Act, which expressly carry it to all possessions of the United States, and those of the general provision of section 14 of the Organic Law, which, it is contended, under an intention to be inferred, gave the Interstate Commerce Commission exclusive control over the subject of the railway rates of the insular possession in question.

Under the circumstances, and considering the Organic Act as a whole, we think the intended and comprehensive congressional delegation of legislative power in respect to local conditions would include subject-matter like that of local railway rates, and would control as against the contention that the Interstate Commerce Commission was clothed with exclusive jurisdiction through the force of the general terms of the same act, which are without any suggestion of a particular intent to carry such jurisdiction to the railroad affairs of the insular situation.

Indeed, the original idea of federal control and federal regulation was based upon physical interstate and interterritorial relations and upon connecting lines, conditions under which local interruptions impair the efficiency of the paramount federal right to regulate commerce between the states and territories. There is no such federal right or federal responsibility as between the people of the island of Porto Rico and their local railroads, and upon this general view, in respect to the question of the intention of Congress under the Organic Act, and after misunderstandings and discussion had arisen as to its scope, and as to the jurisdiction of the Interstate Commerce Commission, it is quite significant and something that must be considered that, through subsequent legislation, Congress declared, through the Act of March 2, 1917, c. 145 (39 Stat. pt. 1, p. 964) § 38, that the Interstate Commerce Act shall not apply to Porto Rico.

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The leading theory of all the cases, on which the appellee relies, in support of the idea of the exclusive jurisdiction of the Interstate Commerce Commission, is that the power of regulation and control of interstate commerce and interstate railroads is a federal power, and it having been asserted that it becomes parmount to, and exclusive of, interference under state and territorial governments. But it must be observed that these cases (like Southern Ry. Co. v. Reid, 222 U. S. 424, 436, 437, 32 Sup. Ct. 140, 56 L. Ed. 257; Southern Ry. Co. v. Reid & Beam, 222 U. S. 444, 447, 32 Sup. Ct. 145, 56 L. Ed. 263; Southern Ry. Co. v. Burlington Lumber Co., 225 U. S. 99, 32 Sup. Ct. 657, 56 L. Ed. 1001; Southern Ry. Co. v. Railroad Com'r of Indiana, 236 U. S. 439, 446, 447, 35 Sup. Ct. 304, 59 L. Ed. 661; Erie Ry. Co. v. People of the State of New York, 233 U. S. 671, 34 Sup. Ct. 756, 58 L. Ed. 1149, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D, 138) proceed upon the idea that federal control is exclusive, because Congress has asserted the right, and because federal control has occupied the field. They thus have no particular weight, first, because states (except as explained in Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18) might regulate tariffs before the right of federal control was asserted, and second, and more particularly, because, as we interpret the Organic Law, federal railway rate control in the new possession of the Island of Porto Rico, where of course there were no questions as to state control, was intended through the instrumentality of the Porto Rican Assembly, under the supervision of Congress exercised through its plenary right, in respect to federal territories and possessions, which was expressly reserved.

The subject of the local freight rates of a remote insular possession, or territory, railroad is not one suggestive of inherent necessity of regulation and control by a continental commission like that of the Interstate Commerce Commission, and while not doubting the paramount right of control by the United States, which we think was asserted under the Organic Act of April 12, 1900, through its delegation of legislative power and of its reserved right of supervision, we see nothing in any of the laws indicating an intention of Congress to make it a subject of exclusive Interstate Commerce Commission regulation.

It is quite possible that conditions might be created in the island of Porto Rico through corporate and business relations which would make its intra-insular railroad business an interterritorial, or an interpossession business, as by connecting with other territories or possessions, and one justifying federal legislation extending right of regulation to the Interstate Commerce Commission, but that no such exigency exists under present conditions is something to be considered upon the question whether Congress intended, either through the general provisions of the Foraker Act or through the provision of the Hepburn Act to carry the functions of the Interstate Commerce Commission to the intraterritorial transportations of the island.

Neither a statutory enactment like that creating Interstate Commerce Commission jurisdiction in the territories of the United States, nor one like the statute in amendment carrying jurisdiction from one point in

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a territory to another point in the same territory, should be accepted as including a remote insular possession like that of Porto Rico, though its relations to the United States are somewhat those of a territory, unless there are apt words or cogent circumstances to show such a legislative purpose. The character and circumstances of Interstate Commerce Commission jurisdiction and the situation of the island of Porto Rico do not support the idea of any such congressional purpose.

It is contended by the petitioners that the intricacies of the commercial relations between the states and territories of continental United States do not apply to Porto Rico in its isolated position, and that seeking remedy in respect to its railway rates through the remote interstate commerce tribunal would be inconvenient, expensive and oppressive, and we regard that as something to be considered upon the question of congressional intent.

There is no reason why Congress as the supreme and paramount legislative body may not legislate broadly with reference to the liability of employer railway common carriers in the possessions of the United States, if it sees fit to do so. That Congress had delegated quite a measure of initiatory legislative power to the local Assembly of Porto Rico, to be exercised subject to its approval, furnishes no reason for saying that Congress may not consistently establish a uniform rule in respect to employer liability to be administered alike in interstate conditions and throughout all the territories and possessions of the United States, and it is difficult to see that the exercise of such right to establish a uniform rule in respect to life and limb, under a law which expressly includes "possessions," furnishes any reason for saying that it carries the idea that Interstate Commerce Commission jurisdiction shall go to Porto Rico under general laws which in all probability did not embody that idea. Employer liability, under a federal statute like that we are discussing, designed to protect life and limb, would be ascertained and established under a uniform rule founded upon a principle, while railroad rates, from their nature, could not be uniform or governed by a single principle. They necessarily depend upon local conditions, and there is thus no analogy between the two subjects in the legislative sense.

It is true that the Act of June 29, 1906, c. 3591 (34 Stat. pt. 1, p. 584), which is now known as the Hepburn Act, and which was an amendment of the act of 1887 to regulate commerce, extends the territorial jurisdiction of the Interstate Commerce Commission and expressly makes it apply to transportations "from one place in a territory to another place in the same territory," but although these words are apt in respect to territories incorporated into the United States and intratransportation therein, we do not think they were apt with respect to a possession like that of Porto Rico whose status at most was only that of a quasi territorial relationship.

At the time of the Foraker Law and the Hepburn Law, and even as late as 1911 and 1912, when the Birch and Didricksen Cases were decided in the Supreme Court, whether Porto Rico was a territory of the United States, within the meaning of that term, was questionable—something in uncertainty and doubt—and, as has been seen, it is con-

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tended that these acts apply to Porto Rico, because of the general term "territory," but, under the most favorable view of this contention, Porto Rico was only a territory of quasi territorial organization and relationship, and so the general term "territory" does not expressly include Porto Rico, as did the term "possession" in the Employers' Liability Act, and, under the circumstances, "territory," as used in these statutes should not be broadly construed for the purpose of including a possession, or a quasi territory, whose relationship was that which the island of Porto Rico sustained to the United States.

In the Birch Case, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879, the Employers' Liability Act was held operative in Porto Rico, because the act applied to common carriers in the territories, the District of Columbia, the Panama Canal Zone, and expressly to the "possessions" of the United States, and a contention in respect to the Safety Appliance Act raised the question whether that act, which did not expressly include "other possessions of the United States" and only expressly applied to carriers by railroad in territories and the District of Columbia, extended to Porto Rico, and the Supreme Court, treating that contention as one presenting a serious controversy, did not decide whether the Safety Appliance Act was in force in Porto Rico. In the Didricksen Case, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456, the relationship of the island to the United States was discussed, with the observation, in effect, that while it was not a territory incorporated into the United States, that it had most of the essentials of those entities known as territories; but we infer from the reasoning of the opinion that the real ground on which the case turned was that the rights involved under the Safety Appliance Act were incident to the subject-matter and the rights involved in the Employers' Liability Act, which did by its terms extend to Porto Rico as one of the possessions of the United States, rather than upon the distinct ground that it was a territory in the ordinary sense in which that term is used in legislation in general. At least we think we would not be warranted in accepting these decisions as meaning that the term "territories," when used in congressional legislation with reference to the general subject of commerce, would carry the exclusive jurisdiction of the Interstate Commerce tribunal to an island whose relationship is that of Porto Rico.

In the Act of June 29, 1906 (Hepburn), which we are discussing, Congress was dealing with states and territories of the United States, and with waterways in them, and between them and foreign countries, and its only departure from that idea was to the District of Columbia, which it designated by name, although it is a distinct United States entity, and is, in fact, territory within the United States. Thus when Congress departed from what in the ordinary acceptation would be understood as covered by the general legislative designation of states and territories, with the view of including an entity not understood to be a territory in the general acceptation of that term, like that of the District of Columbia, it expressly named it, though it is in fact, while not having the relationship of a territory of the United States, both a piece of territory and a possession belonging to the United States,

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thereby indicating the purpose, when departing from the term "territory," as something having a well understood legislative meaning, with the idea of including a piece of territory, or a possession not usually known as a territory, to expressly designate it.

We think if Congress had intended by this act to carry the powers of the Interstate Commerce Commission to Porto Rico that it would have said so as it did of the District of Columbia. It is highly probable, and quite safe, we think, to assume that Congress did not view Porto Rico as a territory in the sense in which it was legislating, and was without the slightest thought that it was legislating with reference to the internal affairs of Port Rico and the local railway rates of that remote insular possession.

And in addition to these views, which we hold under general rules in respect to interpretation, there is the subsequent declaratory interpretation and expression of congressional intent in what is known as the Jones Act, to which we have referred, designed to provide a civil government for Porto Rico, which declares that the Interstate Commerce Act and its amendments shall not apply to Porto Rico. Act March 2, 1917 (39 Stat. pt. 1, p. 964) § 38.

Moreover, it is not understood that the Interstate Commerce Commission has asserted any authority in Porto Rico, other than to make orders in respect to safety appliance devices on Porto Rican railroads, and these were after the decisions in the Birch and Didricksen Cases, and before this statute declaring that its jurisdiction should not apply to Porto Rico.

[2] By section 31 of the Act of April 12, 1900 (Comp. St. 1916, § 3780), the Organic Law under which the local statute in question was passed by the Porto Rican Assembly, it was provided that all laws enacted by that body should be reported to the Congress of the United States, which reserved to itself the power and authority, if deemed advisable to annul, and the legislative assembly of Porto Rico enacted that the secretary of the island should promulgate all laws enacted by the legislative body. Comp. Stat. Porto Rico, p. 512, § 55 (section 2726).

Under these provisions and under such circumstances, it is to be presumed, we think, in the absence of proofs or suggestion to the contrary, that the local Porto Rican legislation was reported to Congress, or, at least, that Congress was cognizant of such legislation, and in the absence of affirmative action by that body, that there was congressional acquiescence. Clinton v. Englebrecht, 13 Wall. 434, 446, 20 L. Ed. 659; Camou v. U. S., 171 U. S. 277, 287, 18 Sup. Ct. 855, 43 L. Ed. 163; Tiaco v. Forbes, 228 U. S. 549, 557, 558, 33 Sup. Ct. 585, 57 L. Ed. 960; Baca v. Perez, 8 N. M. 187, 42 Pac. 162.

The conclusion is that the Porto Rican Public Service Act of March 12, 1908, was a legislative law warranted under the authority delegated by Congress; that it was a valid enactment and is controlling until disapproved by Congress under its paramount and expressly reserved right of supervision; that its effectiveness was not superseded or impaired by the original Interstate Commerce Law of 1887, or as amended by the Act of June 29, 1906, known as the Hepburn Act, and

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that this is so both because they are inapplicable under the present condition of affairs in the island, and because Congress never intended that they should be operative there. And the conclusion in respect to the Act of March 2, 1917, known as the Jones Act, is that it neither superseded nor impaired the Porto Rican Act of March 12, 1908, because section 57 declared that the laws of Porto Rico then in force should continue until amended or repealed by the Legislature.

It is true that the Porto Rican Assembly subsequently passed a law December 6, 1917 (2 Laws of Porto Rico, 432), with respect to public service companies, creating a public service commission, and one which provided for its powers and for control over public service companies, but it is not suggested that there is anything expressly repealing section 7 of the Act of March 12, 1908. On the contrary, the idea of the act is that railway schedules shall not only be just and reasonable, but in conformity with the regulations and orders of the commission, and indeed it is expressly provided by section 23 of article 5 of the act that all rates and charges filed by the extinct executive council shall continue and be in full force until modified or repealed by the commission.

Quite likely this act of the Porto Rican Legislature of December 6, 1917, has no controlling force upon the questions involved in this proceeding, and it is referred to merely to show that there is nothing in the present Porto Rican situation which is inconsistent with the idea that railroads shall submit to local legislative regulations created under the authority of the United States, or with the idea that section 7 is still operative so far as concerns the decision of the questions in this case.

[3, 4] This is an equity proceeding prosecuted by the Attorney General of Porto Rico in behalf of the people and the executive council of the island, and one which was removed from the local district court of San Juan to the District Court of the United States for the District of Porto Rico, upon the ground of diverse citizenship. It was removed by the defendant railroad upon the allegation that the amount in controversy, which it would lose if the relief prayed for by the plaintiff was granted, exceeded the sum of $3,000; and the court to which it was removed, having adequate power under its own comprehensive equity jurisdiction, not by virtue of the local statute in respect to injunctions, may well establish the rights involved and afford relief according to the usual course of equity, as generally administered in the United States courts.

We have in this case questions relating to matters publici juris and the relief sought is an injunction (and perhaps other reliefs, like recovery of unauthorized rates) upon the ground that the railroad was operating under a rate schedule, and was demanding from members of the public, tariff transportation rates in open defiance of a regulatory law. This is plain ground for injunctive relief, and neither the penalty provision of the local law, nor any supposed remedy by way of forfeiture, excluded or limited the jurisdiction of the United States District Court (In re Debs, 158 U. S. 564, 584, 592, 593, 15 Sup. Ct. 900, 39 L. Ed. 1092) to enjoin against publishing and demanding rates

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in disregard of the requirements of section 7 of the local law; and in the circumstances, it is not seen that any other remedy, either at law or in equity, would be reasonably adequate.

Holding the view that we do as to the operativeness of the Porto Rican Act of March 12, 1908, there seems to be no occasion for discussing the emergency provision of that law, and this results because the substantial relief sought, that of protection to the people of Porto Rico against unauthorized and unlawful rates, may be had through injunction under their original bill by virtue of the force of section 7 of the Porto Rican law, quite independent of its emergency provision in respect to temporary and tentative reliefs, and quite independent of the proceedings and findings under the amended bill.

The decree of the District Court dismissing the bill should be vacated, in order that there may be an injunction which should be continued until the defendant railroad has complied with the regulatory provisions of the Porto Rican law, and for further proceedings, if any are necessary, not inconsistent with this opinion.

The decree of the District Court is reversed, and the case is remanded to that court with directions to issue an injunction, and for further proceedings not inconsistent with this opinion; and the appellant recovers costs of this court.

VIRGINIA & WEST VIRGINIA COAL CO. v. CHARLES.

(Circuit Court of Appeals, Fourth Circuit. October 10, 1918.)

No. 1605.

1. APPEAL AND ERROR ⟸1008(2)—REVIEW—FINDING OF FACTS BY TRIAL COURT.
   In an action at law tried to the court by consent, every finding of fact made by the court, having reasonable support in the evidence and tending to support the judgment, is binding on the reviewing court.

2. CONSTITUTIONAL LAW ⟸175, 249, 311—OBLIGATION OF CONTRACTS—RULES OF EVIDENCE—DUE PROCESS—EQUAL PROTECTION.
   As there is no vested right in the rules of evidence, the general principle is that the obligation of a contract is not impaired, nor due process of law nor the equal protection of law denied, by a statute making a fact proved presumptive evidence of another, and since the Legislature may create the presumption where it did not before exist, it may by repealing the statute destroy the presumption.

3. TAXATION ⟸788(2)—TAX DEEDS—PRIMA FACIE EVIDENCE.
   Statutes making tax deeds prima facie evidence of the legality of the proceedings under which they were made have been universally sustained.

4. TAXATION ⟸788(2)—TAX DEEDS—PRESUMPTIONS—REPEALING STATUTES.
   Despite Code Va. 1904, § 6, *held* that Act March 14, 1914 (Laws Va. 1914, c. 100), repealing Act March 13, 1912 (Laws Va. 1912, c. 235), making deeds recorded prior to 1865 prima facie evidence that all requirements had been complied with, destroyed any rights which a purchaser during the life of the act of 1912 from one claiming under deeds recorded prior to 1865 might have acquired; the Legislature being entitled to change rules of presumption, and the Code section protecting only substantive rights, etc.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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5. TAXATION ⟸796(1)—TAX DEEDS—COLLATERAL ATTACK.
As a plaintiff in ejectment, claiming under a tax title has the burden of proving such title, an objection to the legality of the tax deeds under which plaintiff claimed was not a collateral attack on the deed.

6. TAXATION ⟸789(4)—ACTION ON TAX TITLE—BURDEN OF PROOF.
A plaintiff in ejectment, who relies on a tax title may be required by defendant in possession to prove due execution of the power under which the deed was made.

7. TAXATION ⟸788(8)—TAX DEEDS—PRESUMPTION.
Both the authenticity and validity of a tax deed may be inferred from long possession under it, with such failure of the alleged defaulting taxpayer to assert his title as to show acquiescence or estoppel.

8. TAXATION ⟸788(8)—PRESUMPTION—VALIDITY OF TAX DEEDS.
Under the Virginia rule that a presumption of the validity of a tax deed does not arise, unless there has been possession for such length of time as would presume any other link in the chain of title, evidence *held* insufficient to warrant a presumption of the validity of a tax sale under which plaintiff deraigned title.

9. TAXATION ⟸773—TAX DEEDS—RECITALS—EFFECT.
The recitals in an ancient tax deed do not prove its authenticity or validity, and are not sufficient to show compliance with the law.

10. TAXATION ⟸615—SALE OF PROPERTY—MANDATORY STATUTE.
The provisions of Act Cong. Jan. 9, 1815, as amended by Act March 3, 1815, providing for sale of land for nonpayment of direct taxes, and for assessment, are mandatory, because designed to protect the taxpayer.

11. TAXATION ⟸855—FORFEITURE OF LANDS—TAX TITLES—"JUST TITLE"—"JUST CLAIM."
Plaintiffs in ejectment, who asserted that the title of the original owner of land west of the Allegheny Mountains had been forfeited to the state, and that their predecessors took title under Act Va. 1842, § 3, *held* not entitled to recover; their predecessors not having "just title," which means a title good against all the world, or a "just claim," which means a claim that would be good, but for the paramount right forfeited to the state, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Just Claim; Just Title.]

12. TAXATION ⟸855—FORFEITURE OF LAND—PRESUMPTION.
There is no presumption of forfeiture of land to state for nonpayment of taxes.

13. TAXATION ⟸851—NONPAYMENT—LAND—STATUTE DECLARING FORFEITURE—PUBLICATION.
While ordinarily provisions for the publication of statutes are directory, yet as the only notice to defaulting taxpayers of the impending forfeiture of their land under Act Va. 1808 (2 Rev. Code, 1819, p. 528), was the publication of the statute provided for in section 2, no forfeiture can be declared were such publication was not had as provided.

14. ADVERSE POSSESSION ⟸16(3)—LAND IN STATE OF NATURE.
It is settled in Virginia that there can be no adverse possession of land in a state of nature, but actual possession of part of a single tract, under a junior patent, extends to the entire patent, including the portion still in a state of nature.

15. ADVERSE POSSESSION ⟸101—CONSTRUCTIVE POSSESSION—ADJOINING PARCELS.
Where several parcels are granted by different patents to the same person, and are so situated that they are covered by an unbroken boundary, they are regarded as forming one tract, and actual adverse possession, for the statutory period, of any portion of the one tract thus formed from several extends to the entire boundary, and perfects the title to all separate tracts so consolidated.

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16. ADVERSE POSSESSION ⊂=106(4)—EFFECTIVE POSSESSION—LIENS.
Liens existing on land are lost by possession for the statutory period adverse to the owner, so the tax lien of the state is destroyed where an adverse occupant holds the land for the statutory period, though forfeiture be declared before the adverse occupancy ripened into title.

In Error to the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge.

Action of ejectment by the Virginia & West Virginia Coal Company against Green Charles and others. There was a judgment for defendant Charles (251 Fed. 83), and plaintiff brings error. Affirmed.

S. B. Avis, of Charleston, W. Va. (J. L. Jeffries, of Norfolk, Va., on the brief), for plaintiff in error.

Barnes Gillespie and William H. Werth, both of Tazewell, Va. (E. M. Fulton, of Wise, Va., G. W. St. Clair, of Tazewell, Va., C. C. Burns, of Lebanon, Va., G. E. Penn, Jr., of Bristol, Va., Hager & Stewart, of Ashland, Ky., Chase & Daugherty, of Grundy, Va., and Chapman, Peery & Buchanan, A. S. Higginbotham, and Greever, Gillespie & Divine, all of Tazewell, Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. On January 14, 1915, the Virginia & West Virginia Coal Company commenced this action of ejectment against Green Charles and about 1,250 other defendants for 146,109¼ acres of land called the "Hagan Survey" or "Pearson Survey," excepting from its claim, however, 11 described tracts lying within the boundaries set out. On the plea of not guilty the District Court by consent tried without a jury the issue of title to the particular tract claimed by the defendant Green Charles, containing 673.52 acres, and found in favor of the defendant.

The plaintiff's claim of title was as follows:

(1) Patent, November 16, 1795, from state of Virginia to Richard Smyth and Henry Banks, for 200,000 acres.
(2) Tax deed, November 3, 1823, from W. D. Taylor, collector of direct taxes of United States, to Wm. Lamb, of 200,000 acres of Richard Smyth and Henry Banks.
(3) Will of Wm. Lamb, probated March 5, 1827.
(4) Deed, Lamb's executor to Joseph Hagan and Sarah Purcell.
(5) Deed, February 7, 1839, Sarah Purcell to James Culbertson.
(6) Decree of circuit court, October 6, 1856, in case of Joseph Hagan v. James Culbertson, directing commissioners to convey to Hagan interest of Culbertson.
(7) Deed, August 6, 1857, Morrison, commissioner, to Joseph Hagan.
(8) Deed, April 4, 1871, Joseph Hagan to Patrick Hagan.
(9) Deed, November 8, 1883, Patrick Hagan to Frederick Pearson.
(10) Tax deed, February 17, 1905, Dennis, clerk, to Buchanan Company of lands bought by state for delinquent taxes of Frederick Pearson.
(11) Deed, Buchanan Company to Virginia & West Virginia Coal Company, April 2, 1914.

Defendant's claim of paper title was as follows:

(1) Patent, May 1, 1861, state of Virginia to Silas Ratliff.
(2) Deed, December 8, 1896, Ratliff's heirs to Margaret Justice.
(3) Deed, May 24, 1910, John W. and Margaret Justice to Green Charles.

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The defendant also claimed by adverse possession.

[1] Every finding of fact made by the District Court, having reasonable support in the evidence and tending to support the judgment, is binding on this court.

We consider, first, whether any error of law entered into the finding of the District Court that the plaintiff failed to connect itself with the patent of 1795 to Richard Smyth and Henry Banks. There was no sufficient extraneous evidence of the execution of a valid tax deed by Taylor, collector, to Wm. Lamb. To make this connection it was necessary to establish the validity of the tax deed of 1823 to Wm. Lamb: and on this point it is earnestly contended that under the following statute of Virginia the tax deed is itself prima facie evidence that all provisions of law requisite to its validity were complied with:

"An act to prescribe the effect as evidence to be given to deeds recorded prior to the year 1865. Approved March 13, 1912.

"1. Be it enacted by the General Assembly of Virginia, that in every action at law or suit in equity, in which it shall appear that a deed or other writing, which constitutes a part of the chain of title to any lands has been made by an officer or other person, purporting to act under the provisions of any statute or decree, authorizing or providing for a sale or conveyance of real estate, and that said deed was duly recorded in the proper clerk's office prior to the year eighteen hundred and sixty-five, and that the record or evidence, or some parts thereof of the proceedings under or pursuant to which such sale, deed or other writing was made, has been lost or destroyed, or cannot be produced, the said deed or other writing, or a certified copy thereof, taken from said record, shall be prima facie evidence of the fact that all provisions and requirements of such statute or decree were duly complied with in the making of such sale, deed or other writing as well as the power or authority of such officer or other person to make and execute the same, and of the due execution thereof by him." Laws 1912, c. 235.

A repealing statute was passed March 14, 1914, in these words:

"Be it enacted by the General Assembly of Virginia, that an act * * * to prescribe the effect as evidence to be given to deeds recorded prior to the year eighteen hundred and sixty-five, approved March 13, 1912, be and the same is hereby repealed." Laws 1914, c. 100.

The repeal did not take effect until ninety days after its enactment. The conveyance of Buchanan company was made to plaintiff April 2, 1914, after the repealing statute was enacted, but before it went into effect. The argument is that the act of 1912 conferred a substantive right on those claiming under the old deeds referred to in the statute to such deeds as prima facie valid, and that the repealing statute could not have the effect of taking away that substantive right. To sustain this position, the plaintiff relies on section 6 of Code of 1904, which provides:

"No new law shall be construed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued, or claim arising before the new law takes effect; save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings; and if any penalty, forfeiture, or punishment be mitigated by any provision of the new law, such

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provision may, with the consent of the party affected, be applied to any judgment pronounced after the new law takes effect."

[2] As there is no vested right in rules of evidence, the general principle is that the obligation of a contract is not impaired, nor due process of law nor the equal protection of law denied by a statute making a fact proved presumptive evidence of another. This statement of the rule and its limitation has been adopted by the Supreme Court:

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed." Mobile, etc., R. R. Co. v. Turnipseed, Adm'r, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463.

[3] Statutes making tax deeds prima facie evidence of the legality of the proceedings under which they were made, and other like statutes, have been universally sustained. Marx v. Hanthorn, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410; Turpin v. Lemon, 187 U. S. 51, 23 Sup. Ct. 20, 47 L. Ed. 70; Leigh v. Green, 193 U. S. 79, 24 Sup. Ct. 390, 48 L. Ed. 623; Mobile, etc., R. R. Co. v. Turnipseed, Adm'r, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463; Bailey v. State of Alabama, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191; Lindsley v. National Carbonic Gas Co., 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160; Reitler v. Harris, 223 U. S. 437, 32 Sup. Ct. 248, 56 L. Ed. 497; Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412, 35 Sup. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691.

[4] Since the Legislature may create the presumption where it did not before exist, it may by a repealing statute destroy the presumption, and thus deprive of its aid persons who entered into contracts relying on the statutory presumption to establish the claims acquired.

Applying these rules, if the action had been tried while the act of 1912 was in force, it would not have availed the defendant in possession of the land in dispute under a junior grant to say that he took his grant and paid the purchase money after ascertaining that no evidence of the validity of the proceedings under which this land was sold for taxes could be produced. On the other hand, the plaintiff acquired the rights of the grantee under the tax deed charged with notice that the presumption created by the act of 1912 was a mere rule of evidence, that it did not inhere in the title deed, and that in purchasing it took the risk of the destruction of the presumption as evidence by the legislative authority which created it.

The only serious question therefore on this branch of the case is, Was the presumption created by the act of 1912 saved to the plaintiff by section 6 of the Code of 1904, above quoted, notwithstanding the repeal of the act of 1912 by the act of 1914?

"Rights accrued and claims arising under the former law" protected by section 6 from the effect of a repeal, are substantive rights and

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claims. Rules of evidence are "proceedings," as distinguished from such rights and claims, which, so far from being protected from the effect of the repeal, are expressly required to conform, as far as practicable, to the law as it remains after the repeal. After a review of the authorities the application of the statute is thus limited in Crawford v. Halsted, 20 Grat. (Va.) 211:

"The court held that the mode of conducting a suit, or the rules of practice regulating it, are not the subject of vested rights. It might as well be contended that the party had a right to have his action tried in the court under the same organization as it existed when the suit was instituted, or by the same number of jurors, as to contend that the rules of evidence, or form of proceeding, the form of the plea and answer, may not be changed so as to affect all future trials, whether of actions then commenced or subsequently instituted. If the law is objectionable as violating vested rights then pending, why not equally so as to all causes of action then existing? The mere fact of having instituted a suit does not give any additional vested rights. It is the demand or claim that cannot be interfered with by legislative enactment."

Philips v. Commonwealth, 19 Grat. (Va.) 485, relied on by plaintiff, may be distinguished by the fact that the prosecution had been commenced at the time of the repeal. Discussion of the distinction would not be pertinent, however, since this court follows the latest construction of the statute by the state court, based as it is on the clearest principle and reasoning.

Even if it be assumed that the right to a rule of evidence was intended to be embraced within the protection of section 6, that statute could not limit or control the plainly expressed or implied contrary intention of subsequent legislation; and we think the act of 1914 does clearly imply a contrary intention. If it does not then it has no substantial meaning. The act of 1912 was general in its terms and conferred upon claimants under the old deeds the benefit of the presumption whether original holders or their grantees or heirs or devisees, without distinction between those who acquired claims before its passage and those who acquired them after its passage. One who like the plaintiff purchased such a claim after the act was passed took only the rights of his grantor; and these embraced no vested right to the rule of evidence provided by the statute. There is no ground whatever for the court to infer that the Legislature intended to make subsequent grantees a favored class. To hold that the repeal was intended to affect only those who might acquire title or claims after the repeal would be to make the repeal of no practical effect, for there would be few, if any, transfers of such titles or claims when the presumption in their favor would be destroyed by the transfer. Looking at the matter in a plain way, the legislation on its face shows that the intention of the Legislature was to take away by the repeal the presumption in every case where it had been conferred by the act of 1912. The Legislature, having in prominent view the hardship sometimes arising from the difficulty of proving the execution of the old deeds referred to in the act, and the authority under which they were made, passed the statute of 1912. At the next session the Legislature, upon reconsideration, having in prominent view the hardship resulting from the act of 1912 in unsettling the titles of those who were claiming adversely to the

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old deeds, unmistakably intended to make the repeal coextensive with the act repealed—to restore the rule of evidence in its full scope and application just as it was before the act of 1912. This being the manifest intention of the repealing act, the saving provisions of section 6 have no application. In Town of Danville v. Pace, 25 Grat. (Va.) 1, 18 Am. Rep. 663, it was held that construing sections 5 and 6 together the latter was not applicable when inconsistent with the manifest intent of the Legislature. Great N. Ry. v. U. S., 208 U. S. 452, 28 Sup. Ct. 313, 52 L. Ed. 567.

We conclude (1) that section 6 saves from the operation of a repealing statute substantive claims and rights, but has no application to a change by repeal of a mere rule of evidence; and (2) that it could not bind a future Legislature which expressed a contrary intention in a repealing statute.

[5, 6] The plaintiff next contends that, without regard to the act of 1912, the court should have admitted in evidence the tax deed as valid because it could not be attacked collaterally by the defendant who claimed under an independent title. The fallacy is in assuming that the defendant had to make any attack on the deed. The burden was on the plaintiff to prove its title, and to do this it was necessary to prove that the tax title, one of its links, was executed in compliance with law. Reusens v. Lawson, 91 Va. 226, 21 S. E. 347; Boom v. Simmons, 88 Va. 259, 13 S. E. 439; Sulphur Mines Co. of Va. v. Thompson's Heirs, 93 Va. 293, 25 S. E. 232; Marx v. Hanthorn, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410.

An objection to the legality of a tax deed under which plaintiff claims is not a collateral attack on the deed. Reusens v. Lawson, 91 Va. 226, 21 S. E. 347. When any right is claimed under a naked power, the burden is on the claimant to prove the due execution of the power. One in adverse possession of land may demand strict proof of the execution of the power. Sulphur Mines Co. of Va. v. Thompson's Heirs, 93 Va. 293, 25 S. E. 232.

The case of Munroe v. Winegar, 128 Mich. 309, 87 N. W. 396, and other cases relied on by plaintiff, do not apply, since they merely hold the familiar doctrine that tax sales, under judicial decrees, can only be attacked by direct proceedings to set aside the decree.

[7, 8] It is true that both the authenticity and the validity of a deed purporting to be made under a naked power, including even a tax deed, may be inferred from long possession under it with such failure of the alleged defaulting taxpayer to assert his title as to show acquiescence, or estoppel. Williams v. Conger, 125 U. S. 397, 9 Sup. Ct. 793, 33 L. Ed. 201; Fulkerson v. Holmes, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. Ed. 915; Lenning's Ex'r v. White, 20 S. E. 831, 1 Va. Dec. 873; Bowe v. City of Richmond, 109 Va. 254, 64 S. E. 51; Caruthers v. Eldridge's Ex'r, 12 Grat. (Va.) 670; Nowlin v. Burwell, 75 Va. 551; Cook et al. v. Lasher et al., 73 Fed. 701, 19 C. C. A. 654; Van Gunden et al. v. Virginia Coal & Iron Co., 52 Fed. 838, 3 C. C. A. 294; Wilson v. Snow, 228 U. S. 217, 33 Sup. Ct. 487, 57 L. Ed. 807, 50 L. R. A. (N. S.) 604. The authorities are in some confusion as to what possession or acts of ownership or acquiescence by the former

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owner is necessary to give the presumption of validity to an ancient tax deed, or other deed purporting to be executed under a naked power. The rule in Virginia seems to be that the presumption does not arise unless there has been possession for such length of time as would presume any other link in the chain of title. Jesse v. Preston, 5 Grat. (Va.) 130; Allen v. Smith, 1 Leigh (Va.) 231. We do not think, however, the plaintiff's proof measures up even to the most liberal rule laid down in any authority. The only evidences of possession were that Joseph Hagan went to Tazewell county in 1833 and had surveyed some large tracts of land including the land in dispute lying entirely or mainly in Buchanan county; that in 1837 commissioners in the partition suit of Joseph Hagan v. Sarah Purcell made an actual survey and assigned one hundred thousand acres to each party; that in 1842 or 1843 Collins who was then living on the land agreed to hold it for Culbertson; and that about the same time Hagan placed one Looney on another portion of the land as his agent. There was nothing to show the extent of their possessions or their duration after 1855, or that either Collins or Looney ever acted in such way as to indicate that they were agents for Culbertson or Hagan. The presumption that a possession once begun continues is overcome by the fact that with all the diligence shown by the plaintiff not a particle of evidence was adduced of any act of possession for more than 60 years after the alleged agreement of Collins and Looney to hold for the plaintiff's predecessors in title.

The evidence, it is true, tended to show that neither Banks nor Smyth, nor any one under them, had set up any claim to the land since the tax sale. But there was no proof of any affirmative acts or expressions of recognition of the validity of the tax sale by the former owners. It is not evident whether their inaction was due to indifference because of low estimate of value or to acquiescence in the tax sale. We agree with the District Court, therefore, that there was no such evidence of possession or acquiescence by the former owners as to warrant the presumption of the validity of the tax sale.

[9] The recitals in an ancient tax deed do not prove its authenticity or validity. Sulphur Mines Co. of Va. v. Thompson's Heirs, 93 Va. 293, 25 S. E. 232. A tax deed made under judicial authority as in Machir v. Funk, 90 Va. 284, 18 S. E. 197, stands on a different footing under the familiar rule that all presumptions are to be indulged in favor of conveyances and other proceedings of a court of competent jurisdiction. Minor's Tax Titles, 123. But even in such cases the Virginia court has held that the recitals of the deed are not sufficient to show compliance with the law. Miller v. Williams, 15 Grat. (Va.) 213; Walton v. Hale, 9 Grat. (Va.) 194.

[10] The conclusion that there are no presumptions in favor of its tax deed, left the plaintiff's claim that it was valid dependent upon proof of compliance with tax law under which the sale was made and the deed executed. This proof was lacking in several particulars: There was no proof of the assessment; nor of the published notice of the assessment to persons concerned required by sections 13 and 14 of the act of 1815 (Act Jan. 9, 1815, c. 21, 3 Stat. 169); nor of ad-

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vertisement that the taxes were due and payable under section 26; nor of the notification of the taxes due by advertisement in one newspaper under section 28; nor filing of the list of property sold in the clerk's office, with a view to its redemption by the owner, required by section 30.

The plaintiff undertook to prove that the tax sale had been advertised as required by sections 28 and 29 of Act Jan. 9, 1815, as amended by Act March 3, 1815 (3 Stat. 230, c. 91). The amendment requires that the advertisement of the tax sale shall be by publication "at least once a week for eight weeks in succession in every newspaper within the state in which the laws of the United States are by public authority published." In support of the tax deed, plaintiff contended that the Richmond Enquirer was the paper, and the only paper, in which the statute required the advertisement of sale, and offered evidence tending to prove that the sale was advertised in that paper. Whether the Richmond Enquirer was the proper medium of advertisement was a mixed question of law and fact, fully discussed in the opinion below. It seems to us there can be no doubt that the District Judge correctly construed the statutes. Designation of the Enquirer as the only newspaper, even one of the newspapers, "in which the laws of the United States are by public authority published," was left by the evidence at least in great doubt, and therefore the conclusions of fact by the District Judge against the plaintiff are not subject to review by this court. This makes immaterial the question whether the advertisement was in the proper form. The statutory provisions referred to were mandatory because designed to protect the taxpayer, and therefore proof of compliance with them was necessary to the validity of the tax deed.

[11] The plaintiff next claims title by operation of law under the familiar section 3 of the act of 1842 (Acts 1841–42, c. 13). The contention is that, since neither Smyth and Banks, nor those claiming under them, were assessed with taxes after 1832, therefore all their title to the land was forfeited to the state; that Joseph Hagan, Sarah Purcell, and James Culbertson were persons having "just claim," if not "just title," to the land under the Smyth and Banks grant; that they paid the taxes which the direct claimants under the Smyth and Banks patent should have paid; and that therefore all title derivative from that patent was vested in them, and hence in the plaintiff, their grantee.

The act of 1842 provides:

"And be it further enacted, that all the right, title and interest, which shall be vested in the commonwealth in any lands or lots lying west of the Alleghany Mountains, by reason of the nonpayment of the taxes heretofore due thereon, or which may become due on or before the first day of January next, or of the failure of the owner or owners thereof to cause the same to be entered on the books of the commissioner of the proper counties, and have the same charged with taxes according to law, by virtue of the provisions of the several acts of assembly heretofore enacted, in reference to delinquent and omitted lands, shall be and the same are hereby absolutely transferred to and vested in any person or persons (other than those for whose default the same may have been forfeited, their heirs or devisees), for so much as such person or persons may have just title or claim to, legal or equitable, claimed, held or derived from or under any grant of the commonwealth, bearing date previous to the first day of January, eighteen hundred and forty-

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three, who shall have discharged all taxes, duly assessed and charged against him or them upon such lands, and all taxes that ought to have been assessed or charged thereon, from the time he, she or they acquired title thereto, whether legal or equitable; Provided, that nothing in this section contained, shall be construed to impair the right or title of any person or persons who shall bona fide claim said land by title, legal or equitable, derived from the commonwealth, on which the taxes have been fully paid up according to law, but in all such cases the parties shall be left to the strength of their titles respectively."

Joseph Hagan and Sarah Purcell were not those for whose default the land was forfeited nor their heirs or devisees. Grantees of those in default are not, in terms, excluded by the statute from the general privilege of acquiring title by payment of taxes; and the express exclusion of heirs and devisees indicates that it was not the intention to exclude grantees. It is true that in Wild's Lessee v. Serpell, 10 Grat. (Va.) 405, Levasser v. Washburn, 11 Grat. (Va.) 572, and Atkins v. Lewis, 14 Grat. (Va.) 30, the Virginia court does refer to a subsequent grantee as a person who may obtain title by payment of the taxes, but the court does not decide that only a claimant under a patent different from that under which the forfeiture occurred can acquire title by payment of the taxes. Where the point was expressly involved the West Virginia court in construing a similar statute held that the grantee of the defaulting taxpayer may acquire the state's title by payment of the taxes. State v. Collins et al., 48 W. Va. 64, 35 S. E. 846.

But even under this construction of the statute, we do not think the plaintiff can claim the benefit of it, because it failed to prove either a "just title" or a "just claim." A just title means a title good against all the world. We are unable to find any definition of a just claim by the courts of Virginia or West Virginia. It evidently means something more than a mere asserted claim. Having regard to the context, it must mean at least a claim to the land which would be good under the same patent, but for the paramount right forfeited to the state, or an adverse right acquired under some other patent—a claim susceptible of proof under some patent from the state. As we have seen, the plaintiff was not able to show that Culbertson and others who paid the taxes derived title under any grant from the state, and therefore they could not derive title by payment of the taxes as the holders of a "just title" or a "just claim," under the act of 1842.

The plaintiff must fail under its own evidence of title.

[12, 13] The defendant, in addition to denial of plaintiff's title, set up two affirmative defenses: First, that the land was forfeited to the state either under the act of 1803 or under the act of 1814, and so was not subject to the federal tax of 1816; that therefore the grant of 1861 under which he claims was good against the senior grant of 1795, all rights under the latter having been forfeited.

There is no presumption of forfeiture. Under the act of 1803 (2 Rev. Code, 528), land was forfeited to the commonwealth and made subject to location when the taxes remained unpaid for more than two years. Section 2 of the act required publication of the statute by the auditor in the "Gazette of the Public Printer" and in some newspaper published at the seat of the general government. The general

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rule is that provisions for the publication of statutes are directory, and failure to comply with them does not impair the validity of the statute. Endlich on the Interpretation of Statutes, § 432. But in this instance the only notice to the defaulting taxpayer of the impending forfeiture of his land provided by the statute was publication of the statute. The publication was an act not only intended, but apparently necessary, for the protection of the taxpayer. It seems to us, therefore, that contrary to the general rule publication of the statute should be held necessary to a forfeiture, and that no presumption should be indulged that the auditor published it. The like claim of the defendant of alleged forfeiture under the act of 1814 depends upon the issue of fact as to the proper assessment of the land which was found by the District Judge adversely to the claim of forfeiture, and is therefore not reviewable here.

We do not understand that the defendant questions the finding of the District Court that under the proof he cannot rely on outstanding title in Moorehouse, Ralph, or Banks, or any other third person.

[14, 15] The defendant's claim of title by adverse possession presents a difficult question which arises in this way: As early as 1851 Silas Ratliff, whose title defendant acquired, established his residence in the vicinity of the land in dispute, using a number of acres around his dwelling for agricultural purposes. This actual possession embraced a portion of a tract of 15 acres granted to Ratliff in 1854. He held this actual possession until his death in 1896. On May 1, 1861, he obtained a patent for 595 acres adjacent to the 15-acre grant and overlapping a portion of it. On the same day, May 1, 1861, he obtained a patent for 673 acres, including the land in dispute. No part of this last patent adjoined the tract of 15 acres of which Ratliff had actual possession; but in 1862 a patent was issued to him for a tract of 163 acres between the 595 acres and the land in dispute. Thus the land in dispute was connected in 1862 by unbroken boundaries covered by the color of title of junior patents from the state with the small tract in Ratliff's actual possession from 1851 to 1896. The question is whether this possession in contemplation of law extended to and perfected his title to the land in dispute, assuming that there was no actual possession for that period shown under the senior patent. The stay law was operative in Virginia until January 1, 1869, but Silas Ratliff's possession remained unbroken until his death in 1896, and if the adverse possession relied on by defendant extends to the land in dispute it was perfected before the commencement of the action on January 14, 1915.

It is settled in Virginia that there can be no adverse possession of land in a state of nature. Whealton v. Doughty, 112 Va. 649, 72 S. E. 112. But actual possession of a part of a single tract under a junior patent extends to the entire tract, including the portion still in a state of nature. When several tracts are granted by different patents to the same person, and are so situated that they are covered by an unbroken boundary, they are regarded as forming one tract, and actual adverse possession for the statutory period of any portion of the one tract thus formed from several extends to the entire bound-

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ary and perfects the title to all separate tracts so consolidated into one. In Overton's Heirs v. Davisson, 1 Grat. (Va.) 216, 229 (42 Am. Dec. 544), the rule is thus stated:

"And, moreover, that upon the question of adversary possession, it is immaterial whether the land in controversy be embraced by one or several coterminous grants of the older patentee, or one or several coterminous grants of the younger patentee; in either case the lands granted to the same person by several patents must be regarded as forming one entire tract."

The same rule is laid down in Hutchinson on Land Titles, § 416; Virginia & Tennessee C. & I. Co. v. Fields, 94 Va. 102, 26 S. E. 426; Roller v. Armentrout, 118 Va. 173, 86 S. E. 906; Sharp v. Shenandoah Furnace Co., 100 Va. 27, 40 S. E. 103; Rich v. Braxton, 158 U. S. 375, 15 Sup. Ct. 1006, 39 L. Ed. 1022.

It is true that in the cases cited the patented land held to be covered by the adverse possession was immediately contiguous to the tract on which there was actual possession. But the principle is the same, namely, that the possession of a part covers all lands embraced in a common boundary under patents from the state.

The case of Harman v. Ratliff, 93 Va. 249, 24 S. E. 1023, is distinguished by the fact that, while the possession proved was on a tract contiguous to one of the granted tracts, it was an entirely independent tract not proved to be embraced in any of the patents. The distinction may be somewhat artificial, but we perceive no other ground of reconciliation of this case with the other cases cited.

The last question is whether Ratliff's adverse possession was broken by reacquisition by the state of the entire tract covered by the patent of 1795. The 200,000 acres of land embraced in the patent of 1795 was sold on October 12, 1886, for delinquent taxes assessed against Frederick Pearson for the past years, beginning February 1, 1876, and bought by the state. The state, by W. L. Dennis, clerk, conveyed on February 17, 1905, to Buchanan Company, from which plaintiff derived title.

Plaintiff's position is that the alleged adverse possession set up by defendant had not matured in 1876, when the state's lien for taxes attached, that it could not thereafter run against that lien, and that therefore the conveyance of the state was not limited to the title of Pearson at the date of the sale in 1886, but carried whatever title he had in 1876, when the lien first attached.

Under the tax laws of Virginia, as is conceded by plaintiff's counsel, the lien for taxes bears only upon the title of the person against whom the taxes are assessed and the tax title carries only his title. As the state's lien was limited to Pearson's title and its conveyance carried nothing more, and plaintiff was unable to show that Pearson had title, it is not in a position to assert a valid lien in favor of the state, defeating defendant's assertion of title by adverse holding by another under whom he claims.

[16] But waiving that, and assuming that Pearson was the real owner and that the state's lien for taxes was good against the world, the question is: Was the lien for taxes assessed against the land as Pearson's, which accrued in 1876, defeated by the adverse possession of Ratliff beginning in 1869? Obviously no statute of limitation ran

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against the state's lien in favor of Pearson, or any one claiming in privity with him. Cogent reasons might be stated in support of the validity of the state's lien against an adverse possession of even a stranger to Pearson, begun, but not consummated, at the time the lien attached. We are relieved of the consideration of the question, however, by the decision of the Supreme Court of Virginia in McClanahan's Adm'r v. Norfolk & W. Ry. Co., 123 Va. ——, 96 S. E. 453. There the court held that liens existing on land were lost by a possession for the statutory period adverse to the true owner, on the ground that the liens against the true owner were dependent on his title, that adverse possession conferred, not a derivative, but an independent paramount, title, and that therefore, when the paramount title matured by adverse possession, the former title was lost, and with it fell the lien, which was dependent upon it. The court quoted with approval the opinion of Judge McDowell in this case, laying down the rule stated as applicable to a lien for state taxes.

We must therefore sustain the conclusion of the District Court that title by adverse possession set up by the defendant is good against the conveyance of the state to the Buchanan Company, based on the sale under its lien for taxes.

Other questions concerning the admission and rejection of documentary evidence are discussed in the enlightening opinion of the District Judge, and in the comprehensive arguments of counsel. Without respect to these questions, the conclusions we have stated are decisive of the case.

Affirmed.

SANTA MARINA CO. v. CANADIAN BANK OF COMMERCE.*

(Circuit Court of Appeals, Ninth Circuit. October 22, 1918.)

No. 3113.

1. CORPORATIONS ⟸402—REPRESENTATION BY OFFICER—BANK CHECKS—INDORSEMENTS.
   Indorsements of checks by a corporation's secretary are all in effect in the name of payee corporation by its secretary, though, in some, "Company" is abbreviated to "Co.," and "Secretary" to "Secy.," or "Sec."

2. CORPORATIONS ⟸432(12)—SECRETARY—AUTHORITY TO INDORSE CHECKS—EVIDENCE.
   Evidence *held* to show that secretary of corporation, with knowledge and consent of its president and board of directors, was authorized to indorse checks payable to it, as for five years he did.

3. BILLS AND NOTES ⟸149—CHECKS—NEGOTIABILITY—"GENERAL INDORSEMENT."
   Checks with "general indorsement," defined by Civ. Code Cal. § 3112, as one by which no indorsee is named, are negotiable instruments.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Indorsement.]

4. CORPORATIONS ⟸414(4)—AUTHORITY OF SECRETARY—INDORSING CHECKS.
   Authority of secretary of a corporation to indorse in blank checks payable to it was not limited by the mere fact that its president and board of directors supposed he deposited them with its bank.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied February 10, 1919.

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5. BANKS AND BANKING ⟸130(3)—CHECKS—DEPOSITS.
Secretary of corporation having authority to indorse in blank checks payable to it, title to checks so indorsed passed on delivery to his bank, when tendered by him to it for deposit to his own account, unless it had timely notice that he had no title, or it acted in bad faith in receiving them.

6. BANKS AND BANKING ⟸130(3)—DEPOSITS—ESTOPPEL.
A corporation, which gives its secretary authority to indorse in blank checks payable to it, is estopped to recover of his bank, which acted in good faith in receiving them for deposit to his account.

7. APPEAL AND ERROR ⟸1033(7)—MATTERS REVIEWABLE.
Appeal from decree by plaintiff alone brings up for review only what was decided adversely to him, and not whether decree, so far as favorable to him, was erroneous.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Benj. F. Bledsoe, Judge.

Suit in equity by the Santa Marina Company against the Canadian Bank of Commerce. From a decree for part only of the amount claimed (242 Fed. 142), plaintiff appeals. Affirmed.

E. W. McGraw and J. E. Barry, both of San Francisco, Cal., for appellant.

Gavin McNab, R. P. Henshall, and Nat Schmulowitz, all of San Fransciso, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. This is a suit in equity, in which the appellant, the Santa Marina Company, as plaintiff, brought suit against the appellee, the Canadian Bank of Commerce, as defendant, to obtain a decree declaring the defendant the trustee of a fund amounting to $6,775.98.

One R. T. Hooper was the secretary of the plaintiff corporation from September 21, 1906, until he resigned, on March 17, 1913. During this period the plaintiff was the owner of two pieces of property located in the city of San Francisco. One piece is referred to in the testimony as the "Santa Marina Building"; the other, as the "Front Street Building." The first yielded to the plaintiff an income from rentals amounting approximately to $4,000 per month; the other rental amounting to about $300 per month. Two real estate firms in San Francisco acted as the agent of the plaintiff in collecting the rents from these two buildings, respectively; the rents being paid in checks drawn by the agents in favor of the plaintiff, and delivered to Hooper as secretary of the plaintiff. His function was to indorse these checks and deposit them to the credit of the plaintiff in its bank, which at first was the Mercantile Trust Company of San Francisco, and afterwards the Mercantile National Bank of San Francisco. His failure to so deposit 21 checks, amounting to $6,775.98, and his action in depositing them to his own credit with the defendant, has given rise to the present controversy.

These 21 checks are identified as having been drawn by Bovee, Toy & Co., plaintiff's agent in collecting the rents from the Front Street

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Building. They were drawn in favor of plaintiff on the Bank of California, and delivered to Hooper as the secretary of the plaintiff, who indorsed them in blank in plaintiff's name and deposited them to his own credit in the defendant bank. The defendant in the usual course of business passed these checks through the clearing house, and they were paid by the Bank of California. The first check was deposited by Hooper with the defendant on December 31, 1907, and the last on March 23, 1911. Hooper was elected secretary of the plaintiff September 21, 1906, and resigned March 17, 1913. The plaintiff did not discover that Hooper had deposited these checks with the defendant until April 2, 1913. This suit was commenced January 26, 1914.

[1] In the allegations of the complaint it is alleged that each check was drawn in favor of the Santa Marina Company. In 12 checks, the indorsement appeared to be the "Santa Marina Company," and in 9 the indorsement is "Santa Marina Co." It is alleged with respect to each separate check that the indorsement was made by R. T. Hooper, and it so appears in the indorsements set out in the record. In 5 indorsements R. T. Hooper adds the title of his authority as "Secretary"; in 11 he abbreviates it as "Secy.," and in 3 as "Sec." These variations in the form of the indorsements on the checks are of no significance in the routine of passing title to checks in the banking business. They were all in effect the indorsements of the name of the "Santa Marina Company, by R. T. Hooper, Secretary," and would be so recognized in any business transaction.

[2, 3] This is a suit in equity, in which the plaintiff seeks to recover upon the charge that the defendant was a trustee for the plaintiff for the sums of money represented by these checks. To raise such a trust it was necessary for the plaintiff to allege that Hooper, without the knowledge and consent of the plaintiff, had indorsed the checks in the name of the plaintiff and deposited them to his own credit with the defendant. It was also necessary to allege that the defendant, well knowing that said checks and the moneys they represented were the property of the plaintiff, placed the same to the personal account of Hooper. In the complaint the plaintiff so alleges with respect to each of the checks. In defendant's answer these allegations are specifically denied, raising an issue which we think is the controlling question in this case.

Hooper was the secretary of the plaintiff, and in that capacity he indorsed the checks. Mr. E. W. Hopkins, the president of the plaintiff corporation during the time Hooper was its secretary, testified that the duties of the latter "were to take care of the accounts of the corporation and take care of its cash, etc." He supposed that Hooper's authority as secretary "was the usual authority that secretaries have." The by-laws of the corporation provided that the board of directors should elect a secretary, whose duties were specified in several particulars; among other things it was provided:

"He shall keep proper account books, countersign all checks drawn upon the treasury, and discharge such other duties as pertain to his office and are prescribed by the board of directors."

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Hopkins testified:

"I must have known that he [Hooper] was receiving checks from Bovee, Toy & Co. on account of the rents. The money of the Santa Marina Company was supposed to be deposited with the Mercantile Trust Company, and subsequently with the Mercantile National Bank. No other place was authorized for such deposits. I cannot tell you whether authority was given Hooper to indorse checks of the Santa Marina Company with the Mercantile National Bank, specially by resolution, or not. * * * I believed he was indorsing checks and depositing them with the Mercantile National Bank. I never objected to his doing so. do not know if any other director objected to it."

H. A. Coggins, a director of the plaintiff corporation and the successor of Hooper as its secretary, testified that he "believed Hooper had no authority to deposit checks with the Canadian Bank of Commerce," and he believed Hooper was "supposed to deposit all checks in the Mercantile National Bank." That Hooper was authorized to indorse checks with the knowledge and consent of the president and board of directors of the corporation is established by this testimony, and by the fact that he did so in transacting plaintiff's business for the period of more than five years. The checks deposited with the defendant by Hooper were negotiable instruments. The indorsements were general (section 3112, California Civil Code), and were made by authority.

[4, 5] It is true plaintiff's president and board of directors supposed Hooper deposited the checks with plaintiff's banks, but this was far from so limiting his authority. His authority to indorse the checks in blank was complete. Where he should deposit the checks was another matter, concerning which there was no express restriction. Plaintiff's officers may have supposed that they had limited his authority to the depositing of the checks in plaintiff's bank, but there is no evidence that they actually did so, or that they required him to so indorse plaintiff's checks. It follows that, when Hooper tendered the checks in question to the defendant for deposit to the credit of his own account, the title passed on delivery, unless defendant had timely notice that Hooper had no title to them, or there was some act of bad faith on the part of the defendant in receiving the checks. There is no such evidence in the record.

In Murray v. Lardner, 2 Wall. (69 U. S.) 110, 17 L. Ed. 857, the Supreme Court had before it the question of the title to certain coupon bonds payable to bearer, which had been stolen from the defendant in error and pledged to the plaintiff in error for a loan. The court reviewed the decisions upon the transfer of commercial or negotiable paper, and concluded by stating the following propositions:

"The possession of such paper carries the title with it to the holder. 'The possession and title are one and inseparable.' The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world.

"Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part."

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In Hotchkiss v. National Bank, 21 Wall. (88 U. S.) 354, 359, 22 L. Ed. 645, the controversy also related to the title to certain coupon bonds stolen from the owner and pledged as collateral securities. The court said:

"The law is well settled that a party who takes negotiable paper before due for a valuable consideration, without knowledge of any defect of title, in good faith, can hold it against all the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or willful ignorance, and the burden of proof lies on the assailant of the title. It was so expressly held by this court in Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857."

In Shaw v. Railroad Co., 101 U. S. 563, 25 L. Ed. 892, the controversy related to an indorsed bill of lading. For the purpose of distinguishing the transfer of such an instrument from the transfer of a bill of exchange or promissory note, the court said of the latter:

"They are representatives of money, circulating in the commercial world as evidence of money, 'of which any person in lawful possession may avail himself to pay debts or make purchases or make remittances of money from one country to another, or to remote places in the same country. Hence, as said by Story, J., it has become a general rule of the commercial world to hold bills of exchange as in some sort sacred instruments in favor of bona fide holders for a valuable consideration without notice.' Without such a holding they could not perform their peculiar functions. It is for this reason it is held that if a bill or note, indorsed in blank or payable to bearer, be lost or stolen, and be purchased from the finder or thief, * * * the bona fide purchaser may hold it against the true owner. He may hold it, though he took it negligently, and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it—that is, nothing short of mala fides—will defeat his right. The rule is the same as that which protects the bona fide indorser of a bill or note purchased for value from the true owner. The purchaser is not bound to look beyond the instrument."

In Swift v. Smith, 102 U. S. 442, 444, 26 L. Ed. 193, the question related to the transfer of an indorsed promissory note. The Supreme Court said:

"One who purchases such paper from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in it, or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts. * * * He can lose his right only by actual notice or bad faith."

In First National Bank v. Moore, 148 Fed. 953, 78 C. C. A. 581, in this court, the question related to the title to certain promissory notes alleged to have been given to the original holder without consideration. Assigned to the plaintiff in error, the question was whether the purchaser was deprived of his character of purchaser in good faith by proof that he took the note with knowledge of such circumstances as ought to have put an ordinary man on inquiry to ascertain the facts. The court cites a number of cases, among others Murray v. Lardner, supra, and Hotchkiss v. National Bank, supra, to the effect that to defeat a recovery by an indorsee of a promissory note for value before

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maturity, on the ground that the note was given without consideration or was obtained by fraud, the burden rests upon the indorsee to prove that the holder had knowledge of such fact or was chargeable with bad faith.

There is no evidence that defendant had any notice that the checks deposited by Hooper were not his property, and there is no evidence of bad faith on the part of the defendant in the transaction. Upon the controlling question in the case plaintiff has therefore failed to furnish the proof required to sustain the action.

[6] There is, moreover, a well-established principle of equitable estoppel applicable to this case. It is found in numerous cases. In the leading case of McNeil v. Tenth National Bank, 46 N. Y. 325, 7 Am. Rep. 341, the Court of Appeals of New York states it as follows:

"That where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected.

"Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

In Cluett v. Couture, 140 App. Div. 830, 125 N. Y. Supp. 813, it was held that, where a principal granted full power to his agent to indorse checks in blank by writing the principal's name on the back without any restrictive words, but required him to deposit them in a bank to the credit of the principal, any departure by the agent from the authority was a mere diversion of a negotiable instrument from an authorized use, and where a loss occurred it must fall on the principal, rather than on the holder, who took the check in good faith and without any information or knowledge that the agent did not have authority to use the check for the purpose and in the manner in which he used the same.

The same principle is stated more concisely, but with equal clearness, by Mr. Justice Day, speaking for the Supreme Court, in National Safe Deposit Co. v. Hibbs, 229 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241:

"In such case we think the principles which underlie equitable estoppel place the loss upon him whose misplaced confidence has made the wrong possible."

In the late case of Arcade Realty Co. v. Bank of Commerce (Cal. App.), the court applied this doctrine in a case almost identical with the present case. The syllabus of that case is as follows:

"Where the owner of a building knowingly permits its agent to indorse its name upon checks given in payment of rent, and to deposit them in his own bank, the agent thereafter remitting by his personal check, and this practice continued over a period of 16 months, the owner created and vested in such agent ostensible authority to indorse its name upon the checks, and the bank making payments on the checks so indorsed would not be liable to such owner."[1]

The plaintiff, through mistaken confidence in Hooper, gave him authority as its secretary to indorse checks without restriction, which

[1] For new opinion by California Supreme Court, see 181 Pac. 66.

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made the wrong possible in these transactions, and under the rule of equitable estoppel it cannot recover.

[7] The decree of the court below is in accordance with the law of negotiable paper and the rule of equitable estoppel as here stated, except as to certain checks, amounting in the aggregate to $1,666.35, for which a decree was entered in favor of the plaintiff. As to these checks, the court found that they were deposited at a time when Hooper was indebted to the defendant bank in certain overdrafts, and that the defendant appropriated the proceeds of such checks in satisfaction of such overdrafts, thereby becoming liable to plaintiff in that amount.

From this decree both parties to the suit had the right to appeal to this court. Plaintiff appealed. The defendant did not. An appeal brings up for review only that which was decided adversely to the appellant. Loudon v. Taxing District, 104 U. S. 771–774, 26 L. Ed. 923; Cherokee Nation v. Blackfeather, 155 U. S. 218–221, 15 Sup. Ct. 63, 39 L. Ed. 126; Field v. Barber Asphalt Paving Co., 194 U. S. 618–621, 24 Sup. Ct. 784, 48 L. Ed. 1142; Southern Pine Co. v. Ward, 208 U. S. 126–137, 28 Sup. Ct. 239, 52 L. Ed. 420; O'Neil v. Wolcott Mining Co., 174 Fed. 527–535, 98 C. C. A. 309, 27 L. R. A. (N. S.) 200; Swager v. Smith, 194 Fed. 762–765, 114 C. C. A. 482; Sanborn-Cutting Co. v. Paine, 244 Fed. 672–681, 157 C. C. A. 120.

The correctness of that part of the decree in favor of the plaintiff for $1,666.35 is therefore not a question before this court.

This conclusion renders it unnecessary for us to consider the defense that the plaintiff is chargeable with laches in the prosecution of this suit, and the further defense that plaintiff's claim has been fully satisfied in certain direct suits and judgments against Hooper.

The decree of the lower court is affirmed.

GILBERT and HUNT, Circuit Judges, concur in the result.

THE KOREA MARU (two cases).

(Circuit Court of Appeals, Ninth Circuit. October 11, 1918.)

Nos. 3114, 3115.

1. SHIPPING ⟸166(1)—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—MEDICAL TREATMENT.
   A ship is liable for the incompetence and unskillfulness of its physician and surgeon in treatment of an injured passenger only when it failed to exercise reasonable care in his employment.

2. CARRIERS ⟸280(1)—CARRIAGE OF PASSENGERS—INJURY TO PASSENGERS.
   The duty of a carrier to a passenger is the same, whether liability is claimed as a breach of contract or as a failure to perform the duty of a carrier.

3. CARRIERS ⟸280(1)—CARRIAGE OF PASSENGERS—DUTY OF CARE.
   Although a carrier does not insure that a passenger will be carried safely, still it is bound to exercise as high a degree of care, skill, and diligence in receiving a passenger, conveying him to his destination, and

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setting him down safely as the means of conveyance employed and the circumstances of the case will permit.

4. SHIPPING ⟸166(3)—INJURY TO PASSENGERS—ASSUMPTION OF RISK.
Passengers on a steamship, in going upon deck for air and exercise, as was customary, did not assume the risk, unless the danger was apparent and obvious to them, exercising reasonable care for their own safety, or unless warned by the officers of the danger.

5. SHIPPING ⟸166(1)—CARRIAGE OF PASSENGERS—NEGLECT OF INJURED PASSENGERS.
Failure of a ship's surgeon to treat one of two injured passengers at all, although requested to do so, and treatment of the other for a contused wound, when there was a compound fracture of a bone of her leg, held negligence, for which the ship was liable.

Appeal from the District Court of the United States for the Territory of Hawaii; Horace W. Vaughan, Judge.

Suits in admiralty by Uto Yenobi and by Omito Itokazu against the Japanese steamship Korea Maru. Decrees for libelants, and claimant appeals. Affirmed.

Smith, Warren & Whitney, William O. Smith, and L. J. Warren, all of Honolulu, T. H., and Samuel Knight, of San Francisco, Cal., for appellants.

George A. Davis and Charles S. Davis, both of Honolulu, T. H., for appellees.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. The libels charge the breach of a marine contract in the failure of the owners and officers of the steamship Korea Maru to carry the libelants safely and without injury from the port of Kobe, in the empire of Japan, to the port of Honolulu, in the district and territory of Hawaii, in the United States. The two suits arise upon substantially the same state of facts, involving the same issues, and were heard together, both in the lower court and here, and will be so treated in this opinion.

It is alleged that the libelants were passengers for hire on the Japanese steamship Korea Maru, leaving the port of Kobe, empire of Japan, on the 6th day of December, 1916, and being third-class or steerage passengers on that boat; that the Korea Maru was at that time engaged in carrying passengers, mail, and freight from divers ports and places in the republic of China, the empire of Japan, and other ports and places, to the port of Honolulu, territory of Hawaii, and San Francisco, state of California; that on or about the 11th day of December, 1916, while said steamship was upon the high seas, the libelants were compelled by reason of the stifling condition of their quarters, the heat and impure air, to go from their quarters up to and upon the lower deck of the vessel; that while on the deck, and during heavy weather, and while a heavy swell and a high sea was running, they were struck by a wave, which swept over and across the deck of the steamship, and fell with great force and violence upon the deck of the steamship, throwing libelants down; that the libelant Uto Yenobi suffered a fracture of the metatarsel bone of the right foot,

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and the libelant Omito Itokazu suffered a compound fracture of the tibia of her right leg and was otherwise bruised and injured; that neither libelant received any proper medical care after the injuries complained of; and that said injuries were caused by the negligence of the appellants, in not warning the libelants that it was dangerous and unsafe at that time to go on the deck of the vessel, and in failing to provide safety appliances on the deck, and in allowing the libelants to go upon the deck of the steamship without taking the necessary precautions for the safety of the passengers.

During the trial, the libel in case No. 3114 was amended, charging that the claimant employed an unskillful and incompetent physician and surgeon, who wholly failed and neglected to attend and treat the libelant Uto Yenobi, and by reason of such neglect libelant suffered great hardship and pain. The libel in case No. 3115 was also amended, in which the claimant is charged with the employment of an unskillful and incompetent physician and surgeon, who treated the broken leg of Omito Itokazu as an ordinary contused wound, and not as a broken leg, by reason of which unskillful and incompetent treatment the libelant suffered great hardship and pain.

[1] With respect to the charge contained in these amendments, that the physician and surgeon neglected the libelants, we are of the opinion that such neglect was an element in the general charge of neglect for which the vessel was liable; but with respect to the charge that the physician and surgeon was incompetent and unskillful in the treatment of Omito Itokazu we are of the opinion that the vessel was only liable when the claimant failed to take reasonable care in the employment of such an officer on board the vessel. Hutchins v. American Steamship Great Northern, 251 Fed. 826, — C. C. A. —. It is not charged in either of the libels or the amendments that the claimant was negligent in the selection of, or in the employment of, the physician and surgeon, or that his incompetency or lack of skill, as charged, was known to the claimant at the time of his engagement, or that his incompetency and lack of skill, as charged, was subsequently ascertained by the claimant, and that with such knowledge he was retained as an employé of the vessel. In the absence of such a charge, and competent evidence to sustain it, we pass over the evidence relating to the lack of skill and competency on the part of the physician and surgeon in the treatment of Omito Itokazu.

[2] We come, then, to the general charge of negligence, the character of which, with respect to the duty of the carrier to a passenger, is the same, whether the liability of the carrier is claimed as a breach of contract or as a failure to perform the duty of a carrier.

[3] The care required of a carrier in transporting passengers, and its consequent liability, is sufficiently stated for the present purpose under the general rule that, although the carrier does not insure that the passenger will be carried safely, still it is bound to exercise as high a degree of care, skill, and diligence in receiving a passenger, conveying him to his destination, and setting him down safely, as the means of conveyance employed and the circumstances of the case will permit. 10 Corpus Juris, 854.

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The testimony relating to the weather conditions on board the vessel at the time of the accident is conflicting. The chief officer testified that the weather was not bad, that the ship did not roll much, and that he did not think the sea was so rough that it was dangerous for passengers to be on deck. He said the spray came on deck, but no wave came over. He testified, further, that there was a standing order given that the passengers were not to go up on deck when it was in any way rough, because it was dangerous.

The head steward testified that he saw the libelants pass his room, going in the direction of the upper deck, just before the accident, and he warned them then that they must not go up. He said to them:

"It is rough, and the spray is coming over the deck," "and that the sea was rough, and not to go up on deck;" "that it was dangerous, and for that reason not to go up on deck."

He subsequently modified his testimony to the effect that he did not say to the libelants that it was dangerous, but that he said it was dark, and the spray would come on deck, and that they would get wet. A steerage boy testified that the steward told him to tell the passengers that the weather was bad, and it would be dangerous for the passengers to go up on deck, and he says he so told the libelants.

The libelants testified that they were not warned not to go on deck, and they were not told it was dangerous. A female companion, who was with the libelants, and who went up on deck with them and was struck down at the same time, testified that she heard no warning that it was unsafe or dangerous to go on deck. A steerage passenger, who was on deck and saw the libelants struck down, testified that the weather was bad and the waves were rough; but he heard no warning that it was dangerous to be on deck. Two other passengers testified that they heard no warning that it was dangerous to go on deck, although they appear to have been situated so as to have heard it, had such a warning been given.

The court below found as facts, from this testimony, that the sea was rough and the weather was bad; that it was in fact dangerous for passengers to be on the steerage deck; that the officers and crew were negligent in not so warning the passengers, and in allowing them to go on deck. The weight of testimony supports this finding, and we find no reason for rejecting it.

[4] The claimant contends that the accident happened by reason of the libelants slipping and falling upon the deck, which was wet from flying spray and rain, and was an ordinary and usual risk of travel at sea, which libelants assumed. This contention is in conflict with the claim that the deck was dangerous and that the libelants were so warned: but, assuming that such an alternative defense may be made, it is not supported by the evidence. The libelants were not walking on the deck at the time they were struck down by the wave. They were standing still on the steerage deck near the entrance to the steerage quarters, from which they had just emerged. The steerage passengers had the right to go on the steerage deck for air and exercise, and it was usual for them to do so when the conditions of weather and sea were

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favorable. When the conditions were not favorable, it was the duty, and the evidence shows that it was the custom, of the officers of the vessel to so warn the passengers. If the danger upon the deck was not apparent and obvious to the libelants, exercising reasonable care for their own safety, they assumed no risk, unless warned by the officers of the vessel of the danger, which was not a fact; and it does not appear from the evidence that the danger was obvious or apparent, or that the libelants had been on deck long enough to apprehend the danger from their own observation. The conclusion is that the libelants did not assume the risk, and that they were not guilty of contributory negligence.

[5] It is charged that the libelants were neglected after they were injured. The physician and surgeon carried by the vessel saw Omito Itokazu soon after she was injured, when he was called by the steerage steward to see her. He found her lying on the steerage deck below, suffering pain from an injury which he diagnosed as a contused wound on the front part of her leg. He did not see her again for two or three days, when he was again called by the steerage steward. On this second visit the doctor directed that the bandage should be removed and the leg washed. He applied antiphlogistine and the leg was again bandaged. The next time he saw the libelant she was in the ship's hospital, when the libelant was taken there for inspection on the arrival of the vessel at Honolulu. The bandage of antiphlogistine had been removed and the leg was bare. He did not see her after that, and he did not see her carried from the vessel to the immigration station by a fellow passenger, where she was reported to the surgeon of the United States Public Health Service, who upon examination thought the injury was a fracture. He immediately had her sent to the Queen's Hospital, where she was examined by the surgeon in charge, who found she had a compound fracture of the right tibia. An X-ray picture was taken of the injured limb, to ascertain the position of the fragments. The picture was introduced in evidence, and shows the fracture clearly and unmistakably.

On December 27th the wound had sufficiently healed to place the leg in a plaster cast, and the libelant remained under treatment in the hospital until March 7th, when she was discharged; but she had not fully recovered from the injury when the case was tried in April, 1917. She suffered pain from the time of the injury until about the time she was discharged from the hospital.

The ship's physician and surgeon claims to have discovered that the libelant's leg was broken before she was taken from the ship at Honolulu; but his health report, delivered to the health officer at Honolulu, does not show this fact. In this report it is stated that the injury was to her ankle. The only conclusion to be drawn from this testimony is that the libelant was neglected, and the nature of her injury was not ascertained, although it could have been, very soon after the accident, and some relief easily given.

Uto Yenobi, the other libelant, was carried below after her injury, and she was placed in her berth, where she remained until the arrival

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of the vessel at Honolulu. The doctor did not attend or see her, although requested to do so by a friend of the libelant, who was a fellow passenger. At Honolulu she was carried to the immigration station by a fellow passenger and examined by the surgeon of the Health Service, as in the case of the other libelant, and she was found to have an injury to her foot. She was also immediately sent to the Queen's Hospital, where she remained under treatment until February 21, 1917. Her injury was of such a character as to cause her pain until about the time she was discharged from the hospital. The doctor on board the vessel makes no claim to have treated her, or to have seen her, after her injury.

The testimony in the record reveals the fact that these helpless creatures were otherwise shamefully neglected in a way that need not be mentioned in this opinion. Had there been no physician or surgeon on board the vessel, the neglect by the master or other officer to give them proper care would, under the rule we have stated, have rendered the vessel liable.

The District Court entered a decree in favor of Uto Yenobi for the sum of $1,200, and a decree in favor of Omito Itokazu for $2,000. We see no reason for disturbing the decrees on the ground that they are excessive. In our opinion they are not excessive, but under all the circumstances are fair and reasonable.

Finding no error in the record, the decrees of the court below are affirmed.

QUAN HING SUN et al. v. WHITE, Commissioner of Immigration.*

(Circuit Court of Appeals, Ninth Circuit. October 11, 1918.)

No. 3039.

1. CITIZENS ⟸9—WHO ARE CITIZENS—CHILDREN OF CITIZENS BORN ABROAD.
Rev. St. § 1993 (Comp. St. 1916, § 3947), providing that "all children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States," makes no distinction as to race or place of birth.

2. CONSTITUTIONAL LAW ⟸215—DISCRIMINATION—APPLICANTS CLAIMING CITIZENSHIP—CHILDREN OF CHINESE BIRTH.
To apply to a person of Chinese birth, seeking admission on the ground that his father was a citizen of the United States, a different procedure from that provided by the immigration statute and applied to all others making similar claim, is an unlawful discrimination.

3. ALIENS ⟸25—EXCLUSION—CHILDREN OF CITIZENS BORN ABROAD.
A regulation of the Department of Labor, adopted under the Chinese exclusion laws, excluding from admission persons of Chinese birth, although their fathers are or were citizens of the United States, unless they are dependent members of the father's household, is without warrant of law.

Appeal from the District Court of the United States for the First Division of the Northern District of California; M. T. Dooling, Judge.

Habeas corpus by Quan Hing Sun and others against Edward White, Commissioner of Immigration for the Port of San Francisco.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied February 10, 1919.

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From an order discharging the writ, and remanding petitioners for deportation, they appeal. Reversed.

George A. McGowan, of San Francisco, Cal., for appellants.

Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., C. F. Tramutolo, Asst. U. S. Atty., of San Jose, Cal., and Caspar A. Ornbaun, Asst. U. S. Atty., of San Francisco, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. The appellant, Quan Hing Sun, a child eight years of age, arrived at the port of San Francisco, Cal., on the steamship China March 11, 1916, in charge of his uncle, Quan Foo. He applied for admission to the United States as the son of Quan Hay, deceased, who was a native-born citizen of the United States. His claim was that, although born in China, he was the son of a citizen of the United States, and under section 1993 of the Revised Statutes (Comp. St. 1916, § 3947) entitled to enter the United States.

The appellant's father, Quan Hay, died in Los Angeles, Cal., February 25, 1914. His mother, Wong She, died in China two or three months after the death of the father. The appellant's uncle, Quan Foo, was born in the United States. He visited China in 1906, and again in 1914, returning to the United States with the appellant in March, 1916.

The appellant was first examined as to his right to admission under the provisions of the immigration laws, and was found qualified to be admitted. He was then examined by the immigration inspector under the Chinese Exclusion Act, and his application for admission denied, on the ground that the applicant had failed to establish the fact that he was the son of Quan Hay; but it was stated by the Inspector that the applicant was excluded under rule 9 (f) of the then rules governing the admission of Chinese. This finding was approved by the Commissioner of Immigration, and upon appeal to the Secretary of Labor the decision of the Immigration Commissioner was affirmed.

It is claimed on behalf of appellant that the action of the officers of the Immigration Bureau and of the Department of Labor in holding the appellant for deportation was an abuse of discretion committed to them by statute, and resulted in denying him a fair hearing, to which he was entitled under the law. The objection to the hearing is that under the regulations prescribed by the Commissioner General of Immigration a different procedure was pursued by the immigration officers in determining appellant's right to admission into the United States from that pursued under other statutory regulations for determining the right of persons other than those of the Chinese race to enter the United States.

There is such a difference in procedure. Under the provisions of the act of Congress of February 20, 1907 (34 Stat. 898, c. 1134), as amended by the act of March 26, 1910 (36 Stat. 263, c. 128), and March 4, 1913 (37 Stat. 736, c. 141), a person claiming to be a citizen of the United States arriving at a port of the United States, who may not appear to the examining immigration inspector at the port of ar-

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rival to be clearly and beyond a doubt entitled to land, will be detained for examination in relation thereto by a board of special inquiry. The same procedure is provided when the decision of the inspector is favorable to the admission of the alien and such decision is challenged by any other immigration officer. Act Feb. 20, 1907, c. 1134, § 24, 34 Stat. 906 (Comp. St. 1916, § 4273). This special board of inquiry is appointed by the Commissioner of Immigration, with the approval of the Secretary of the Department of Labor, and consists of three members selected from the immigration officials. Such boards have the authority to determine whether a person who has been duly held shall be allowed to land or shall be deported. An appeal lies from the decision of the board, through the Commissioner of Immigration and the Commissioner General of Immigration, to the Secretary of the Department of Labor. Act Feb. 20, 1907, § 25, 34 Stat. 906 (Comp. St. 1916, § 4274).

The regulations governing the admission of a person of the Chinese race provide for an examination by an officer (Act May 6, 1882, c. 126, § 9, 22 Stat. 60 [Comp. St. 1916, § 4296]), who makes a report on the case to the Commissioner of Immigration. This officer determines whether the person shall be admitted or not. An appeal from adverse decisions lies to the Secretary of the Department of Labor (rules 3 and 5 governing the admission of Chinese). In this examination of a person of the Chinese race, there is no intervening board of special inquiry between the inspector and the Commissioner of Immigration, or the other superior officers of the Department of Labor. We are advised that in practice there is this further difference: The immigration procedure for persons other than Chinese allows a complete inspection of the entire record, including the findings and reasonings of the board of special inquiry. The practice under the Chinese Exclusion Law withholds this record from the applicant for admission, only advising him of the final result.

[1] The procedure under the immigration statute is provided by law. The regulations under the Chinese Exclusion Act are provided by regulations of the Department of Labor. The appellant claimed the right to enter the United States under section 1993 of the Revised Statutes (Comp. St. 1916, § 3947), providing as follows:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States."

[2] This statute applies to all persons alike, without any discrimination as to race or place of birth. To apply to a person of Chinese birth the procedure provided by the rules of the Department of Labor governing the admission of Chinese, for the purpose of determining whether the applicant's father was a citizen of the United States, and to all others making this claim the procedure provided by the immigration statute, is plainly a discrimination against the person of Chinese birth, and the hearing measured by the immigration statute distinctly unfair. This unfair procedure is made clear by the proceedings in this case.

[3] When the applicant arrived in the United States on March 11,

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1916, the rules of the Department of Labor governing the admission of Chinese were the rules approved October 15, 1915. It was provided in rule 9 (f) of said rules that "the dependent members of the household of a Chinese-American citizen may be admitted to the United States" upon certain conditions therein provided with respect to the proof that shall be exacted in such cases. These conditions were as follows:

"Male children 14 years of age and under shall be conclusively presumed to be members of the father's household. Male children 15 years of age or over and under 18 years of age shall be presumed to be members of the father's household, but such presumption shall be subject to rebuttal. Such children 18 years of age and under 21 years of age shall be required to prove affirmatively and to the satisfaction of the Secretary of Labor that they are members of the father's household. No Chinese male 21 years of age or over shall be permitted to be admitted to the United States otherwise than of his own individual status or capacity as a member of the exempt classes, and upon exhibition of the certificate prescribed by section 6 of the Act of July 5, 1884, irrespective of whether he is or is not a member of the household of his exempt father."

All other children of Chinese-American citizens were excluded under rule 2, which provides:

"Rule 2. Only those Chinese persons who are expressly declared by the treaty and laws relating to the exclusion of Chinese to be admissible shall be allowed to enter the United States, and those only upon compliance with the requirements of said treaty and laws and of rules issued thereunder."

We know of no law making a race distinction in American citizenship, and by reason of such distinction excluding the sons of citizens of the United States of Chinese birth who, seeking to enter the United States, if over 21 years of age, are not permitted to do so, except upon the exhibition of a certificate prescribed by section 6 of the act of May 6, 1882, c. 126, 22 Stat. 58, as amended July 5, 1884 (23 Stat. 116, c. 220 [Comp. St. 1916, § 4293]) or if under 21 years of age, except upon evidence that they are dependent members of the household of such American citizen.

That there is no such law is practically admitted by the Department of Labor in the adoption of new rules in which these conditions are omitted. The new rules were adopted May 1, 1917, in which it is provided in rule 9, subdivision 1:

"The lawful children of an American citizen of the Chinese race partake of their father's citizenship, and are entitled to admission into the United States."

No conditions are imposed, except to retain a provision of the previous rule safeguarding the United States against false and fraudulent claims of citizenship as follows:

"In every such case convincing evidence with respect to such citizenship and relationship shall be exacted."

The inspector, who examined the applicant in this case, proceeding under the rules of October 15, 1915, reported:

"He is but a child, and neither of his parents are in this country, both in fact, being dead, and the provisions of rule 9 would prevent his landing.

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The testimony of all witnesses was, however, taken in order to ascertain, if possible, if the relationship claimed exists."

The immigration inspector refers to the testimony upon the feature of the case last referred to, and reaches the conclusion that such relationship had not been established, concluding his report as follows:

"In my opinion the relationship claimed does not exist, and even if rule 9 did not prohibit the applicant's landing I would recommend denial based upon applicant's failure to establish that he is the son of Quan Hay."

Upon this report the Commissioner of Immigration rendered the following decision:

"In the matter of the application of the Chinese person, Quan Hing Sun, for admission to the United States as the minor son of a native, the existence of the relationship claimed to his alleged father is not established to my satisfaction, and it further appears that both parents of the applicant are dead, and he is therefore inadmissible under the provisions of rule 9."

From the decision of the Commissioner of Immigration counsel for the appellant appealed to the Secretary of Labor at Washington. The final decision of that official is not in the record, but the Assistant Commissioner General of Immigration advised the Commissioner of Immigration at San Francisco that the Secretary had affirmed the excluding decision of the latter, "on the ground that the relationship had not been established." Whether the decision of the Secretary of Labor was oral or written does not appear.

Passing over the informality in such a disposition of the appeal, the question remains: Was this decision based solely upon the objection that it had not been established that the appellant was the son of Quan Hay, a native-born citizen of the United States, or was it influenced by the fact that Quan Hay was dead, and the appellant was not, at the time of his arrival in the United States, a "dependent member" of his father's household, as required by rule 9 (f)? The exclusion under that rule appears to have been considered, and apparently was an element in the decision of the inspector of immigration and the Commissioner of Immigration at San Francisco, and it is not clear that it did not influence the Department of Labor at Washington.

We are of the opinion that in such an inquiry it should distinctly appear that the department was not influenced in its decision by considerations not authorized by law. The decisions of Judge Dooling in Ex parte Wong Foo (D. C.) 230 Fed. 534, Ex parte Leong Wah Jam (D. C.) 230 Fed. 540, Ex parte Ng Doo Wong (D. C.) 230 Fed. 751, Ex parte Lee Dung Moo (D. C.) 230 Fed. 746, and Ex parte Tom Toy Tin (D. C.) 230 Fed. 747, we think state a rule of caution applicable in all fairness to such a case. The judge said (Ex parte Wong Foo, supra):

"The inquiry of the Immigration Department should be directed, of course, in good faith to the ascertainment of that fact [that the applicant is the son of an American citizen]. The burden of proving such a relationship is entirely upon the applicant, but that burden should not be increased by throwing extraneous matters into the scale against him."

We are also of the opinion that there is but one procedure applicable to such an inquiry, and that is the procedure provided by the im-

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migration statute. Upon the record in this case we do not think appellant had such a fair hearing before the Immigration Department as the law provides.

The decree of the District Court will be reversed, with direction to issue the writ as prayed for, and such further proceedings as will not be inconsistent with the opinion. It is so ordered.

ROYAL UNION MUT. LIFE INS. CO. v. LLOYD (two cases).*

(Circuit Court of Appeals, Eighth Circuit. November 20, 1918.)

Nos. 5100, 5102.

1. INSURANCE ⟸587—LIFE POLICY—DELIVERY.
A husband's delivery to his wife of a life policy *held* not a surrender of his right to revoke the designation of the wife as beneficiary, and so to preclude the insurer from giving effect to a change of beneficiary by the husband.

2. INSURANCE ⟸587—LIFE POLICY—CHANGE OF BENEFICIARY.
The right to change a beneficiary, if reserved in a life policy, is equally available to the insured as it is in case of a certificate issued by a fraternal benefit association.

3. INSURANCE ⟸587—LIFE POLICY—CHANGE OF BENEFICIARY.
A provision in a life policy allowing the insured to change the beneficiary, which required return of the original policy, so that an indorsement of the change might be indorsed thereon, is for the benefit of the insurer, and the original beneficiary cannot complain that the insurer, on the representation that the policy had been lost, issued a new policy, in which, at the request of the insured, the beneficiary was changed, though the original policy was in the possession of the first beneficiary.

4. APPEAL AND ERROR ⟸184—OBJECTIONS—NECESSITY.
Where plaintiff in an action on a life policy made no objection to the trial on the equity side of the court of defenses based on the ground that the policy should be canceled, because a new one, naming a new beneficiary, had been issued at the request of the insured, *held*, that the case was not so wholly without color of equitable jurisdiction that it can be dismissed on appeal.

Appeal from and in Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Action by Anzonetta M. Lloyd against the Royal Union Mutual Life Insurance Company, in which the parties stipulated certain issues should be transferred to the equity side of the court. There was a judgment and decree for the plaintiff (245 Fed. 162), and defendant appeals and brings error. Judgment reversed, and decree reversed, with direction.

F. J. Dawley, of Cedar Rapids, Iowa (Dawley & Jordan, of Cedar Rapids, Iowa, N. M. Hubbard, Jr., of Des Moines, Iowa, and F. F. Dawley, of Cedar Rapids, Iowa, on the brief), for appellant and plaintiff in error.

E. A. Fordyce, of Cedar Rapids, Iowa (Leslie H. Whipp, of Chicago, Ill., on the brief), for appellee and defendant in error.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied February 22, 1919.

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MUNGER, District Judge. The appellee and defendant in error, hereafter called plaintiff, brought an action at law against appellant and plaintiff in error, hereafter called the company, upon a policy of life insurance issued by it upon the life of plaintiff's husband. By the terms of the policy she was named as beneficiary, subject to a right of revocation of such designation. She alleged that her husband had transferred the policy to her as her own property and that she had ever since held it. The company's answer denied the transfer, denied notice of any claimed transfer, and alleged that the insured had filed an affidavit with it showing the loss of the original policy, and an application for the issuance of a duplicate policy; that such duplicate policy was issued, and that the insured had then made a written request to have his mother substituted as beneficiary in place of plaintiff, and that this change was made and indorsed on the policy; that after the death of insured his mother had entered suit against the company and had obtained judgment for the full amount of the policy. The answer concluded with a prayer that the assignment and transfer of the policy be canceled and that plaintiff be required to surrender for cancellation the policy held by her. The reply denied that plaintiff had any knowledge of the application for change of beneficiary, or of the issuance of a duplicate policy or of the indorsement of a change of beneficiary thereon. The parties entered into a stipulation that the case should be transferred to the equity side of the court and the court made an order that the issues presented by a part of the answer and the reply thereto, relating to the change of beneficiary and praying for cancellation and surrender of the policy held by plaintiff should first be tried as a suit in equity, and that after the determination of that issue, the issues made by plaintiff's petition and the remainder of the answer and reply should be tried as an action at law. See section 274b, Judicial Code, Act March 3, 1915, c. 90, 38 Stat. 956 (Comp. St. 1916, § 1251b).

The court heard the testimony and entered a decree in the case that the portion of defendant's answer which prayed equitable relief should be dismissed for want of equity, and on the same testimony and in the same case entered judgment for plaintiff for the amount of the policy and costs. An appeal and writ of error were allowed on application of the company, and both have been submitted on one record.

The chief question presented by the appeal is whether the decree is justified by the evidence. There is no serious dispute as to the essential facts. The plaintiff and insured were married in September, 1911. They lived together until in August, 1915, when they separated, and plaintiff obtained a divorce in November following. He died in December, 1915. When they were married, each had a fair income; the plaintiff's income from her separate estate amounting to about $5,000 a year. In the December following the marriage, plaintiff's husband said to her that, as she had a separate estate, it would be no more than fair that she should pay one-half of the household and living expenses and all of her personal expenses, and that, in return, "he would make out his will in her favor and a life insurance

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policy," but did not state for what amount the policy should be. He also stated that, if he took out a policy, "it would not be any more than right that she should pay the premium on that, if he made it in favor of her." She agreed to this arrangement. Her husband stated that, as long as she kept up the premium, the policy would continue in her name, in her favor. Several months afterward her husband told her that he had a policy for her, and then delivered the policy to her. She examined it sufficiently to see what its general nature was, and then at once placed it in her safety deposit box at the local bank, and kept possession of it until after her husband's death. The premiums were paid annually to the company by her husband, but she reimbursed him for the amounts so advanced, in settlements made soon after he had made the payments. The plaintiff had no knowledge of her husband's application for a change of beneficiary, and the company had no knowledge that the original policy was in existence when the change of beneficiaries was made, nor did it know of any agreement or understanding between plaintiff and her husband relating to the insurance.

The company is an Iowa insurance corporation, and the policy was issued in Iowa. By its terms the company agreed to pay $5,000, in case of the death of the insured, to plaintiff, if living, with right of revocation. Among the conditions of the policy were the following:

"If the right of revocation has been reserved, or in case of the death of the designated beneficiary, the insured may at any time while the policy is in force, and subject to any existing assignment of the policy, designate a new beneficiary (with or without the right of revocation) by filing written request therefor at the home office, together with this policy; such change to take effect on the indorsement thereof on the policy by the company."

"No assignment hereof shall be binding upon the company unless a duplicate original thereof shall have been filed at the home office. Assignment blanks will be furnished upon application."

The application for a change of beneficiary was made by the insured in January, 1915, by written application and affidavit sent to the company, and the indorsement of the change of beneficiary from the wife to the mother of the insured was made in the same month on the duplicate policy which the company had issued to the insured, and this policy, so indorsed, was kept by the insured until his death.

[1] Was the attempted change of beneficiaries effective to bind the company in an action upon the first policy? By the terms of the policy a change of beneficiaries was subject to any existing assignment of the policy, but the policy also required that a copy of the assignment should be filed at the company's home office in order to bind the company. Appellee's brief denies that the transaction between plaintiff and her husband constituted an assignment of the policy, and claims that they amounted to a surrender to plaintiff of the right of the insured to revoke the designation of plaintiff as the beneficiary. As the understanding between them was that the policy should continue in her favor so long as she paid the premiums, the reservation of some right to change the beneficiary was not in violation of it. Whether this reserved right was or was not capable

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of assignment, the facts in this case do not show any assignment of the policy. The delivery of the policy to the plaintiff was not accompanied by any expression of intention to transfer to her any reserved interest of the insured, and was significant only of a grant of custodianship of the policy.

[2, 3] The remaining question is whether a change of beneficiaries could be made without the surrender of the original policy to the company. It is the contention of plaintiff that this requirement was for her benefit and that the company therefore could not waive it. Since this case was submitted the controlling principles to be applied in a situation of this kind have been declared by the Supreme Court of the United States in the case of Supreme Council of the Royal Arcanum v. Behrend, 247 U. S. 394, 38 Sup. Ct. 522, 62 L. Ed. 1182. It is there determined that the naming of a certain person as a beneficiary in the benefit certificate of a fraternal benefit association confers no vested right, but a mere expectancy which may be defeated at any time by the act of the insured member; that where the certificate promises payments to the beneficiary provided the certificate has not been surrendered and another certificate issued at the request of insured in accordance with the laws of the order, the requirement for a return of the policy is for the protection of the society, and if complied with to its satisfaction, or waived by it during the lifetime of the insured, it cannot be used to support the claim of the former beneficiary.

But the right to change a beneficiary, if reserved in the policy, is equally available to the insured under an ordinary policy of life insurance as it is in case of a certificate issued by a fraternal benefit association. Mutual Benefit Life Ins. Co. v. Swett, 222 Fed. 200, 137 C. C. A. 640, Ann. Cas. 1917B, 298; Hopkins v. Northwestern Life Assur. Co., 99 Fed. 199, 40 C. C. A. 1; Townsend v. Fidelity & Casualty Co., 163 Iowa, 713, 144 N. W. 574, L. R. A. 1915A, 109; May on Ins. § 398m; Joyce on Ins. §§ 740, 741.

The provision for a return to the company of the original policy, so that an indorsement of change of beneficiary may be made thereon, is one for the protection of the company, and not for the protection of the original beneficiary, and whether the policy is an ordinary life policy, or the certificate of a fraternal beneficiary association, if a new policy has been issued in the lifetime of the insured, at his request the original beneficiary will not be heard to complain that the original policy was not returned. Mutual Benefit Life Insurance Co. v. Swett, supra; Lamb v. Mutual Reserve Fund Life Ass'n (C. C.) 106 Fed. 637; Mutual Life Ins. Co. v. Lowther, 22 Colo. App. 622, 126 Pac. 882; John Hancock Mut. Life Ins. Co. v. Bedford, 36 R. I. 116, 89 Atl. 154; Navassa Guano Co. v. Cockfield (D. C.) 244 Fed. 222; Simcoke v. Grand Lodge A. O. U. W., 84 Iowa, 383, 51 N. W. 8, 15 L. R. A. 114; Wandell v. Mystic Toilers, 130 Iowa, 639, 105 N. W. 448; Allgemeiner Arbeiter Bund v. Adamson, 132 Mich. 86, 92 N. W. 786; Marsh v. Supreme Council American Legion of Honor, 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382.

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A number of cases have been cited by appellee in which it was held that the original beneficiary was entitled to recover when a change of beneficiaries had been attempted, but in these cases the company or society had not accepted the application for a change of beneficiary and acted upon it by the proper entry or indorsement of the change during the lifetime of the insured, and hence the question of waiver was not involved. In this case the company indorsed the change of beneficiaries on the policy, without knowledge of any claim by the plaintiff of an understanding with her husband that she was to remain the beneficiary while she kept the premiums paid. As stated in the case of Supreme Council of Royal Arcanum v. Behrend, supra, the remedy to enforce any contract of that kind is not to be applied in a suit on the policy between the original beneficiary and the company.

[4] Some objection is made in the brief of appellee that the defense urged by appellant should have been made in the action at law. No objection to the trial of the issues as a suit in equity was made in the court below, and the case is not so wholly without color of equitable jurisdiction that this court should now dismiss the suit on that ground. Fay v. Hill, 249 Fed. 415, — C. C. A. —; Audit Co. of New York v. City of Louisville, 185 Fed. 349, 107 C. C. A. 467; Babcock & Wilcox v. American Surety Co., 236 Fed. 340, 149 C. C. A. 472.

It follows, from what has been said, that the decree of the trial court should have canceled the policy in question as an obligation of the company, and should not have rendered judgment thereon in favor of defendant in error.

The judgment in No. 5100, the proceeding in error, will be reversed, with costs, and the decree in No. 5102, the proceeding on appeal, will be reversed, with direction to enter a decree in conformity with the views expressed herein.

CLINCHFIELD FUEL CO. v. HENDERSON IRON WORKS CO.
SAME v. HENDERSON.

(Circuit Court of Appeals, Fifth Circuit. November 21, 1918.)

No. 3264.

1. JOINT ADVENTURES ⟹1—CONTRACTS—CONSTRUCTION.
A corporate shipowner and a company operating a tug owned by the corporation *held* joint adventurers, responsible for one-half of the expenses and losses; it appearing that the corporation which contracted with one interested in the operating company recognized the company's rights.

2. CORPORATIONS ⟹432(12)—CONTRACTS—EVIDENCE OF AUTHORITY.
Evidence of a contract relating to a tug owned by a corporation entered into by the president and general manager *held* to show it was made for the corporation, binding on the corporation.

3. CORPORATIONS ⟹447—CONTRACTS—VALIDITY.
Where a corporation, which under its charter might build vessels, acquired a tug in the discharge of a debt, a contract relating to the operation of the tug was not ultra vires.

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4. CORPORATIONS ⟸379—CONTRACTS—PARTNERSHIP AGREEMENT.
Where the stockholders and officers of a corporation acquiesced in a contract between it and another for the joint operation of a vessel, *held*, that the corporation could not escape resulting liability on the ground that the contract was one of partnership and a corporation cannot be a member of a firm.

5. CORPORATIONS ⟸423—TORTS—NEGLIGENCE—AUTHORITY OF OFFICERS.
Where the officer in charge of a corporation's business entered into a contract for the operation of a tug which it owned, *held*, that the corporation could not escape responsibility for the results of a collision due to negligent operation, on the ground that no person was authorized to so conduct the business of the corporation as to impose upon it liability for negligence.

6. CORPORATIONS ⟸306—LIABILITY OF OFFICERS—ILLEGAL ACTS.
Where the president and general manager of a corporation entered into a contract with respect to the operation of a tug which the corporation owned, and the contract was beyond his authority, he would be personally responsible.

7. COLLISION ⟸153—REVIEW—DETERMINATION.
Where the trial court found against a libelant, seeking to recover on account of collision on the ground that the respondent was not a person responsible, but did not determine the question of negligence, the appellate court, on reversing the decree, will not, regardless of its authority to consider the record, determine the question of negligence, but will remand the case to enable the trial court to determine such question.

Appeal from the District Court of the United States for the Southern District of Alabama; Robert T. Ervin, Judge.

Libel by the Clinchfield Fuel Company against the Henderson Iron Works Company, together with a like libel against Frank Henderson. The two cases were tried together, and, judgment being against libelant in each case, it appeals. Decree reversed as to the Henderson Iron Works Company, and affirmed as to the individual respondent.

Harry T. Smith and Wm. G. Caffey, both of Mobile, Ala., for appellant.

T. M. Stevens, of Mobile, Ala., for appellees.

Before WALKER and BATTS, Circuit Judges, and EVANS, District Judge.

BATTS, Circuit Judge. The Clinchfield Fuel Company filed a libel against Henderson Iron Works Company for injuries alleged to have been caused by the negligence of the master and crew of the tug Helen Henderson, owned by respondent. Upon denial of liability by respondent, a like libel was filed against Frank Henderson. The two cases were tried together, judgment being against libelant in each case.

At the time of the accident the Helen Henderson was being operated by the Steele Towing & Wrecking Company in the harbor at Galveston, Tex. The tug was towing a barge of the Clinchfield Fuel Company, and, according to the allegations of the bills, "the master and crew of the tug so negligently went about the performance of their duties" as to collide with a pier, and subsequently to ram a steamer; the collisions resulting in injuries to the barge.

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The judgment of the court was upon the ground that, at the time of the accident, the vessel was under the complete control and management of the Steele Towing & Wrecking Company; and it is now insisted that the respondent corporation had relations alone with T. J. Anderson, and none with the Steele Towing & Wrecking Company.

[1] The contract, signed by T. J. Anderson and Frank Henderson, of importance in determining the relationship between the Steele Towing & Wrecking Company and the Henderson Iron Works Company, was to the following effect:

"This contract, entered into and between T. J. Anderson, partner in the firm of Steele & Anderson, of Galveston, Texas, and Frank Henderson, of the firm of the Henderson Iron Works Company, of Mobile, Alabama, this first day of June, 1915, to wit:

"In consideration of the said Frank Henderson furnishing his tug Helen Henderson, her tackle, apparel, and machinery, for operation along the coast of the Gulf of Mexico, and particularly in the harbor of the port of Galveston, Texas, he agrees to divide the net profits and to assume all cost and liabilities of operation of the said tug to the extent of fifty per cent. (50%), both profit and expense.

"The said T. J. Anderson, as one of the principals of the firm of Steele & Anderson, agrees to keep the said tug Helen Henderson in operation, endeavoring to secure all the profitable employment that he possibly can, both in the harbor and on the outside, maintaining thereon a single or double crew as the necessity might demand, and agrees on behalf of the firm of Steele & Anderson to be responsible for fifty per cent. (50%) of the costs and expenditures of operation in lieu of receiving fifty per cent. (50%) of the net profits of the tug.

"It is further mutually agreed by the parties signing this contract and constituting the principals of this contract that the tug will be operated under the name of the Steele Towing & Wrecking Company, although the direct management shall be in the hands, and all transactions passed through the hands, of the said T. J. Anderson on behalf of the firm of Steele & Anderson.

"All fuel, provisions, wages and any disbursements whatsoever are to be paid for by the said firm of Steele & Anderson, and in the event of loss or profits the division to be made in accordance with that portion of agreement relating as above.

"Witness my hand this first day of June, 1915, at the city of Galveston, Texas, U. S. A.

"This contract can be broken by either party (60) days after written notice.

"T. J. Anderson. [Seal.]

"Signed in the presence of:

"Henry J. Schutte.

"Witness my hand this first day of June, 1915, at the city of Mobile, Alabama, U. S. A.

Frank Henderson.

"Signed in the presence of:

"Adolph Danne."

The contract is one difficult to construe. The intention of the parties is set forth in terms uncertain and ambiguous. It is provided that the tug would be "operated under the name of the Steele Towing & Wrecking Company, although the direct management shall be in the hands, and all transactions passed through the hands, of the said T. J. Anderson." From this provision, from the correspondence, and from the testimony of Anderson, it sufficiently appears that the Henderson Iron Works Company, having peculiar confidence in Anderson, expected him to look after the interests of the Henderson Company, but that the actual operation was to be by the Steele Towing &

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Wrecking Company. The possibility of a sale to this company was in contemplation, and insurance was effected, payable to the Steele Towing & Wrecking Company, "as its interest may appear." One of the letters from Anderson contained a sentence to this effect:

"The contract I contemplate writing up in connection with your good self and this office will be in such manner as will give the Steele Towing & Wrecking Company no hold on you whatever, thereby fully protecting you by dealing exclusively through my office."

In another letter Henderson Iron Works Company suggest:

"I would prefer doing business through your office, whom I am well acquainted with, although I believe the Steele Towing & Wrecking Company are first-class, honorable people; but, as you are better acquainted with both sides, this is my reason for expecting you to protect us."

Anderson testified that when the tug went to Galveston he turned her over to the Steele Towing & Wrecking Company to operate; that he and Henderson "conferred and co-operated in suggestions for the betterment of the operations after the Steele Towing & Wrecking Company took charge of her"; that "the vessel was not chartered at so much a month," but "on the mutual understanding that all profits were to be divided as between owners and Steele Towing & Wrecking Company."

Whatever may have been the original understanding and the meaning of the contract, it is quite certain that Mr. Henderson and the Henderson Iron Works Company knew of the actual operation of the tug by the Steele Towing & Wrecking Company, and looked to that company for its part of the profits. Among the letters introduced in evidence was one in which the Henderson Iron Works Company says:

"We have been trying hard to get a settlement with the Steele Towing & Wrecking Company for the tug Helen Henderson's earnings from the last statement up to the time she sunk."

The conclusion reached is that the Henderson Iron Works Company and the Steele Towing & Wrecking Company were, at the time of the accident, engaged in a joint venture, each party undertaking to become responsible for one-half the expenses and losses, and to equally share in the profits.

[2] It is contended that there was no corporate action of any kind with reference to the operation of the vessel or the assumed contract with Steele Towing & Wrecking Company. The incorporators of the Henderson Iron Works Company were Frank Henderson, who subscribed for 25 shares, William Henderson, his brother, who subscribed for 1 share, and Maud Henderson, the wife of William Henderson, who subscribed for 24 shares. The incorporators were the directors, Frank Henderson was president and general manager, and William Henderson secretary. The complete control of the corporation's business was in Frank Henderson. His brother was a practicing physician, and the only thing to indicate that he ever had anything to do with the corporation was a statement by Frank Henderson that "on matters of importance we always consult one another." In the active management of the business he did not participate. The pres-

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ident and general manager thought that the company had by-laws, but did not know where they were.

There is nothing to indicate that formal action had ever been taken by the board of directors in any matter pertaining to the conduct of the business of the corporation. In making the arrangement with reference to the operation of the tug, the corporation acted in the same way that it ordinarily did, through Frank Henderson alone. From the circumstance that the tug belonged to the Henderson Iron Works Company, that in the contract Henderson was spoken of as "of the Henderson Iron Works Company," that the letters with reference to this transaction were signed "Henderson Iron Works Company, by Frank Henderson, President," that there was no claim of ownership of the tug by Frank Henderson, and nothing to indicate that any arrangement had been made between him and the corporation by which the tug could be used for his sole benefit, it must be assumed that the contract was made for the corporation, and it must be held that it was so done as to bind the corporation.

[3] Further contention is made that, if there was a contract between the Steele Towing & Wrecking Company and the Henderson Iron Works Company, whereby a partnership between the two corporations for the operation of the tug resulted, the contract was ultra vires.

The Henderson Iron Works Company was a corporation, the objects of which were set forth in the charter as follows:

"To conduct a general foundry, machine shop, boiler, and blacksmith business, or any one or more thereof; to buy, manufacture, and sell all kinds of material, marine and railway machinery and supplies; to buy, manufacture, and sell all kinds of iron and other metal goods; to build or repair engines, vessels, boilers, sawmill and other machinery, and generally to do any and all acts incident to the operation of a general foundry, machine, boiler, and blacksmith shops."

The powers of the corporation were very broad, and the ownership of a vessel was a possibility contemplated. The tug was acquired in the discharge of a debt due the company. It could not be said that the company was without authority to acquire a vessel under such circumstances, when it had power to build and repair vessels. The ownership of a vessel carries along with it the right to use it in a way that will make it a source of revenue, instead of loss. The vessel had brought expense and loss, and the arrangement made was the result of an effort to make it profitable.

[4] The proposition is made that a corporation cannot become a member of a partnership. Doubtless there are many expressions in the books to this effect. Whether a corporation may become a technical partner or not, there is no doubt of its capacity to enter into commercial ventures within the general scope of its corporate powers, whereby the profits or losses of the enterprise are to be divided between the corporation and another person or corporation. Having the right to own and operate the vessel, it had the further right to make a reasonable and not extraordinary arrangement by which this operation could be effected. The rules of law with reference to corporate power will, in a measure, be dependent upon the persons by

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whom they are invoked, and the circumstances under which an effort is made to apply limitations of authority. In the instant case, a close corporation, under the complete management of one of the incorporators, enters into an enterprise with another concern, with the expectation of making profit, under a contract whereby expenses and profits are to be divided. It may be that some member of the corporation could have invoked a lack of authority of the corporation or of the president, to prevent such a contract, or to prevent the carrying of it out after it was made. But a court would hesitate to allow a corporation (all of its officers and stockholders acquiescing) to take the possible profits of an enterprise, under a contract beyond its powers, and then, liability resulting, permit it to secure immunity by an appeal to lack of authority.

[5] The proposition is made that no person was authorized to so conduct the business of the corporation as to impose upon it liability for negligence or other tort. Of course, no corporation can lawfully authorize the doing of an unlawful act, or of a tortious or negligent act. Neither can an individual acquire a right to commit a tort; but the absence of the right to do that which is wrong will not absolve him from the consequences of the wrong. A corporation may authorize the doing of that which is within its corporate authority; and if, in the doing of this, the agents or agencies which it selects are, within the scope of their authority, guilty of negligence or other tort, the same rules (with exceptions not necessary to state) are applicable as would be applied to an individual.

[6] If Frank Henderson acted for the corporation without authority, under circumstances under which the corporation would not be bound, he would himself be responsible. The conclusion reached, however, is that that which he did was for the corporation, under circumstances making the corporation responsible for the results. Judgment for him was therefore proper.

[7] The trial judge has not determined whether, under the facts developed, injuries resulted to the barge of the libelant under circumstances fixing negligence upon the master and crew of the tug. While this court would have the right to consider the record, and determine this question, it is believed that more satisfactory results can be attained by referring the matter to the trial court.

The case against Frank Henderson is affirmed, and that against the Henderson Iron Works Company is reversed, for further action consistent with this opinion.

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NORTH AMERICAN TELEGRAPH CO. v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. November 11, 1918.)

No. 5013.

1. EMINENT DOMAIN ⟸202(2, 3)—DAMAGES—EVIDENCE.
In a proceeding to condemn a right of way for a telegraph pole line on a railroad right of way, *held*, that evidence of the rental paid for similar easements was admissible on the question of damages, and, while it is not to be used as a mathematical formula, witnesses were properly allowed to state what such rental would amount to, if capitalized at 4½ to 5½ per cent.

2. EMINENT DOMAIN ⟸202(2, 3)—DAMAGES—EVIDENCE—"MARKET VALUE."
The expression "market value" indicates the price established in a market where the article is dealt in by such a number of persons as to standardize the price; but as applied to real property the term indicates fair or reasonable value, which the property would have if dealt with as at a market overt. So in a proceeding to condemn a right of way for a telegraph line over a railroad right of way, the price for which rights of way over other railroads were acquired is not admitted to fix the market value except in the latter sense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Market Value.]

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Condemnation proceeding by the North American Telegraph Company against the Northern Pacific Railway Company. There was judgment on the verdict, assessing damages in the sum of $16,850, and plaintiff brings error. Affirmed.

E. T. Young and O'Brien, Young, Stone & Horn, all of St. Paul, Minn., for plaintiff in error.

D. F. Lyons, of St. Paul, Minn. (C. W. Bunn, of St. Paul, Minn., on the brief), for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. This is a proceeding brought by the North American Telegraph Company as plaintiff to condemn a right of way for a telegraph pole line on the railroad right of way of the defendant, the Northern Pacific Railway Company, from White Bear to Duluth, Minn., a distance of 138 miles, and from White Bear to Stillwater, a distance of 12 miles, under section 6246 of the General Statutes of Minnesota for 1913. The case was before this court and was carefully examined in an opinion reported in 230 Fed. 347, 144 C. C. A. 489, L. R. A. 1916E, 572. The decision of the trial court was there reversed, because it failed to receive evidence which we deemed necessary to show the true value of the property, and because the rule of damages adopted was erroneous. On the second trial the rejected evidence was received, and the rule of damages formulated

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by this court was stated, with explanations which gave plaintiff no cause for exception. The jury returned a verdict for $16,850, upon which judgment was entered, and plaintiff brings error.

[1] The only exceptions urged in argument of sufficient merit to require mention are these: Mr. Baker, superintendent of the Postal Telegraph Company, testified that he had acquired at the price of $10 per mile, rights over several Southern and Southwestern railroads identical with those sought by plaintiff. Counsel insists that this practice established a "market value" for the right, to which the jury should have been restricted, and excepted to the use of any other standard. The trial court also received, over plaintiff's objection, evidence of witnesses produced by defendant of the annual rental paid for such easements for limited terms of years, and then permitted the witnesses to state what that rental would amount to if capitalized at 4½ to 5½ per cent. Counsel insists that such a valuation would be proper only in case the fee to the property was taken; and, as the statute provides that plaintiff's right is subject to termination whenever the property shall be needed by the railway company for its own purposes, it is urged that the reception of this evidence was highly prejudicial. We might content ourselves by simply referring to our opinion when the case was here before. We then stated that rental value was a proper element for consideration in assessing damages. For the reasons there given, we still adhere to that opinion. As we then explained, such a valuation is not to be used as a mathematical formula. It should be qualified by the limited nature of the right, and that was clearly done by the trial judge. It then constituted one of the most valuable elements for the consideration of the jury.

[2] The term "market value," as the words fairly import, indicates price established in a market where the article is dealt in by such a multitude of persons, and such a large number of transactions, as to standardize the price. Proof of such a market value can only be made by one of the recognized methods of proving the price current in a market. Individual dealings are not competent to prove it. The term is, however, frequently used in a figurative sense, as meaning the fair or reasonable value of the property—that is, such a value as the property would have if it were dealt in according to the practices of a market overt. This is the meaning which the term usually has when applied to real property. To prove market value when it is used in this secondary or figurative sense, it is proper to receive evidence of individual transactions, even offers made in good faith for property of like character, the nature of the property, its location, its rental value, the uses to which it can be put, and all the manifold elements which are admissible to show the fair and reasonable value of property which is not so traded in as to give it a market value in the primary sense of the term. Private dealings in property can never be used to show market value in the primary sense, and, when used to show market value in the sense of fair and reasonable value, individual transactions can never be made the sole basis for ascertaining such value. No text-writer or court has been discovered which supports any such doctrine. The distinction between the two meanings attached

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to the term "market value" is now found in the elementary works. Chamberlayne on Evidence, §§ 2099h, 2099i.

When the matter under investigation is so exceptional as the right involved in the present case, to try to fit it into the formula of "market value" leads only to confusion. In such a case all that can be done is to aid the jury by the opinions of men who are shown to have opinions which will prove, in the judgment of the trial court, a help to the jury, and to present the various features of the property to which we have already referred. The elements which witnesses may properly bring forward in such a case are those which experienced and intelligent business men would present, if they were negotiating with respect to the property in question. Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; United States v. Chandler-Dunbar Co., 229 U. S. 53, 77, 33 Sup. Ct. 667, 57 L. Ed. 1063. When the minds of jurymen have been enlightened by such evidence and opinions, their composite judgment constitutes the "fair compensation" referred to in our Constitutions. Judges cannot properly make a schedule of the elements which may be brought before a jury by experienced men to aid them in making their assessments. The rule and the elements for its application must be adapted to the subject-matter that is under investigation. That is what was done by this court in its opinion when the case was here before. The Circuit Court of Appeals of the Sixth Circuit, after a careful examination of the same subject, has recently approved the same method. Louisville & Nashville R. R. Co. v. Western Union Telegraph Co., 249 Fed. 385, —— C. C. A. ——.

The judgment is affirmed.

In re JOSEPH R. MARQUETTE, JR., Inc.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 58.

1. BANKRUPTCY ⟸136(1)—SUMMARY PROCEEDINGS.
A bankrupt may be summarily ordered to surrender to his trustee any assets of the estate found in his possession, and for failure to obey such order may be committed as for contempt.

2. BANKRUPTCY ⟸288(1)—SUMMARY PROCEEDINGS.
Where the trustee has possession of and legal title to any property, the bankruptcy court in summary proceedings may adjust demands for the property; but, where the trustee has not title and possession, an adverse claim to property demanded by him cannot be summarily determined.

3. BANKRUPTCY ⟸288(1)—SUMMARY PROCEEDINGS.
Where the bankrupt is a corporation, summary proceedings may lie to recover corporate property in the possession of an officer thereof who makes no personal claim to it; but as against another than the bankrupt, who sets up title in himself, his claim, if more than colorable, cannot be disposed of, except by plenary suit.

4. BANKRUPTCY ⟸288(1)—SUMMARY PROCEEDINGS.
Where imported merchandise was deposited by the owner in a bonded warehouse, and after organizing a corporation such owner pledged the warehouse receipt as collateral security for a corporate debt, *held* that,

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as title remained in him, his claim to the property, which he asserted on bankruptcy of the corporation, could not be disposed of in summary proceedings.

Petition to Revise Order of the District Court of the United States for the Eastern District of New York.

In the matter of Joseph R. Marquette, Jr., Incorporated, bankrupt. Petition by Joseph R. Marquette, Jr., individually, to revise an order rendered on petition of the trustee in summary proceedings restraining Marquette from interfering with the sale of certain merchandise, etc. Order reversed, and matter remanded, with directions to dismiss the trustee's petition.

The bankrupt corporation succeeded to the business of and was formed by Joseph R. Marquette, Jr., who became its president. Before incorporation Marquette individually became the owner of a considerable quantity of imported merchandise, which (duty not being paid) was deposited in a bonded warehouse, the proprietor of which issued the usual receipt for said merchandise to said Marquette individually.

Thereafter, the bankrupt corporation having been created, Marquette, on behalf of the corporation, borrowed money from a bank, and as collateral security transferred to the bank the warehouse receipt aforesaid. The merchandise could not be removed from warehouse without the consent of the collector of customs showing that it was duty paid before withdrawal. Bankruptcy having supervened, Marquette refused to sign applications for withdrawal unless the bank would stipulate to pay to him individually, and not to the trustee of the bankrupt corporation, whatever surplus might remain on the sale of the merchandise to liquidate the bankrupt's indebtedness to the bank. Apparently failing to obtain such stipulation, he transferred his right, title, and interest in and to said merchandise to a third party.

The trustee, becoming aware of this situation, brought by petition a summary proceeding against Marquette individually, seeking an order directing him to "instruct the collector of customs that he relinquishes and withdraws any claims which he" might have against said merchandise. After considering affidavits on both sides, the District Court ordered (1) that Marquette be restrained and enjoined from in any manner interfering with the sale by the bank of said merchandise; (2) that the bank and the trustee jointly offer the merchandise for sale, and any surplus over indebtedness be paid to the trustee; and (3) that Marquette be required to execute an instrument in writing signifying that he had no objection to the sale of said merchandise by the bank and the trustee jointly as aforesaid.

Marquette, in his answer to the trustee's petition, averred that the merchandise in question was not, and never had been, property of the bankrupt corporation, and objected to the jurisdiction of the court in the premises. After the passage of the order hereinabove summarized, he brought this petition to revise.

Patrick J. McDonald, of New York City, for petitioner.

Niebrugge & Maxfield, of New York City (Samuel C. Duberstein, of New York City, of counsel), for trustee in bankruptcy.

Rounds, Hatch, Dillingham & Debevoise, of New York City (Stephen Barker, of New York City, of counsel), for Battery Park Nat. Bank.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The petitioner, Marquette, never submitted himself to the jurisdiction of the court below, but insisted, and still insists, upon his right as an ad-

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verse claimant to a plenary suit. The rules regarding this matter laid down by this court for this circuit may for the purposes of this litigation be restated as follows:

[1] A bankrupt may be summarily ordered to surrender to his trustee any assets of the estate found in his possession, and for failure to obey such order may be committed as for a contempt. In re Schlesinger, 102 Fed. 117, 42 C. C. A. 207.

[2, 3] Where the trustee has possession of, and legal title to, any given piece of property, the bankruptcy court in summary proceedings may adjust demands for said property, or any portion thereof, including the determination of such a question as the validity of a mortgage upon the property so in possession. In re Kellogg, 121 Fed. 333, 57 C. C. A. 547. But, where the trustee has not title and possession, an adverse claim to property demanded by him cannot be summarily determined. In re Baudouine, 101 Fed. 574, 41 C. C. A. 318. Where the bankrupt is a corporation, summary proceedings may lie to recover property of the corporation in the possession of an officer thereof, who makes no personal claim to said property. In re Brockton Ideal Shoe Co., 202 Fed. 199, 120 C. C. A. 447. But as against another than the bankrupt, who sets up title in himself, his claim, if more than colorable, cannot be disposed of otherwise than by plenary suit; summary proceedings will not lie. "Colorable" was defined in Re Yorkville Coal Co., 211 Fed. 619, 128 C. C. A. 570, and extended to cover a question of law, as distinct from one of fact, in Re Midtown Contracting Co., 243 Fed. 56, 155 C. C. A. 586.

[4] Applying these rules to the present case: Undoubtedly the bank, by the transfer of the warehouse receipt, had symbolical possession of the merchandise in question; but on the face of the papers Marquette individually remained the owner at least of the equity in the property hypothecated to secure the debt of his corporation. The issue in this proceeding is whether Marquette did or did not turn this merchandise into the corporation he formed, as he admittedly did do with most of his other belongings. This is a question of fact, and suggestive of several debatable points of law, and is plainly not such a matter as, over timely objection to jurisdiction, could be summarily disposed of by a court sitting in bankruptcy, guided by the above-cited decisions.

The order under review is reversed, with costs of this court, and the matter remanded, with directions to dismiss the petition.

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WALKER GRAIN CO. v. BLAIR ELEVATOR CO.

(Circuit Court of Appeals, Fifth Circuit. December 14, 1918.)

No. 3229.

1. TRIAL ⊂⊃412—OBJECTIONS TO EVIDENCE—WAIVER.
Where defendant objected to a question to its witness as to whether he had been indicted for forgery, it was not a waiver of the objection and exception for defendant's counsel to state in the presence of the jury that he was not trying to keep anything back, and would like to have the witness explain the matter, as he stated he could.

2. WITNESSES ⊂⊃345(1)—CREDIBILITY—INDICTMENT.
Evidence of a pending indictment is not competent to affect the credibility of a witness.

3. EVIDENCE ⊂⊃158(28)—BEST AND SECONDARY—ORAL ASSIGNMENTS.
Oral proof of assignment of a cause of action is proper, where it was not shown to have been in writing; and the fact that a memorandum of the terms was contained in a journal entry on the assignee's books of account does not establish that the assignment was in the form of a written contract.

4. SALES ⊂⊃58—REFERENCE.
Where a contract for the sale of corn for future delivery referred to the trade rule, such rule thereby became a part of the contract.

5. EVIDENCE ⊂⊃450(5)—ORAL EVIDENCE—TRADE RULE.
Where a trade rule, which was part of a contract, was ambiguous, oral proof was properly permitted to elucidate it.

6. SALES ⊂⊃64—CONSTRUCTION—TRADE RULE.
Under a trade rule, which by reference was incorporated into and made a part of a contract for the sale of corn for future delivery, *held*, that it was immaterial to the buyer how long before the exercise of the election of the seller to ship the grain, or cancel the contract, notice of election was given, provided it reached the buyer 24 hours before election was exercised.

In Error to the District Court of the United States for the Northern District of Texas; William R. Smith, Judge.

Action by the Blair Elevator Company against the Walker Grain Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded for further proceedings.

Wm. H. Slay, Mike E. Smith, Uriah M. Simon, and Theodore Mack, all of Ft. Worth, Tex., for plaintiff in error.

Stanley Boykin, of Ft. Worth, Tex. (H. C. Ray, of Durant, Okl., on the brief), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. This was an action in the District Court, brought by the defendant in error against the plaintiff in error for alleged breaches of contracts of sale and purchase of corn for future delivery. The defendant in error claimed that the plaintiff in error breached the contracts by failing to accept and pay for the corn agreed to be purchased by it, and that it was entitled to recover, because of such breaches, the difference between the contract price and

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the market price on the dates of the respective breaches. Only one shipment of corn was actually made by defendant in error, and it was rejected by plaintiff in error. With reference to the other contracts, the breaches relied upon by defendant in error were charged to have consisted in the failure by plaintiff in error to furnish billing instructions within the time required by the contracts. The issues involved the construction of the contracts in respect to the requirement as to the furnishing of billing instructions, and whether, in fact, such instructions had been sent by the plaintiff in error to the defendant in error, as required by the contract, or at all.

[1, 2] The evidence of defendant in error tended to show that such instructions were not received by it, while that of the plaintiff in error tended to show that they were mailed by it. Upon this issue the evidence was in sharp conflict, and depended largely upon the weight accorded to the evidence of the plaintiff in error's witness, J. L. Walker. Upon the cross-examination of this witness, he was asked whether he had been indicted for perjury. The plaintiff in error interposed an objection, which the court overruled, plaintiff in error excepting. No answer to this question was given. He was then asked if he had been indicted for forgery, and answered that he had. No new objection was interposed to this question. However, the record as to what transpired convinces us that the court below understood the plaintiff in error's objection to have been continued to this line of proof, and that it ruled, with that understanding, upon it. The District Judge, after announcing that he would sustain an objection to it, upon the idea that it was permissible only in a criminal case, finally said that he would change his ruling, and permit it to be shown upon the issue of the credibility of the witness. After the announcement of his final ruling, plaintiff in error again asked the court to note its exception. We do not think that the plaintiff in error waived its objection and exception, because its counsel, thereafter, said in the presence of the jury:

"We are not seeking to keep anything back, for the damage has already been done, and it is all for the jury; but we would like for him to explain, as he stated he could a while ago."

The witness then gave his explanation of the transaction. The plaintiff in error was entitled to have the explanation of the witness go before the jury, without withdrawing or waiving its previous objection to the question. We do not see that its counsel did more than state that, as the evidence of the pending indictment had been allowed to go to the jury, it was desirous that the witness make an explanation to the jury of his version of the transaction. In the case of Coyne v. United States, 246 Fed. 120, 158 C. C. A. 346, we held that evidence of a pending indictment was not competent to affect the credibility of a witness.

[3] As this necessarily results in a reversal of the judgment, it is unnecessary to consider the other assignments of error in detail, as they may not arise upon a future trial of the cause. We are not thereby to be taken as approving all the other rulings of the court below on matters of evidence. For the guidance of the parties in

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the future conduct of the case, we may say that we think the court below properly admitted oral proof of the assignment of the cause of action to defendant in error, as it was not shown to have been in writing. The mere memorandum of its terms in a journal entry on the defendant in error's books of account would not show that the assignment itself was in the shape of a written contract.

[4-6] We are of the opinion that the court below properly construed the trade rule, which was referred to in the contracts and thereby became a part of them. The language of the rule is ambiguous, and oral proof was properly permitted to elucidate it. In the state of the evidence in the present record, we have no hesitation in construing the rule as if it read:

"The buyer shall be allowed 3 calendar days, after receipt of a demand from the seller for billing instructions, within which to furnish such instructions, and, failing to furnish such instructions within such time, the seller shall have the right to elect either to ship the grain to the post office address of the buyer, or to cancel the contract and charge the buyer with the difference between the contract price and the market price at the time of cancellation, provided the seller has given the buyer notice of his election for a period of 24 hours before the seller ships the grain or cancels the contract."

This construction is that established by the evidence as that customarily acted upon by the grain trade, which we would be reluctant to depart from for that reason. It also accords with the option given by the contract to the seller to ship during the shipping period. Under the construction contended for by the plaintiff in error (that a demand could only be made during the shipping period), the period of optional shipment given the seller would be diminished at least 3 days. A construction so inconsistent with the spirit of the agreement should only be adopted by the court where the language is compelling and unambiguous. The purpose of the 24-hour notice of election is evidently not to enlarge the 3-day period after demand for furnishing billing instructions but to enable the buyer to take steps to protect himself by getting knowledge for that period, at least, in advance of the exercise of the seller's election either to ship or to cancel and charge the buyer with the loss. For this purpose it is immaterial to the buyer how long before the exercise of the election the notice of the seller's election is given, provided it reaches him at least 24 hours before that election is exercised.

For the error pointed out, the judgment is reversed, and the cause remanded for further proceedings in conformity to this opinion.

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MOREY v. CITY OF NEW ROCHELLE et al.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 5.

1. WHARVES ⟸20(1)—WHARFINGER—DUTY OF CARE.
A wharfinger is bound to exercise ordinary care and diligence, and no more.

2. WHARVES ⟸20(3)—WHARFINGER—NEGLIGENCE.
The fact that a wharf is so built, or that the berths alongside it are so obstructed, that special care is necessary on the part of any vessel using the wharf, is not per se evidence of that lack of care and diligence on the part of the wharfinger which is negligence, and the existence of danger only increases the quantum of the wharfinger's duty.

3. WHARVES ⟸20(5)—WHARFINGER—NEGLIGENCE.
Where a municipal wharf was built on a ledge of rock in such a manner that there was an under-water projection on the face of the completed wharf, necessitating the use of planks or beams, with appropriate toggles, to keep vessels off the projection, a vessel is justified in assuming that the wharfinger has the best information as to the condition of the premises, and where the master refused to use appliances furnished by the wharfinger, but relied on his own, which proved insufficient, the wharfinger is not liable.

4. SHIPPING ⟸63—MASTER—NEGLIGENCE—ACT OF MASTER.
Where the master of a vessel declined to use appliances furnished by the wharfinger to keep his vessel off an under-water projection, and the vessel was injured, *held*, that negligent act of master was imputable to owner of vessel.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by Stephen W. Morey against the City of New Rochelle and another. From a decree for libelant for half damages only, the named respondent appeals. Reversed and remanded, with directions to dismiss libel.

Libelant owned a coal barge of a not unusual size, which was sent to New Rochelle and berthed at a public wharf owned by the city; the municipality collecting the wharfage. This wharf had been in existence for upwards of ten years, and stands upon a ledge of rock rising above the general bottom level. To get a holding or resting place on the ledge for the wharf foundation, it is somewhat set back from the ledge edge.

This construction produces an under-water projection along the face of the completed wharf, which projection at at least one place is something over four feet, and nowhere less than one foot. Vessels lying alongside the wharf will, unless breasted off at least as much as the ledge projects, catch upon it with the fall of the tide.

The city employed a wharf master, and furnished means in the shape of planks or beams, with appropriate toggles affixed, by which boats using the wharf could be, and for years had been, kept clear of the aforesaid under-water projection.

Libelant's boat came to this wharf in charge of an experienced boatman, who was told by the wharf master of the ledge projection and offered the city's appliances for keeping himself breasted off. He did not like them, thought they were "no good," and substituted therefor a contrivance of his own, which he thought superior. The weather was unfavorable; the boat master's apparatus failed him; his vessel came too close to the wharf, was

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caught on the projection, and severely strained. To recover for the damage thus caused this action was brought, and the District Court held that the city was "negligent in maintaining such a dangerous berth," but that the boat master "would have known the extent of the danger if he had kept his eyes open," and therefore awarded the libelant half damages only. Respondent thereupon appealed, and on this hearing the libelant urged demand for full damages.

Walter G. C. Otto, of New York City (Arthur H. Longfellow and John Hunter, both of New York City, of counsel), for appellant.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] Admittedly the city's responsibility is that of a wharfinger. One occupying this position is bound to "ordinary care and diligence," and no more. Toxaway, etc., Co. v. Sulzberger, 242 Fed. 888, 155 C. C. A. 476.

[2-4] The mere fact that a wharf is so built, or that the berths alongside it are so obstructed, that special care is necessary on the part of any vessel using the wharf, is not per se evidence of that lack of care and diligence which is negligence. The existence of danger only increases the quantum of the wharfinger's duty, and he must inform those in charge of vessels patronizing his wharf of just what they must expect to encounter. A vessel is justified in assuming that the wharfinger has better information than any one else in regard to the condition of his own premises. The Stroma, 50 Fed. 557, 1 C. C. A. 576. In this case proper information was given and means tested by time supplied for guarding against the known and recognized danger. Libelant's master, who was his agent, chose to pursue methods of his own, and no reason appears why the principal should not be bound by his agent's act. No legal difference exists between this case and that of Leo v. McCollum (D. C.) 107 Fed. 742, which in our opinion was well decided.

Finding, therefore, no negligence or lack of diligence on the part of the city as wharfinger, it is ordered that the decree appealed from be reversed, with costs of this court, and the cause remanded, with directions to dismiss the libel, with costs below.

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SMITH v. STANDARD SANITARY MFG. CO.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 81.

1. BROKERS ⟸64(1)—COMMISSIONS—WITHDRAWAL OF OFFER.
Where a corporation agreed to pay a broker a certain fee if he could effect a consolidation with defendant corporation, and defendant withdrew its offer of consolidation before it was acted upon by broker's employer, broker could not recover compensation from defendant; there being no contract between the two.

2. TRIAL ⟸109—DISMISSAL ON OPENING STATEMENT.
A complaint, sufficient in its allegations, may be dismissed, on admissions made by plaintiff's counsel in his opening clearly showing plaintiff had no cause of action.

In Error to the District Court of the United States for the Southern District of New York.

Action by James Milne Smith against the Standard Sanitary Manufacturing Company. There was a judgment dismissing the complaint, and plaintiff brings error. Affirmed.

Hollander & Bernheimer, of New York City (Herbert Cone, of New York City, of counsel), for plaintiff in error.

Henry A. Blumenthal, of New York City, for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. In this case a most unusual thing happened. The complaint was dismissed at the trial, before the taking of any testimony and because of admissions made by the plaintiff's counsel in his opening.

The plaintiff is by education an engineer, who since he left college has devoted himself exclusively here and in England to the organizing, promoting, and financing of large enterprises. He commenced this action to recover commissions which he claimed he had earned in bringing about an agreement of consolidation or merger whereby the defendant corporation, having a capital stock of $10,000,000, agreed to take over the J. L. Mott Company, having a capital stock, assets, and business which it was alleged amounted to more than $7,000,000. Both of these corporations are engaged in the manufacture and sale of plumbing and sanitary supplies. The defendant company is a corporation organized under the laws of the state of Pennsylvania, and the J. L. Mott Company is a corporation organized under the laws of the state of New Jersey.

The complaint alleged that between March 15, 1916, and December 18 of the same year, plaintiff was engaged in negotiations with defendant, having proposed to it the advantages of combining with the J. L. Mott Company; that with the knowledge and upon the request of defendant plaintiff continued his negotiations with defendant and with the J. L. Mott Company and its stockholders for the purpose of obtaining the most favorable terms for such combination;

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that through plaintiff's efforts and procurement defendant agreed to purchase the entire capital stock, assets, and business of the J. L. Mott Company, paying therefor the sum of $2,651,000 in cash or securities, and assuming the existing bonded indebtedness of the latter, amounting to $2,000,000; that upon information and belief this promise to make such purchase was communicated by defendant to the officers and stockholders of the J. L. Mott Company, the defendant agreeing that it might take such offer under advisement and act upon the same, and that the same would be left open for a period including January 3, 1917, during which time there might be procured the formal acceptance by its stockholders of the said offer; that thereupon the vice president of the company and the stockholders undertook to call a meeting of their stockholders to obtain a formal acceptance of the offer, and a meeting for that purpose was called for December 18th at 2 o'clock; that a few hours before the time set for the holding of the said meeting the defendant, by special delivery letter, withdrew its offer and refused to complete the purchase; that all the services and negotiations of plaintiff with defendant and with the J. L. Mott Company were with the knowledge and consent and at the special request of the defendant.

It was also alleged that plaintiff had been damaged in the sum of $232,550, which was the reasonable value of his services, and judgment in that amount was demanded.

The defendant put in an answer, in which it denied certain of the allegations of the complaint and declared that as to the other allegations it had no knowledge or information sufficient to form a belief.

The case came on for trial, and a jury was impaneled and sworn. In opening for the plaintiff his counsel made certain statements as to what he could prove and what he could not prove, which led the court, on the motion of the defendant, to dismiss the complaint. In his opening he explicitly stated to the jury that no arrangement was had between the plaintiff and the defendant, and that his contract, if any, was one whereby the J. L. Mott Company was to pay him $100,000 in cash in order to consummate the deal. His statement was as follows:

"Smith [the plaintiff] had made the deal with the Mott Company that he was to be paid. I think you will have the letter before you. In order to help the deal go through, he was willing to take $100,000 in spot cash, although he figured his commission at a great deal more. That was the amount that the Mott Company agreed should be paid. As for the Standard Company, he had made no arrangements with them."

[1] This was brought to the attention of the court by defendant's counsel, who asked to have the action dismissed. The plaintiff's counsel was then asked by Judge Mayer what he had to say, and a colloquy of some length followed, in the course of which Judge Mayer said:

"But, as I understand this case, a business man or a business corporation cannot be held in damages when they have not employed a broker or promoter and have made no agreement with him of any kind, manner, or description, because perchance the deal does not go through—if such a doctrine would hold, no business man would be safe. * * * To my way of thinking, the

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proposition as advanced has no support in law, in reason, in common sense, in business requirements or in the orderly conduct of business in a great community like New York, or in the United States. People are held in contracts, they are held for what they agree. Where a man does not agree to something and puts himself in a position where an agreement may be inferred, you can see what a hopeless mess such a doctrine as is contended for would bring about, and I am utterly against it."

After some further discussion of the matter, the motion dismissing the complaint was granted.

It appears that no consolidation ever took place between these two corporations. It appears, also, that the offer made by the defendant corporation was withdrawn before it was ever formally accepted by the J. L. Mott Company; so this is not a case where an agreement between these two corporations had ever been made and later breached. Neither is the case governed by that class of cases holding that a real estate broker, employed to sell property upon terms stated by the seller in advance, has complied with his agreement and earned his commission when he has produced a purchaser able and willing to purchase at the price and upon the terms named in his contract of employment, and where the contract for some reason fails of consummation. It more nearly resembles Hale v. Kumler, 85 Fed. 161, 29 C. C. A. 67. In that case the plaintiff sought to recover an agreed compensation under a contract for services rendered as a broker in attempting unsuccessfully to bring about a consolidation of two rival companies. On the facts in that case it was held that nothing short of an actual accomplished consolidation entitled the plaintiff to any compensation from the defendant.

The plaintiff in this court argued that it was no defense to say that no consolidation ever took place, because that would be permitting the defendant to profit by its own wrong in breaching the contract. Breaching what contract? There never was a contract between defendant and plaintiff, and there never was a contract between the defendant corporation and the J. L. Mott Company. Before the offer made to the J. L. Mott Company was accepted, the offer was withdrawn.

[2] So the question presented is whether a complaint which is sufficient in its allegations can be dismissed because of admissions made by the plaintiff's counsel in his opening, and which clearly showed that he had no cause of action against the defendant. The question is answered for us in the decision in Oscanyan v. Winchester Repeating Arms, 103 U. S. 261, 26 L. Ed. 539. In that case the court said:

"In the trial of a cause, the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof; and if in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion, or that of counsel, act upon it and close the case."

The judgment is affirmed.

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DISC GRADER & PLOW CO. v. AUSTIN-WESTERN ROAD MACHINERY CO.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1918.)

No. 5141.

1. PATENTS ⟸328—CONSTRUCTION—VALIDITY.
Patent No. 758,148, for a combination in a grading machine of a rotary disc plow and a dirt carrier, *held* invalid, not showing invention, but only mechanical skill.

2. PATENTS ⟸243—COMBINATION PATENTS—INFRINGEMENT.
Where the principle and mode of operation of a patented combination are appropriated, mere changes of the form or position of the mechanical elements thereof, or the substitution of plain mechanical equivalents for some of the elements of the combination, will not deprive the device of infringement in cases in which the forms and positions changed and the specific elements rather than the equivalents substituted for them were not claimed by the patentee to be, and were not, essential and distinguishing characteristics of the invention.

3. PATENTS ⟸26(2)—COMBINATION PATENTS—VALIDITY.
A new combination of old elements by which a new and useful result is produced, or an old result is obtained in a more facile, economical, and useful way, may be patented, as well as a new machine or composition of matter.

4. PATENTS ⟸328—VALIDITY—INFRINGEMENT.
Notwithstanding restrictions because of the prior art, patent No. 816,543, for improvements in rotary disc plowing attachments, *held* infringed.

Sanborn, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by the Disc Grader & Plow Company against the Austin-Western Road Machinery Company. From a decree of dismissal, complainant appeals. Reversed and remanded, with directions.

Amasa C. Paul, of Minneapolis, Minn., for appellant.

George L. Wilkinson and John L. Jackson, both of Chicago, Ill., for appellee.

Before SANBORN and CARLAND, Circuit Judges, and ELLIOTT, District Judge.

SANBORN, Circuit Judge. The plaintiff below, the Disc Grader & Plow Company, a corporation, the owner of letters patent No. 758,148, issued April 26, 1904, to Powlison, Erb, and Huston, for the combination in a grading machine of a rotary disc plow and a dirt carrier, and for certain combinations appurtenant thereto, and the owner of letters patent No. 816,543, issued March 27, 1906, to the same grantees, for certain improvements in rotary disc plowing attachments, sued the Austin-Western Road Machinery Company, another corporation, for infringement of these patents. The road company defended on the grounds that the patents were void for lack of invention in the devices patented, and that it had not infringed them. There was a final hearing below upon voluminous evidence, and the dismissal of the

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suit on the grounds that patent No. 758,148 was void for lack of invention and that the road company had not infringed the exclusive rights secured by patent No. 816,543.

[1] Each of these patents is, like the great majority of all patents, for a new combination of old mechanical elements. No. 758,148 is for the combination of a rotary disc plow with a dirt carrier or dirt elevator in a grading machine. Grading machines were old, dirt carriers, endless apron dirt carriers for elevating the dirt from the ground to a wagon or other receptacle, were old, the combination of a grading machine, a dirt carrier or elevator, and a moldboard plow, whereby the earth, as it was plowed up, was thrown upon the endless apron, and carried or elevated to a receptacle or other desired location, was old. But when Powlison made, perfected, and applied for patent No. 758,148, upon the combination there patented, no one had ever succeeded in conceiving and manufacturing a successful or useful combination of a grading machine, a dirt carrier or elevator and a rotary disc plow, although unsuccessful attempts had been made to do so, and the need of such a combination had long been felt. The first question is: Was the discovery of this combination an invention? The state of the art at the time Powlison conceived his combination has been patiently studied and considered, and the majority of the court is of the opinion that Powlison's combination was the product of the skill of the mechanic, and that his conception and manufacture of it failed to rise to the dignity of an invention, a conclusion to which the writer is unable to assent. The finding and decree of the court as to patent No. 758,148 must therefore stand undisturbed.

[2-4] This conclusion leaves nothing further for consideration, except the assignment of the grader company that the court below erred in holding that claims 1 and 3 of patent No. 816,543 were not infringed by the road company. That patent by its terms secured to the grader company the exclusive right to manufacture, use, and sell, in or for rotary disc plowing attachments, the combination described in this way:

"Claim 1. In a rotary plowing attachment, a concave rotary plowing disc, a plate secured thereto, an axle secured to the plate, a bearing support having a boxing for said axle, anti-friction devices between the axle and boxing, said bearing support having a socket cast integral therewith, said socket having its plane position at an oblique double angle to the axis of the rotary plowing disc, a standard, said socket adapted to receive the lower end of said standard, an arm connected approximately centrally to said standard, said standard carrying a moldboard scraper, and said standard adapted to be connected to a grading, or ditching, or wagon-loading machine."

"Claim 3. In a rotary disc-plowing attachment, a concave rotary plowing disc, a bearing plate connected centrally to the rear side of said rotary plowing disc, a central axle projecting rearwardly from said bearing plate, a roller bearing placed around said axle, a bearing support carrying a boxing for the roller bearing axle, said bearing plate and bearing support having circular concave ball races opposite each other, a series of bearing balls placed in said ball races, means for retaining the said bearing support in proper adjustment to the said central axle, a standard connected to the said bearing support, and an arm carrying a moldboard scraper."

One of the chief advantages of this combination is the co-operation with the other mechanical elements described therein of the anti-fric-

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tion rollers secured about the axle of the plowing disc to resist lateral thrusts against it, and the bearing balls secured in circular concave ball races opposite each other in the bearing plate and bearing support to resist the longitudinal or end thrusts upon the axle. The road company at an early day recognized the value and utility of this combination and for many years, commencing in 1907, purchased from the grader company and sold to its customers the rotary disc plowing attachments manufactured by the grader company under this patent. While the record demonstrates the fact that, prior to the invention in this patent, roller bearings and ball bearings were old, that they had been used separately frequently, and that in one patent, No. 132,100, issued to Perry & Hawley, a description is found of a combination of bearing rollers and bearing balls with a railroad car axle and car box, they had never been successfully combined or used together so far as the record in this case discloses in combination with the axles of rotary disc plows, or with the other mechanical elements described in the claims under consideration until Powlison disclosed his combination in an application for the patent in suit. After the road company had learned by its purchase and sale for some years of the grader company's patent rotary disc attachment, of the utility and superiority of Powlison's combination, it proceeded to manufacture and sell the attachment, which is now claimed to constitute an infringement of the exclusive right patented to Powlison. It made, as usual in such cases, some changes in the forms and positions of some of the mechanical elements of the grader company's combination, but none which changed their effect or utility in the patented attachment. It substituted for Powlison's axle of uniform diameter screwed into the supporting plate of the disc and his single set of bearing rollers an axle made integral with the plate having two cylindrical portions of different diameters and two sets of double coned rollers, one set surrounding each of the cylindrical portions of the axle, but the principle, mode of operation, and effect of the substitutes are the same in the combination as were the parts for which they were substituted, and the substitutes are plain mechanical equivalents thereof. It took the bearing balls out of their circular concave ball races near the top of the axle between Powlison's bearing plate and bearing support and placed them in a cage between the end of the axle and the surface of the chamber in which it is supported, where they performed the same function and wrought the same result in the same way in the combination as did Powlison's bearing rollers and bearing balls in the locations where he placed them. It made other immaterial changes in the method of securing the disc to the boxing and the axle bearing rollers and bearing balls in their places and in one or two other respects.

But after a careful comparison of the road company's combination with Powlison's, and after consideration of these various changes and of the combination and device of the road company in the light of the state of the prior art and of the record, no escape has been found from the conclusion that the road company's device was conceived and constructed with a just and high appreciation of the utility of the com-

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bination and co-operation with the other elements specified in claims 1 and 2 of Powlison's second patent with his axle protected against heavy lateral thrusts and friction by his roller bearings, and against friction and longitudinal thrusts by his ball bearings, with the determination to take to itself the benefit of that combination. By making immaterial changes of form and position of some of the elements of that combination, and the substitution of one mechanical equivalent for another, the road company has constructed a device which accomplishes the object it sought. But it has not escaped infringement of Powlison's second patent, because it has appropriated the principle and mode of operation of his combination. In its device the same or equivalent mechanical elements co-operate in the same way and on the same principle as do the elements of Powlison's combination, perform the same functions and accomplish the same desired and useful result. Where the principle and mode of operation of a patented combination are appropriated, mere changes of the form or position of the mechanical elements thereof, or the substitution of plain mechanical equivalents for some of the elements of a patented combination will not deprive the device of infringement in cases like this, in which the forms and positions changed, and the specific elements rather than the equivalents substituted for them were not claimed by the patentee to be and were not essential and distinguishing characteristics of the invention. Machine Co. v. Murphy, 97 U. S. 120, 125, 24 L. Ed. 935; Nat. Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 714, 45 C. C. A. 544; Zittlosen Mfg. Co. v. Boss, 219 Fed. 887, 892, 135 C. C. A. 551; Wm. F. Goessling Box Co. v. Gumb et al., 241 Fed. 674, 680, 154 C. C. A. 432.

This conclusion has not been reached without thoughtful consideration of the argument of counsel for the road company that the scope of the patent to Powlison was so limited by the state of the art when he made the invention and especially by the patents to Casady, No. 592,764; to Jernberg, No. 629,722; to Brummer, No. 644,138; to Lindy, No. 618,110; to Heylman, No. 625,764; to Lindgren, No. 647,720; to Poole, No. 657,204; to Weaver, No. 713,027 and to Hendon, No. 721,591—that the device of the road company escapes infringement. But an examination of these patents and of the other evidence of the state of the art has convinced that the exclusive right granted to Powlison was sufficiently broad to cover the combination which the road company devised and used to appropriate the benefit of that right. While some of the patents disclose some of the mechanical elements of Powlison's combination and others disclose others, none of them shows all of them or of their mechanical equivalents combined together, capable of co-operation and of accomplishing the desideratum on the principle and in the mode of Powlison's combination. This patent is for a combination, and a new combination of old elements by which a new and useful result is produced, or an old result is obtained in a more facile, economical and useful way may be patented as well as a new machine or composition of matter. Seymour v. Osborne, 11 Wall. 516, 542, 548, 20 L. Ed. 33; Gould v. Rees,

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15 Wall. 187, 189, 21 L. Ed. 39; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 703, 45 C. C. A. 544; Stead Lens Co. v. Kryptok Co., 214 Fed. 368, 376, 131 C. C. A. 144; N. Y. Scaffolding Co. v. Whitney, 224 Fed. 452, 456, 140 C. C. A. 138.

The conclusion is that the decree below must be reversed, and the cause must be remanded to the court below, with directions to enter a decree in favor of the grader company and against the road company for an infringement of the first and third claims of letters patent No. 816,453, and for the usual injunction and accounting; and it is so ordered.

TOSTEVIN-COTTIE MFG. CO. v. M. ETTINGER CO., Inc.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 94.

1. PATENTS ⟸282—INFRINGEMENT—WHAT CONSTITUTES.
   If a claim cannot be read on defendant's device, there can be no infringement; but, if it can be read, infringement is suggested, not proved, and the prior art, as well as the disclosure, must still be studied.
2. PATENTS ⟸328—INFRINGEMENT.
   The Cottie patent, No. 909,555, relating to a belt coupling, claims 1, 2, and 3, *held* not infringed by defendant's device, in view of the prior art and the limitations of the disclosure.

Appeal from the District Court of the United States for the Southern District of New York.

Bill by the Tostevin-Cottie Manufacturing Company against the M. Ettinger Company, Incorporated. From a decree dismissing the bill, complainant appeals. Affirmed.

Arthur L. Fullman, of New York City (Samuel E. Darby and Darby & Darby, all of New York City, of counsel), for appellant.

Frank J. Kent, of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. This invention (says the specification) "relates to a belt coupling; with the object in view of providing a simple, durable, and effective coupling for securing the ends of a belt together, leaving the face of the belt, toward the pulley or wheel over which it passes, free from any metallic projection or surface." The patentee also represents that his structure "has the further advantage of requiring no riveting in order to secure the sections of the belt."

The reduction to practice defined by the claims consists (claims 1 and 2) of interlocking male and female sections economically stamped from sheet metal in such wise that the T-shaped tongues of one half fit into the grooves formed by turning back upon themselves the tongues with "reduced extensions" of the other half. Both these claims also require that the end of each section distant from the interlocking device shall be provided with "holding" or "pointed" prongs to "hook

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into" the belt body and for "securing the coupling to a belt." Claim 3 omits all reference to means for securing the metal interlocking parts to the fabric of the belt.

Further examination of the specification and drawings to discover with exactitude "what the alleged invention is" (Hall-Borchert, etc., Co. v. Ellanam, etc., Co., 213 Fed. 341, 130 C. C. A. 193) plainly shows that Cottie's prongs were to be "forced into the body of the belt to such an extent as to leave no projecting metal on the inner face of the belt."

Defendant has no prongs at all, and fastens its interlocking sections to the belt ends by rivets, which do leave projecting metal on the inner face of the belt. Plaintiff asserts that the avoidance of inwardly projecting metal is not claimed, is not a part of Cottie's patentable novelty, and that a rivet is the fair equivalent of the fastening device disclosed, being a sort of separate prong—while claim 3 is certainly infringed, inasmuch as it makes no reference to any method of securing the metal sections to the belt ends.

[1, 2] If a claim cannot be read on a defendant's device, there can be no infringement; but, if it can be so read, infringement is suggested, not proved. The prior art, as well as the disclosure, must still be studied. In this instance Cottie's interlocking sections were per se old (Avery, No. 399,962), and so were his prongs, even when embedded in the belt fabric, in order to avoid metal exposure on the inner side (Millar, No. 817,501), while the mechanical distribution of strain by a tongued and grooved junction is utilized for driving belts in Cavin's No. 640,177.

In the light of this art, the only possible field of invention left for Cottie was the economical combination in the especial structure disclosed of all the advantages above described. Therefore claims 1 and 2 cannot be valid, unless confined to prongs as described and applied, while claim 3 is only supportable by reading into it a limitation to the disclosure. Whether this should, or indeed can, be done, is an academic point, on which we express no opinion, for plaintiff's so-called commercial embodiment of Cottie's invention frankly abandons all prongs and uses separate fasteners.

It is enough to say that we agree with the court below in finding no infringement, and affirm the decree, with costs.

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W. S. TYLER CO. v. LUDLOW-SAYLOR WIRE CO.

(Circuit Court of Appeals, Eighth Circuit. November 18, 1918.)

No. 5003.

1. PATENTS ⟸328—VALIDITY—INVENTION.
Patent No. 966,599, for woven wire screens used principally for screening ore, *held* invalid, being anticipated, and not showing invention.

2. PATENTS ⟸21—PATENTABLE INVENTION—SUBSTITUTION OF MATERIALS.
Substitution of a hard for a soft metal in one of the parts of a combination patent does not as a rule constitute patentable invention.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by the W. S. Tyler Company against the Ludlow-Saylor Wire Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The following is the opinion of the court below:

I have listened with a great deal of interest to all that was said, and have given attention to all the testimony that was offered. I do not think that a further discussion of this matter will enable the court to do more than it is now able to do from all the testimony in the case. I have specially examined the exhibits that were filed, and I am satisfied, from those exhibits and from the evidence in the case, that there is neither novelty nor invention in this patent, and the result is that the bill will be dismissed.

Frederick P. Fish, of Boston, Mass. (James Negley Cooke, of Pittsburgh, Pa., and W. K. Richardson, of Boston, Mass., on the brief), for appellant.

William E. Garvin, of St. Louis, Mo. (James P. Dawson, of St. Louis, Mo., on the brief), for appellee.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. [1] This suit is brought to restrain infringement of patent No. 966,599, applied for May 27, 1907, and issued August 9, 1910, for woven wire screens. The answer sets up numerous defenses. The only one to which we shall refer is want of patentable invention. The bill was dismissed, and plaintiff appeals.

The patented article is for a woven wire fabric principally used for screening ore. The screen is made of rolled, woven wire. Its meshes are oblong. The weft wires are larger, made of softer metal, and spaced farther apart, than the warp wires. By the rolling the warp wire is pressed into the weft wire, so that it is interlocked with it, and thus the wires are held in place and prevented from sliding upon each other. These screens are fitted into a frame which revolves rapidly. The pulverized metal by centrifugal force is thrown against the sides. Particles smaller than the meshes pass through; larger particles are returned to the rolls for further pulverizing. The

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desideratum was to produce a screen whose meshes would remain uniform during the life of the screen, would not clog, and would provide the largest amount of air space for the passage of the ore to be screened.

The principal competitor of the woven wire screen was the perforated slot screen made of plates containing perforations. It is conceded that plaintiff had manufactured, advertised, and sold a wire screen identical in form and size of wire, and serving the same purpose as the patented article, for at least two years prior to the invention. In that screen, however, both the weft and warp wires were of soft metal. The result was that the smaller wire wore out more quickly than the larger one. This impaired the durability of the screen to such an extent as to greatly restrict its sale. The patent calls for a screen in which the small warp wire is of harder metal than the weft wire. All that skillful argument can do to convince us that this change from a soft to a hard wire produced a new structure, having new functions, has been done; but it has failed to convince. It is urged that the substitution of the harder wire gave to the new screen resiliency, and imparted to it, what we must think for purposes of mystery, is spoken of as "the breathing of the screen." The screen, when in operation, is subjected to varying pressure, and it is claimed that, if it is made wholly of the soft metal, it is bent and remains permanently out of form, and thus becomes subject to greater wear; whereas the harder wire gives to the screen a springy or resilient power, so that after the pressure is withdrawn it returns promptly to its original shape. After the most careful study that we can give to the evidence, we are compelled to regard this as simply a "talking point." It is something that never occurred to the patentee. What he claims in his patent and likewise in his testimony, is that the substitution of the harder wire gave to his screen greater durability. That is the only added merit which is claimed, and we believe it is the only one which the screen possesses.

[2] This brings us to the real point in the case. Did the substitution of a hard warp wire in place of a soft one constitute patentable invention? We think it quite obvious that that question should receive a negative answer. The substitution of a different material in a structure has sometimes been held to be patentable. As a rule such substitution has produced difference in structure and in function. Smith v. Dental Vulcanite Co., 93 U. S. 496, 23 L. Ed. 952; Potts v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275; Edison, etc., Co. v. Electric Lighting Co., 52 Fed. 308, 3 C. C. A. 83. The general principle has been from the early case of Hotchkiss v. Greenwood, 11 How. 248, 13 L. Ed. 683, that to substitute a superior for an inferior material in one of the parts of a machine does not involve patentable invention. Here, however, the patentee does not do even that much. All he does is to substitute a harder metallic wire, where he had been using a soft one of the same metal. He did this for the simple and obvious purpose of making the two parts of his screens which for functional reasons were of different sizes, equal-

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ly durable. He found from experience in the three years that he had made and sold the screen prior to his alleged invention that the smaller wires, being made of iron of the same degree of hardness as the larger wires, wore out faster. So, for the purpose of producing a screen whose two wires, while varying in size, should possess equal durability, he made the smaller wire of harder metal. After this change plaintiff's screen worked precisely as it had worked before. In so far as his invention has merit, its important elements were all embraced in the structure which plaintiff began making and selling in 1902. Consciously or unconsciously, what eminent counsel are trying to do is to bring forward all those elements and embody them with the patented improvement. That cannot be done. The sale of the old structure caused all its elements to pass to the public beyond plaintiff's power to recall.

We do not consider that this case lies close to the line; on the contrary, it lies well back in that field of nonpatentability whose boundary was first marked in Hotchkiss v. Greenwood, 11 How. 248, 13 L. Ed. 683, and has since been illustrated and more clearly defined in Hicks v. Kelsey, 18 Wall. 670, 21 L. Ed. 852; Union Hardware Co. v. Selchow (C. C.) 112 Fed. 1006; George Frost Co. v. Cohn (C. C.) 112 Fed. 1009; Drake Castle Pressed Steel Co. v. Brownell. 123 Fed. 86, 59 C. C. A. 216; Columbia Metal Box Co. v. Halper, 220 Fed. 912, 136 C. C. A. 478.

The decree is affirmed.

A. SCHRADER'S SON, Inc., v. PROTEX MFG. CO.

(District Court, N. D. Illinois, E. D. November 7, 1918.)

No. 1064.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—AUTOMOBILE TIRE PRESSURE GAGE.

Preliminary injunction granted against infringement of the Twitchell patent, No. 927,298, for an automobile tire pressure gage.

In Equity. Suit by A. Schrader's Son, Incorporated, against the Protex Manufacturing Company. On motion for preliminary injunction. Granted.

McGill & Maguire, of Washington, D. C., and Otto R. Barnett, of Chicago, Ill., for plaintiff.

Frank H. Drury, of Chicago, Ill., for defendant.

SANBORN, District Judge. This is a motion for temporary injunction to prevent infringement of the Twitchell patent, No. 927,298. issued July 6, 1909, on a gage for testing the pressure in automobile tires. This is the gage in general use, well known to the public. The nipple of the inner tube valve is screwed off. The gage has a slip over coupling and anvil to co-operate with the inner valve stem and open the valve, so that the pressure operates to compress the gage spring

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and push out the cylinder beyond the top of the gage, on which the pressure may be read.

The motion for a temporary injunction should be granted. There is no question of the validity of the patent which has been several times adjudicated, and whose validity has been acquiesced in by the public almost universally. The sale of gages under the patent has been enormous, substantially as great as the sale of automobiles in this country. All the prior art set up by the defendant has been cited in the prior litigation on this patent. In that litigation 123 prior patents and 8 prior publications have been referred to. The Suiter English patent, upon which correspondence was had with the parties, was cited in prior litigation, and did not contain the slip-on feature, which is an essentially important element of the invention.

I have no hesitation in granting a temporary injunction.

THE OLGA.

(District Court, E. D. New York. December 12, 1918.)

1. ADMIRALTY ⟨@=66—LIBEL—AMENDMENT.
Where the libel of one-fourth interest in a steamer failed to show that libelant was the holder of the legal title, an amendment so showing should be allowed, where libelant asserted he intended to plead a legal title, and it appeared that in the event of dismissal libelant would have great difficulty in enforcing his rights.

2. ADMIRALTY ⟨@=8—JURISDICTION—RELIEF TO MINORITY OWNER.
In view of the protection which a court of admiralty will accord the rights of a minority owner in the event of a dispute as to the employment of the vessel, a court of admiralty has jurisdiction to protect the rights of such an owner, where the majority owners intend to sell the vessel, and may enjoin them from transferring title unless a bond be given that will insure the minority owner will receive his share of the proceeds.

In Admiralty. Libel by Emanuel Fostinis against the steamship Olga and others. On motion to vacate process against the steamer Olga. Motion denied.

John D. Stephanidis, of New York City (L. De Grove Potter and John M. Woolsey, both of New York City, of counsel), for libelant.

Bullowa & Bullowa, of New York City, for respondents.

GARVIN, District Judge. [1] This is a motion to vacate process against the steamship Olga. She has been libeled, and an application is now made in behalf of the owner to discharge her from the custody of the marshal. The libel sets forth that the libelant is the "true and lawful owner of one-fourth interest" in the Olga, and it is claimed in behalf of the agent for the boat, who appears specially, that such an allegation is an allegation of equitable ownership, in which event the court is without jurisdiction. The G. Reusens (D. C.) 23 Fed. 403.

On the argument of this motion the libelant claimed a legal title to one-fourth of the vessel, and asked that he be permitted to amend the libel, so as to set forth legal ownership, if there was any doubt

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⟨@=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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that such ownership had been alleged, stating that he had intended to plead a legal and not an equitable title. It seems to me that I should allow such an amendment in the interest of justice, rather than dismiss the action upon what would be at best a technicality, for in the event of a dismissal it is apparent that libelant would have the greatest difficulty in enforcing whatever rights he may have. The amendment is therefore allowed.

[2] But it is urged that, even if libelant has a legal title, the court has no jurisdiction because a sale of the vessel is involved, and The Eclipse, 135 U. S. 599, 10 Sup. Ct. 873, 34 L. Ed. 269, and The Ada, 250 Fed. 194, — C. C. A. —, are cited to sustain that contention. The former case was an action in which it was held that a court of admiralty has no jurisdiction to enforce a contract of sale and the latter holds that an action does not lie in admiralty to recover damages for breach of a contract of sale.

The case at bar seems to be analogous to the line of cases which hold that admiralty has jurisdiction (where there is a dispute between owners regarding the employment of a vessel) to require the majority owners to give a bond for the safe return of the vessel. Benedict's Admiralty, § 187. The admiralty court has frequently protected the interests of a minority owner. Tunno v. The Betsina, Fed. Cas. No. 14,236; The Emma B (D. C.) 140 Fed. 770.

I have been referred to no authority directly in point, but on principle it would seem that if an admiralty court has power to issue an injunction prohibiting majority owners from taking a vessel on a voyage contrary to the wish of a minority owner, unless they give a bond for its safe return, it has equal power to issue an injunction prohibiting owners from exercising other acts of ownership such as transferring title, unless a bond be given that, upon the transfer, the minority owner who objects to such transfer will receive his share of the proceeds.

Motion denied.

In re GOLDBERG.

(District Court, E. D. Pennsylvania. October, 1918.)

No. 6353.

BANKRUPTCY ⊜390(2)—JUDGMENT CREDITOR—WAIVER OF EXEMPTIONS.

Where, after execution is issued and levied on the personal property of the judgment debtor, a petition in bankruptcy is filed against him, and the debtor refuses to claim exemptions, waiving the same in favor of the judgment creditor, such creditor is entitled to receive payment in full out of the proceeds of the sale of the bankrupt's assets up to the amount of the exemptions.

In Bankruptcy. In the matter of Philip Goldberg, bankrupt. The petition of Harry Berman was granted by the referee. Upon certificate of review. Order of referee affirmed.

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Edwin Fischer and Alfred Aarons, both of Philadelphia, Pa., for petitioner trustee.

J. Henry Spivak, of Philadelphia, Pa., for claimant.

THOMPSON, District Judge. The opinion and order of the referee are as follows:

The question submitted to me for decision by the petition of Harry Berman and the trustee's answer thereto is as follows:

Where a judgment creditor issues execution out of the state court and levies on personal property of the defendant, who, pending the sale under the said execution, has a petition in bankruptcy filed against him, and who subsequently fails or refuses to file any claim for exempt property, is the levying judgment creditor deprived of the lien of his execution, and hence of the right to receive payment in full out of the proceeds of the sale of the assets of the bankrupt estate thus previously levied upon up to the sum of $300, the amount of the debtor's exemption, which had been waived in favor of the said judgment creditor?

A similar question was considered by Referee Hoffman in the Matter of Charles J. Vautier, bankrupt, in bankruptcy, No. 5148, and decided in favor of the waiver judgment creditor. This decision of Referee Hoffman was affirmed by the District Court, and is in my judgment conclusive of the question raised before me, and accordingly this 24th day of September, 1918, upon consideration of the petition of Harry Berman, praying for an order on the receiver, now trustee, to pay to the petitioner out of the proceeds of the receiver's sale the sum of $300 to satisfy the lien of petitioner's execution on assets which came into the bankrupt estate, and upon consideration of the answer of the receiver, now trustee, to the said petition, and in accordance with the foregoing opinion, it is ordered that the prayer of the petition be granted, and that the receiver, now trustee, be and he is hereby authorized and directed to pay the said sum to the said petitioner forthwith.

The decision of Referee Hoffman in the Vautier Case (not reported), which was affirmed by this court, was based on the rule laid down by the Supreme Court in the case of Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. It is contended by counsel for the trustee that the latter case was overruled by the Supreme Court in the case of Chicago, Burlington & Quincy Railroad v. Hall, 229 U. S. 511, 33 Sup. Ct. 885, 57 L. Ed. 1306. That the authority of Lockwood v. Exchange Bank is not disturbed is made apparent by the following excerpt from the concluding paragraph of the opinion of Mr. Justice Lamar in the case of Chicago, Burlington & Quincy Railroad v. Hall:

"The liens rendered void by section 67f are those obtained by legal proceedings within four months. The section does not, however, defeat rights in the exempt property acquired by contract or by waiver of the exemption. These may be enforced or foreclosed by judgments obtained, even after the petition in bankruptcy was filed, under the principle declared in Lockwood v. Exchange Bank, 190 U. S. 294 [23 Sup. Ct. 751, 47 L. Ed. 1061]."

This appears to be conclusive of the present controversy, and the order of the referee is affirmed, and the petition dismissed.

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In re McGRAW.

(District Court, N. D. West Virginia. December 3, 1918.)

1. BANKRUPTCY ⟸81(1)—PETITION—SUFFICIENCY.
In involuntary proceedings, the petition must affirmatively and distinctly show the essential facts necessary to give the bankruptcy court jurisdiction.

2. PLEADING ⟸8(1)—PETITION—SUFFICIENCY—CONCLUSIONS.
In involuntary proceedings, general averments in the petition of legal conclusions are not sufficient.

3. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENCY.
In involuntary proceedings, averments of acts of bankruptcy in the language of the statute, unaccompanied by a statement of facts affirmatively showing them to exist, are insufficient.

4. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENCY.
In involuntary proceedings, the statement in the petition of the acts of bankruptcy should allege the specific facts relied on, with time, place, and circumstances, so that the alleged bankrupt may be distinctly apprised of what he is required to answer.

5. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENCY.
The allegation of acts of bankruptcy in a petition in involuntary proceedings must be based on something more than hearsay, rumors, or suspicion.

6. BANKRUPTCY ⟸56—ACTS OF BANKRUPTCY—ENUMERATION.
The various acts of bankruptcy which support a petition in involuntary proceedings enumerated.

7. BANKRUPTCY ⟸59—ACTS OF—SUFFERING CREDITOR TO OBTAIN PREFERENCE.
Under Bankruptcy Act, § 3, subd. a3 (Comp. St. 1916, § 9587), setting forth as an act of bankruptcy the suffering or permitting while insolvent any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale, etc., vacated such preference, an insolvent debtor does not commit an act of bankruptcy merely by inaction for four months after levy of an execution on his realty, but it must appear that he failed at least five days before the date fixed for sale to discharge or vacate the same, and such failure occurred in the four months period.

8. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENT.
An involuntary petition, alleging that the alleged bankrupt suffered creditors to obtain preferences by legal proceedings, *held* not to sufficiently allege acts of bankruptcy specified by Bankruptcy Act, § 3, subd. a3 (Comp. St. 1916, § 9587).

9. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENT.
An involuntary petition *held* insufficient, not showing that the judgments against the alleged bankrupt asserted to have been acts of bankruptcy were recovered in the four months period.

10. JUDGMENT ⟸784—LIEN—PRIORITY.
As a term of court in West Virginia may last a number of days or weeks, judgments rendered at various times during the term are presumed, as regards priority between themselves, to relate back to the first day of the term, and as liens they are equal, although the lien to be preserved, etc., must be docketed in accordance with Code W. Va. 1913, c. 139, § 6 (sec. 5098).

11. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENCY.
A petition in involuntary proceedings *held* insufficient in its allegation of acts of bankruptcy, failing to state specific facts, etc.

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12. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENCY.
An amended petition in involuntary proceedings, averring the alleged bankrupt suffered creditors to obtain preferences by legal proceedings, *held* insufficient to allege acts of bankruptcy specified by Bankruptcy Act, § 3, subd. a3 (Comp. St. 1916, § 9587).

13. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENCY.
An involuntary petitioning, setting up alleged acts of bankruptcy concerning the sale of property, etc., *held* insufficient to show an act of bankruptcy.

14. BANKRUPTCY ⟸59—ACTS OF—WHAT CONSTITUTES.
For a bankrupt to suffer sale of the property to satisfy a special and superior lien, such as a purchase-money lien, does not constitute an act of bankruptcy.

15. BANKRUPTCY ⟸56—ACTS OF—WHAT CONSTITUTES.
Where no depletion of his estate occurs as result of the debtor's removal of his property from one place to another, such removal is not an act of bankruptcy of which creditors can complain.

16. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENCY.
A petition in involuntary proceedings, which set up the debtor's removal of certain property as an act of bankruptcy, is insufficient, without allegations that the acts complained of occurred within four months of institution of the proceedings.

17. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENCY.
A petition in involuntary proceedings, which set up as an act of bankruptcy the debtor's transfer to his sister of part of the royalty derived from a lease of coal lands, etc., *held* defective for failure to allege the transfer occurred within four months of the filing of the original petition.

18. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENCY.
Allegations in a petition in involuntary proceedings that the alleged bankrupt paid depositors in a bank, etc., *held* insufficient to show an act of bankruptcy.

19. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENCY.
Allegations in an amended petition in bankruptcy that, since the filing of the original petition, the alleged bankrupt suffered and permitted the circuit court in chancery causes to render a decree of sale of his real estate for liens, etc., *held* not to show an act of bankruptcy.

20. EXECUTION ⟸21—SALE OF LANDS.
In West Virginia land cannot be sold under execution, but after execution has been returned nulla bona the judgment creditor may institute his suit in equity to sell real estate, and if such real estate will not rent for enough to in five years pay all liens and costs, it is the practice to appoint special commissioners to make sale, etc.

21. BANKRUPTCY ⟸60—ACTS OF—WHAT CONSTITUTES.
The appointment of special commissioners to sell West Virginia lands of a judgment debtor, execution having been returned nulla bona, etc., *held* not to constitute an act of bankruptcy by the debtor, on the theory such appointment amounted to a general assignment, or applying for or permitting of appointment of a trustee or receiver.

22. BANKRUPTCY ⟸84—PETITION—AMENDMENT.
A petition in involuntary proceedings may be amended, Order XI (89 Fed. vii, 32 C. C. A. xiv), providing for application for leave to amend; but the conditions under which amendments may be made, and the extent thereof, rest in the sound discretion of the court.

23. BANKRUPTCY ⟸84—PETITION—AMENDMENT.
While the power of amendment is substantial, etc., *held* that, in view of Order XI (89 Fed. vii, 32 C. C. A. xiv), an amendment to an involun-

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tary petition relating solely to the material facts respecting the acts of bankruptcy, and including charges of happenings since the filing of the original petition, should not be allowed.

In Bankruptcy. In the matter of John T. McGraw, alleged bankrupt. On motion of the alleged bankrupt to dismiss the original and amended petitions. Petitions and whole cause dismissed.

A. W. Burdett, of Grafton, W. Va., for petitioners.

John L. Hechmer, of Grafton, W. Va., for alleged bankrupt.

DAYTON, District Judge. Three creditors have filed an original and an amended and supplemental petition herein, seeking to have the defendant, McGraw, adjudged a bankrupt. He has appeared and moved the dismissal of these petitions, filing in writing a number of grounds in support thereof, material ones of which are: (1) That, as to the amended and supplemental petition, it cannot be considered properly in court, not having been filed upon written application made to the court, with notice thereof given to the defendant, in which application excuse is given for such amendment; and (2) that the acts of bankruptcy, charged in both the original and amended petitions, either (a) are not supported by sufficient allegations of fact, or (b) the facts as alleged in both petitions show, on their face, that the acts of bankruptcy charged are not so in law and fact.

[1-5] Involuntary proceedings in bankruptcy, being, in theory, prosecuted against the will of defendant, necessarily vary greatly from voluntary ones, as regards the allegations of their pleadings; therefore it has been settled by numerous precedents: (1) That the essential facts necessary to give the bankruptcy court jurisdiction in such cases must appear affirmatively and distinctly; (2) that general averments of legal conclusions are not sufficient; (3) nor are averments of the acts of bankruptcy in the language of the statute, unaccompanied by a statement of facts affirmatively and distinctly showing them to exist; (4) such statement should state the specific facts relied on, with time, place, and circumstances, so that the alleged bankrupt may be distinctly apprised of what he is required to answer; and (6) it must be based upon something more than hearsay, rumors, or suspicion. In re Plotke, 104 Fed. 964, 44 C. C. A. 282; Clark v. Henne & Meyer, 127 Fed. 288, 62 C. C. A. 172; In re Rosenblatt & Co., 193 Fed. 638, 113 C. C. A. 506; In re Bellah (D. C.) 116 Fed. 69; In re Mero (D. C.) 128 Fed. 630; In re Blumberg (D. C.) 133 Fed. 845; In re Pure Milk Co. (D. C.) 154 Fed. 682; In re Hallin (D. C.) 199 Fed. 806; In re Farthing (D. C.) 202 Fed. 557; In re Truitt (D. C.) 203 Fed. 550; In re Deer Creek Water Co. (D. C.) 205 Fed. 205.

[6-8] Preliminary to applying these rules to the charges of the petitions presented here, it is pertinent to call attention to the fact that the bankruptcy court is always limited in assuming jurisdiction, where adjudication is opposed, to a condition where the acts of bankruptcy have been committed within 4 months of the filing of the petition for adjudication; and, further, that the only acts warranting such adjudication, as provided by the statute, are: (1) A conveyance, trans-

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fer, concealment, or removal of any part of his property, made or suffered to be made by the debtor, with intent to hinder, delay, or defraud his creditors, or any of them; (2) by transfer, when insolvent, by the debtor of any portion of his property to one or more of his creditors, with intent to prefer such creditor over his other creditors; (3) by suffering, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least 5 days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; (4) by making a general assignment for benefit of creditors, or, being insolvent, applying for the appointment of a receiver or trustee for his property, or, by reason of such insolvency, the appointment and putting in charge of such receiver or trustee his property, under the laws of a state or territory of the United States; and (5) by reason of written admission of inability to pay his debts and willingness to be adjudged bankrupt on that ground. The original petition in this matter was filed on June 30, 1917, and the amended and supplemental one on November 19, 1917. In the original, the acts of bankruptcy charged, in the order therein stated, are: (a) A transfer within four months of a large amount of property to certain creditors with a design to give them preference over other creditors, based on the second one of the acts defined by the statute; (b) suffering certain creditors to obtain preferences through legal proceedings, the third act set forth in the statute; and (c) transferring, concealing, etc., a large portion of property, with intent to defraud, the first act of bankruptcy set forth in the statute.

In support of these charges the material facts set forth are:

(a) That at the January term of the circuit court of Taylor county, which term adjourned on March 8, 1917, the alleged bankrupt procured, suffered, and permitted one Anna Jarvis to obtain by default against him a judgment for the sum of $6,390, with interest from January 22, 1917, and $15.65 costs, and that such judgment was, on the 20th day of April, 1917, recorded in the lien docket of the county, remains in full force, has not been vacated or discharged, and creates a preference.

(b) That at the same January term, 1917, of said court, he suffered Fred W. Bartlett to obtain a judgment by default against him for $2,743.31, with interest from December 5, 1916, and costs, which judgment was duly recorded in the judgment lien docket on March 16, 1917; that the same constitutes a lien against his real estate, has not been vacated or discharged, and created a preference.

(c) That he has received a large amount of dividends, the amount unknown to petitioners, within 4 months of the filing of the petition, from the Grafton Coal & Coke Company, a corporation which amounts he has concealed and refused to pay to his creditors.

(d) "That he has other large income which has, within four months of the date of this petition, the amounts of which are unknown to petitioners, from royalties on coal leased by him, been paid to other parties unknown to petitioners, which has been procured, suffered, and permitted to be so paid by the said McGraw, and to parties unknown

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to petitioners, with the intent to hinder, delay, and defraud his creditors."

The construction of section 3, subdivision a3, of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 546 [Comp. St. 1916, § 9587]), setting forth as an act of bankruptcy the suffering or permitting, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference, gave rise to contradictory decisions in the federal courts of the country. The conflict arose over this question: If an insolvent debtor suffered or permitted one of his creditors to secure a lien upon his real estate, by judgment or other legal proceeding, which lien was allowed to remain undischarged and unvacated until the lapse of 4 months was about to render it unassailable in bankruptcy, was this an act of bankruptcy? Such cases as In re Tupper (D. C.) 163 Fed. 766, and Folger v. Putnam, 194 Fed. 793, 114 C. C. A. 513, held it to be so. Such cases as In re Vasbinder (D. C.) 126 Fed. 417; In re Windt (D. C.) 177 Fed. 584, and In re Truitt (D. C.) 203 Fed. 550, held it not to be so. The question was finally certified to the Supreme Court, and there decided in Citizens' Bank v. Ravenna Bank, 234 U. S. 360, 34 Sup. Ct. 806, 58 L. Ed. 1352, that:

"An insolvent debtor does not commit an act of bankruptcy, rendering him subject to involuntary adjudication as a bankrupt under the Bankruptcy Act of 1898, merely by inaction for the period of 4 months after levy of an execution upon his real estate.

"All of the three elements specified in section 3a(3) of the Bankruptcy Act of 1898 must be present in order to constitute an act of bankruptcy within the meaning of that provision."

This finally settles the matter. The rendering of a judgment, therefore, can only constitute an act of bankruptcy when (a) the debtor is insolvent, (b) has within 4 months of the filing of the bankruptcy petition suffered and permitted it to be obtained, (c) upon which execution has issued, (d) been levied upon his property, (e) such property advertised for sale, and (f) he has failed, at least 5 days before the date fixed for sale, to discharge or vacate the same; and all these prerequisites must occur within 4 months of the filing of the petition.

In this case, this disposes of the alleged acts of bankruptcy based upon the rendition of the Jarvis and Bartlett judgments. It is not alleged that any executions have issued upon these judgments, been levied upon McGraw's property, with sale thereof advertised, and a failure to vacate and discharge 5 days before such sale.

[9, 10] Another fatal objection might, too, be set forth to the sufficiency of the allegations as to these judgments being suffered to be rendered within 4 months, or at least to one of them. Counsel apparently have assumed that the four months period within which they could be assailed runs from the date when they are recorded in the lien docket in the county court clerk's offce. This is clearly wrong. The date from which the four months period begins to run is that *of* the day when the judgment is entered of record by the court having jurisdiction of the action.

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Under the laws of West Virginia a term of a circuit court may run over a number of days or weeks. If it does, judgments rendered upon different days of such term against the same debtor, as regards their priority between themselves, are presumed to relate back to the first day of the term, and as liens are equal in priority, provided the cases were matured for trial before the term commenced, and did not mature after it commenced. No such judgment, however, is a lien on real estate as against a purchaser thereof for valuable consideration without notice, unless it be docketed in the county wherein such real estate is, either within 60 days next after the date of the judgment, or before a deed therefor to said purchaser is delivered for record to the clerk of the county court. Chapter 139, § 6, Code W. Va. (sec. 5098). The docketing of a judgment is merely for the purpose of preserving its lien, or, more accurately speaking, to give notice of its lien to prospective purchasers, who would otherwise be innocent of its existence; and even they must run the risk of such lien existing for 60 days after it has been rendered by a circuit court, for the creditor has that period given him by the statute within which to docket it. The lien dockets are kept by the clerks of the county courts, which have no judicial power to try cases and render judgments.

Here it is apparent that one of these judgments, the Jarvis one, was actually rendered January 22, 1917, more than 4 months before the petition herein was filed and as to the Bartlett one, it is alleged it was recovered at the same term; but the exact day is not disclosed, so as to enable us to determine whether it was likewise more than 4 months old or not.

[11] As to the allegations of fact in the last two paragraphs of this original petition, I am constrained to hold that they do not comply with several of the rules established by the precedents. The two are alike, and may be considered together, as seeking to establish either one or the other of the first two acts of bankruptcy as defined by the statute. In effect they charge: (a) That the alleged bankrupt had within 4 months received a large unknown amount of dividends from the Grafton Coal & Coke Company, which he has concealed and refused to pay to his creditors; and (b) has large incomes, unknown in amount, from royalties on coal leased by him, which he has allowed to be paid to unknown parties, with intent to hinder, delay, and defraud his creditors.

They fail, in that they do not state specific facts, such as time, place, and circumstance, so that the defendant may be distinctly apprised of what he is required to answer. The ruling in Re Rosenblatt & Co., 193 Fed. 638, 113 C. C. A. 506 (2d Cir.), is directly in point. It is there held:

"A general averment in an involuntary petition in bankruptcy that the alleged bankrupt within four months preceding the date of the filing of the petition committed an act of bankruptcy, in that, while insolvent, he transferred a part of his property to creditors with intent to prefer them, and transferred and concealed large sums of money and valuable securities with intent to defraud his creditors, and that the concealment was a continuous one, is too vague, and the petition is properly dismissed upon demurrer."

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It clearly appears the allegations, so held to be too vague in that case, were less so than those here. See, also, In re Hallin, 199 Fed. 806, and authorities therein cited.

The original petition being demurrable, the next question presents itself in a twofold aspect: (a) How far its defects could be remedied by amendment; and (b) how far are they in fact remedied by the amended and supplemental petition filed here?

[12] In alleging material facts, in support of alleged acts of bankruptcy, it (1) reiterates the charges of the original petition as regards the rendition and existence of the Jarvis and Bartlett judgments, but does not allege that any executions have issued thereon, been levied on property, sale thereof directed, and failure to discharge at least 5 days before sale. It then charges that, since the filing of the original petition, and within 4 months of the filing of this amended and supplemental one, the Farmers' Bank of Clarksburg, in the circuit court of Harrison county, on May 9, 1917, has recovered a judgment, which has not been paid and its preference vacated and discharged. Here, too, there is no allegation of the issue of execution. levy on property, sale directed, or the failure to vacate the preference 5 days before the day of sale.

It is apparent, from what has been hereinbefore said, that these allegations of fact are not sufficient to establish acts of bankruptcy under the decision of the Supreme Court in Bank v. Bank, 234 U. S. 360, 34 Sup. Ct. 806, 58 L. Ed. 1352.

[13, 14] The next allegation of fact in effect is that McGraw, on the ——— day of June, 1917, purchased from Weekley, receiver of the Grafton Bank, what is known as the Grafton Bank property, at the price of $10,500; that petitioners "are informed, believe, and charge" that he paid $3,000 of the purchase price, took possession, expended a large sum in repairs, and has failed to comply with the terms of sale; that Weekley is now proceeding to readvertise and sell on December 1, 1917, and "has applied or will apply the cash payment thereon to McGraw's credit on judgments recovered by the Grafton Bank, thereby preferring said bank over petitioners and other creditors."

It seems to me this charge must be held insufficient for several reasons:

First. So far as allegations of the payment of the $3,000 on the purchase price of this bank property, and its application, made or to be made, to the bank's judgments, are concerned, they are made solely upon information and belief and are under the ban of the ruling in such cases as In re Blumberg (D. C.) 133 Fed. 845.

Second. It is not charged that the purchase of this bank property was made by McGraw by reason of any fraudulent collusion with Weekley, the receiver, to make it the method of preferring the bank, or in short with any purpose to hinder or delay or defraud his creditors. On the contrary, the reasonable presumption arises that such purchase was made openly by him, knowing that he was indebted, but regarding himself as solvent. The Bankruptcy Law does not warrant the assumption that one, indebted to an extent that may even-

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tually amount to insolvency, is compelled to stop business, make no investments, and buy no property, but in effect stand still, and see if bankruptcy proceedings are instituted against him. He can go on increasing his estate by purchases of property, surely, unless such purchases are made with fraudulent design.

Third. We are wholly uninformed as to how old the bank's judgments were, or whether executions were outstanding at the time upon those judgments, which would constitute a lien upon the money paid in the purchase to its receiver. If so, it might be entirely legal for the receiver to apply it on such executions. Such application would not create a "preference" as against petitioners and other unsecured creditors. It is constantly to be borne in mind that the Bankruptcy Law does not, on general principles, undertake to fight the battle of lienholders, or to settle controversies arising solely between them. Its care is to protect and secure the rights of unsecured creditors.

Fourth. The resale of the property, while charged to have been advertised, was not within the 5-day limit before which a preference, if any existed, had to be vacated; and, above all, it was to be made for a purchase-money lien, secured, it is fair to assume, either by vendor's lien retained in the deed made by the receiver to McGraw for the property, or, which is more likely, by the retention of the legal title by the receiver. The suffering of such sale of property to satisfy such a special and superior lien does not constitute an act of bankruptcy in any event, under the principles enunciated by the Circuit Court of Appeals of this Circuit in Richmond Standard Steel Spike & Iron Co. v. Allen, 148 Fed. 657, 78 C. C. A. 389.

[15, 16] The next charge is to the effect that the alleged bankrupt is the owner of the Willard Hotel in Grafton and of a residence property in Oakland, Md., and has conveyed or removed a large part of his personal property, consisting of rugs, furniture, and other articles, from the hotel to such residence. The defects in this charge are: First, its allegations are made on information and belief solely; second, they are too vague and indefinite; third, no depletion of estate is charged or shown, and, where there is none, creditors cannot complain (Collier [11th Ed., 1917] p. 101); fourth, no allegation of such removal having been made within 4 months of the institution of this proceeding is made, and this alone is a vital objection.

[17] The sum and substance of the next charge is that McGraw leased some coal land to the Delmar Coal Company, from which he was to receive a minimum royalty of $250 per month, this back in 1911; that at some time not stated he transferred to his sister, Mrs. Warder, the sum of $150 per month therefrom; and that she has, for the months of April, May, and June, 1917, each within 4 months of the filing of the original petition, been paid and received this $150 of transferred royalty by the company. When this transfer was made, as stated, is not alleged; but it is alleged:

"That said Delmar Coal Company, prior to the said 4 months, paid from month to month for a long period of time to the said Minnie McGraw Warder the said sum of $150 per month at the request, permission, and order of said McGraw, without consideration, and while he the said John T. McGraw, was so insolvent, with intent to hinder, delay, and defraud petitioners and other

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creditors of McGraw. That the said Delmar Coal Company, since the filing of the original petition herein, at the request, permission, and order of said McGraw, and while so insolvent, continued to pay to said Minnie McGraw Warder the said sum of $150 per month from the royalties coming to said McGraw, with intent to hinder, delay, and defraud petitioners and other creditors of said McGraw."

From this it is fair to presume that years ago, long before petitioners' debts were incurred, and it may be in 1911, when the lease was made, McGraw, as alleged, "transferred and conveyed, or permitted the same to be transferred and conveyed, to his sister" an interest, to the extent of $150 per month, in this royalty, and that, in consequence, it has ever since been paid to her. The fact that the transfer or conveyance of this interest may have been based upon a consideration of love and affection only is immaterial here, as is also the fact that it has been carried out by payments made under it. That it may come within the ban of the Bankruptcy Act it must appear that the transfer or conveyance itself had been made within 4 months of the filing of the bankruptcy petition, and at the time so made was with the intent, on the part of McGraw, to hinder, delay, and defraud his creditors. It seems clear that neither of these conditions exist.

[18] The next charge is that McGraw, at various times and places, paid to certain depositors of the Grafton Bank large sums of money on their deposits, voluntarily and without value, amounts unknown and parties unknown, but petitioners "are informed, believe, and aver" that five named persons were depositors so paid. It is hardly necessary to point out that this charge, under the authorities cited, is entirely too vague and indefinite. It is based upon information and belief, and the essential details and data necessary to enable us to form any idea of the nature and reason for making such payments are wanting. No relation is shown to have existed between McGraw and this bank that would explain why he should undertake to pay its debts. It can hardly be presumed that any ordinarily sensible man would for no moving cause want to pay such debts, for which he was in no wise responsible. If McGraw did pay them, it is not disclosed whether he took assignments from the depositors so paid. If he did so, it is not disclosed whether or not the investment in such claims was a bad investment or otherwise. These debts due depositors were superior liens upon the bank's assets under the laws; in addition, a double liability upon the bank's stockholders exists to further secure them, and, while it is said the bank's doors were closed, it does not follow that the taking over of its debts due depositors was not a good investment for McGraw and his estate.

The next specification of fact reiterates the one contained in the original petition, to the effect that McGraw has been paid large dividends by the Grafton Coal & Coke Company. The only substantial differences between the two representations are (a) that in the original petition these payments are charged to have been "concealed," while in this amended one this charge of concealment is omitted; and (b) in this amended one a failure of application of these dividends to existing execution liens (not named) is charged.

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In addition to what has been said hereinbefore touching this charge, I will only call attention to the case of Conway v. German, 166 Fed. 67, 91 C. C. A. 653, wherein the Circuit Court of Appeals for this circuit has clearly pointed out that general statements of this kind, without setting forth details and essential data, such as time, place, persons, and amounts involved in the transaction, are insufficient.

[18] Finally, it is set forth that since the filing of the original petition—that is, on August 4, 1917 (the certified copy of the decree filed shows it was rendered the 4th day of October, 1917)—the alleged bankrupt suffered and permitted, in three consolidated chancery causes named and described, the circuit court of Webster county to render a decree of sale of his real estate for liens amounting to over $600,000, appointed special commissioners to sell the same, of whom large and excessive bonds have been required; that such decree of sale does not include all of McGraw's real estate lying within the state; that petitioners "are informed, believe, and charge" that a great many of the lienors (naming four), since the filing of the original petition herein, have issued executions and docketed them, in Taylor county (where McGraw resides), thereby claiming liens upon his personal property; that the real estate of McGraw, they are informed and charge, will sell for more than enough to pay the debts decreed against it, and the personal estate should not be incumbered with said execution liens; that McGraw has a large amount of personal property placed as collateral security with various creditors, far in excess of the debts secured, the amount, however, not known (and to whom pledged not stated); that the bankrupt court alone can take jurisdiction and equitably settle the affairs of McGraw, and protect his common creditors, and, it is averred, if it does not take jurisdiction, and enjoin the sale of his real estate about to be sold, the common creditors will realize nothing, and will suffer great loss, if the state court proceedings are permitted to go on to a final sale, and "the said Geo. M. Weekley, receiver, be permitted to sell the said Grafton Bank property as advertised by him"; that McGraw should be required to answer, and show what stocks and bonds are owned by him, where situated, and whether or not the same are up as collateral with any of his creditors, and the amount of the debts for which the same are so held, by whom held, and such collaterally secured creditors should be enjoined from selling such collateral until proper proceedings can be taken in this bankrupt court.

A copy of the decree of sale is filed as an exhibit. It discloses that the state court, through its master, has ascertained and determined McGraw to be the owner of an immense amount of real estate, situate in eight different counties of the state, consisting of hundreds of town lots, large and small tracts of lands in fee, undivided interests in others, and coal and timber rights and interests, upon which more than $600,000 of liens, due to several hundred different persons, firms, and corporations, are existing and are decreed. How complete and accurate the work done is not for me to determine. It is apparent that the costs and expenses involved in the litigation resulting in this decree have been enormous. Petitioners believe the interests of com-

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mon creditors, at least, would be promoted by this court taking charge of this immense and very greatly involved estate, and administering it in bankruptcy. I very much doubt it. Be that as it may, however, one thing is sure and certain. It cannot be so administered in this bankruptcy proceeding, against the protest of its owner, unless it affirmatively and definitely appears that he has within 4 months of the filing of the petition (I think the original one) committed one or other of the acts of bankruptcy defined by the statute. The "suffering" this decree to be rendered certainly constitutes no such act under the Supreme Court's ruling in the Citizens' Bank v. Ravenna Bank Case. No sale has been advertised under it, so far as disclosed. A stay of its operation was given to enable an appeal to be taken, but whether taken we are not informed by anything here appearing.

[20, 21] The fourth act of bankruptcy, that of making a general assignment, or applying for or suffering a receiver or trustee to be appointed, has not, in either of these petitions, been set forth and relied upon. If it had been, then a very interesting question, I think of first impression, might be raised, by claiming that the appointment of special commissioners in this decree was equivalent to and came within the meaning and intent of the statute making the appointment of a receiver or trustee an act of bankruptcy; in other words, that such special commissioner is, in the legal intendment of this act, a receiver or trustee. At first it seemed to me that this might be so, but a careful study of the question has led me to the contrary conclusion, especially when applied to legal conditions in this state. In West Virginia real estate cannot be sold under execution. After judgment has been obtained at law, and execution thereon has been returned nulla bona, the judgment creditor is permitted to institute his suit in equity (if no prior one for the same purpose has been instituted) to sell the debtor's real estate. In such equity suit the real estate is ascertained, with the state and condition of its title, the rental value thereof, and all liens thereon. If such real estate will not rent for enough in five years to pay all such liens and the costs, a sale thereof is ordered. Instead of directing the sheriff to make such sale, the usual practice is to appoint one or more special commissioners to make it and report to the court for confirmation. Such special commissioner never takes possession of the real estate, and he does not collect the rents, issues and profits thereof, as does a receiver or trustee. His duties are purely ministerial. His appointment is made by the court to make the sale alone. If, upon his report, the sale is confirmed, the court awards direct to the purchaser a writ of possession that alone judicially gives or warrants such purchaser to take possession. In short, such special commissioner is in effect only a substitute for the sheriff or other public officer required by law in other states to perform these duties, and cannot be held to be a receiver or trustee in the meaning of the Bankruptcy Act.

[22, 23] Counsel for McGraw, in addition to objections to inherent defects in the specifications themselves, strenuously insist that the amended and supplemental petition should be dismissed, because it was not filed by leave of the court, upon written application for

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leave to do so, stating the cause of the error in the petition originally filed, and of which application the alleged bankrupt was to be given notice. In support of this contention counsel cite General Order XI (89 Fed. vii, 32 C. C. A. xiv), In re Brincat (D. C.) 233 Fed. 811, 815, and White et al. v. Bradley Timber Co. (D. C.) 116 Fed. 768.

These authorities fully support this view and seem to be based upon sound reason. However, that amendments can be made is clear. When, under what conditions, and to what extent, is subject to the sound discretion of the court (Armstrong v. Fernandez, 208 U. S. 324, 28 Sup. Ct. 419, 52 L. Ed. 514) and as usual, when matters are so subject, confusion has arisen as to what is an exercise of sound discretion in these matters of amendment. There can be no question that written or printed application must be made for leave to amend, in which shall be stated the error in the paper (petition) originally filed, because Order XI expressly so requires. It has been held, however, touching this order, that its purpose is to allow to be made corrections of errors, supply deficiencies, and remove uncertainties, but not practically to repel the legislative requirement that petitions in duplicate must be filed within the 4 months specified (In re Stevenson [D. C.] 94 Fed. 110); that "this power of amendment is substantial and conferred for effecting the broad purposes of the act, and is not confined to niceties of diction or other immaterial or merely formal matters. To hold that it does not embrace the insertion of material and essential averments at any stage of the proceedings before judgment would reduce it to a shadow." In re Mackey (D. C.) 110 Fed. 355, at page 362.

A careful examination of the numerous decisions of the federal courts, so far as I have been able to find them reported, has led me to the conclusion that the most satisfactory rule to determine for what purposes amendments may be made is set forth by the Circuit Court of Appeal for our own circuit in Millan v. Exchange Bank, 183 Fed. 753, 106 C. C. A. 327, where it is said:

"The law is well settled, however, that amendments relating to the number of the petitioning creditors, the amount and nature of their claims, to the occupation of the debtor, and to errors and deficiencies in the verification of the original petition can be made more than 4 months after the commission of the act of bankruptcy. When so made, they relate back to the date of the filing of the original petition. State Bank v. Haswell (8th Circuit) 23 Am. Bankr. Rep. 330, 174 Fed. 209, 98 C. C. A. 217; Ryan v. Hendricks (7th Circuit) 21 Am. Bankr. Rep. 570, 166 Fed. 94, 92 C. C. A. 78; In re Plymouth Cordage Co. (8th Circuit) 13 Am. Bankr. Rep. 665, 135 Fed. 1000, 68 C. C. A. 434; In re Bellah (D. C. Dist. of Del.) 8 Am. Bankr. Rep. 310, 116 Fed. 69."

If the statement of defects that can be cured by amendment set forth in this quotation was designed by the court to be inclusive of all, then this amended petition must inevitably be rejected, for that its amendments, sought to be made, come not within the list allowable. If, however, it is not designed to be inclusive of all allowable causes of amendment, it is sufficient to say the amended petition was not filed in accord with the requirements of Order XI, its allegations relate solely to the material facts relating to the acts of bankruptcy

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essential to and the very foundation of the court's jurisdiction, including many charges of happenings since the original petition was filed, and jurisdiction thereby sought to be secured. It seems to me an attempt to amend to this extent goes too far. However, I have not based this decision of the motion to dismiss on this ground, and therefore further discussion is unnecessary.

I am constrained to the conclusion that both petitions, the whole cause, must be dismissed; and it will be so ordered.

PRIMOS CHEMICAL CO. v. FULTON STEEL CORPORATION.

(District Court, N. D. New York. December 2, 1918.)

1. COURTS ⊜266—FEDERAL COURTS—JURISDICTION.
Under Judicial Code, §§ 69–115 (Comp. St. 1916, §§ 1051–1106), and in view of section 1 (section 968), the jurisdiction of the several District Courts is coextensive with the boundaries of the judicial district, and extends no further, save as Congress has expressly extended it.

2. COURTS ⊜24—FEDERAL COURTS—JURISDICTION.
While jurisdiction of the person can be given by consent of the defendants, jurisdiction of the subject-matter cannot be conferred on any court, either by assumption of jurisdiction, or consent of the parties, or request of all of the parties.

3. COURTS ⊜24—FEDERAL COURTS—JURISDICTION.
When diversity of citizenship is the ground of federal jurisdiction, if diversity of citizenship does not in fact exist, there is an entire absence of jurisdiction, which cannot be waived by the parties, and the court will dismiss on its own motion.

4. COURTS ⊜276—FEDERAL COURTS—JURISDICTION.
Under Judicial Code, § 52 (Comp. St. 1916, § 1034), relating to where a state contains more than one federal district, etc., in suits not of a local nature, if there be but one defendant, he may waive being sued in the wrong district, but where there are two or more defendants residing in different districts, then to reach the defendants not residing in the district, suit must be brought as the statute directs, etc.

5. COURTS ⊜269—LEASES—NATURE OF PROPERTY THEREIN—"PERSONAL PROPERTY."
A lease of real estate for a term of years is "personal property," and is not property of a fixed nature or character, within Judicial Code, § 55 (Comp. St. 1916, § 1037), relating to district of suit in local actions where land or subject-matter of a fixed character lies partly in one district and partly in another.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Personal Property.]

6. RECEIVERS ⊜207—POWERS OF—EXTENT.
A receiver's power is only coextensive with that of the court which gave him his character, and cannot be asserted as a matter of right beyond the territorial jurisdiction of such court; so a receiver appointed by the District Court for the Southern District of New York has no power to take possession of property of the defendant in the Northern District, etc.

7. COURTS ⊜269 — FEDERAL COURTS — JURISDICTION — "PROPERTY OF FIXED CHARACTER OR NATURE."
Though a corporation which had its domicile and carried on its business in the Northern District of New York admitted the jurisdiction of

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the District Court of the Southern District, wherein it had a small bank account and had leased offices, over a suit for the appointment of a receiver, *held*, that the District Court of the Southern District was without jurisdiction, under Judicial Code, § 55 (Comp. St. 1916, § 1037); the suit being of a local nature, and no property in that district being of a fixed character or nature.

8. COURTS ⊂=269—DOMICILE—PROPERTY OF A FIXED CHARACTER.
The defendant corporation *held* to have its domicile and property of a fixed character or nature wholly in the Northern District of New York, and none in the Southern District, where suit for the appointment of a receiver was begun, so the District Court of the Southern District could not take jurisdiction, under Judicial Code, § 55 (Comp. St. 1916, § 1037).

9. COURTS ⊂=269—APPOINTMENT OF RECEIVERS—"LOCAL ACTION."
A suit for the appointment of receivers to conserve and protect the assets of a corporation is one of a local nature, within Judicial Code, § 54 (Comp. St. 1916, § 1036), and under section 55 (section 1037) cannot be maintained in a district wherein the corporation was not domiciled and had no property of a fixed nature.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Local Action.]

10. COURTS ⊂=269—JURISDICTION—"PROPERTY OF A FIXED CHARACTER"—DEPOSITS.
Money deposited becomes the property of the bank, and the relation between the bank and depositor is simply that of debtor and creditor, so a deposit is not "property of a fixed character," within Judicial Code, § 55 (Comp. St. 1916, § 1037).

11. RECEIVERS ⊂=91—POWERS OF—LEASES.
Receivers of corporation are at liberty to occupy leased premises until they elect whether to retain or abandon; for if the lease is assignable, it may be sold like other personal property, and if not, the receivers may at their option abandon the same.

12. COURTS ⊂=264(1)—JURISDICTION—ANCILLARY JURISDICTION.
Where the District Court for the Southern District of New York was without jurisdiction of a suit, the District Court for the Northern District cannot rightfully exercise ancillary jurisdiction therein, for that presupposes jurisdiction in the Southern District.

13. MANDAMUS ⊂=31—COURTS—PROCEEDING WITH CAUSE.
A court can be compelled to act one way or the other in matters properly before it, for that is its duty; but it cannot be compelled to make a particular decision, when it has power or discretion to act otherwise.

14. COURTS ⊂=264(3)—JURISDICTION—RECEIVERS.
Where a court appointing a receiver had no jurisdiction, it cannot claim jurisdiction over property seized without the jurisdiction; so the fact receivers appointed by the District Court of the Southern District of New York have taken possession of property of the defendant in the Northern District does not give that court jurisdiction, where it exceeded its jurisdiction, etc., in appointing receivers, etc.

15. COURTS ⊂=264(1)—JURISDICTION—ANCILLARY JURISDICTION.
When want of jurisdiction of the court in the main suit appears, it is the duty of a court asked to exercise ancillary jurisdiction to raise the question itself, and to decline to act if the want of jurisdiction in that court appears.

In Equity. Application by the Primos Chemical Company for the appointment of receivers of the property of the Fulton Steel Corporation, as ancillary receivers, based on an ancillary bill, in which another creditor intervened, denying the jurisdiction of the District Court wherein the original suit was brought. Application denied.

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This is an application by the Primos Chemical Company, the above-named complainant, a creditor of defendant, for the appointment of the three receivers named by the United States District Court in the Southern District of New York of all the property of defendant as ancillary receivers of the property of the defendant in the Northern District of New York. The application is based on an ancillary bill filed in the Northern District, which sets out the pendency of the action and the action of the court in the Southern District, and which allegations the plaintiff refuses, on request so to do, to eliminate from such bill filed in the Northern District.

Another creditor of the defendant has appeared herein by intervention, and has filed an answer denying all allegations of the ancillary bill filed in the Northern District which would give the District Court in the Southern District jurisdiction of the subject-matter of the suit, and denies jurisdiction in that court to entertain the suit and appoint receivers, and of this court to recognize that action or take any proceedings ancillary thereto, so far as property of the defendant in the Northern District of New York is concerned. The intervening creditor does not object to the court in the Northern District taking jurisdiction of an independent bill filed in that district by a proper party complainant asking for receivers, or to the appointment of receivers by this court in such an independent and primary action in the Northern District.

In the action commenced in the Southern District, as well as in the ancillary action brought in the Northern District, the defendant appears in person by its president, not by attorney, and files an answer as follows: "The defendant above named herein admits each and every allegation contained in the said bill of complaint and submits its right in the premises to the protection of the court. Fulton Steel Corporation, by Harry C. Beaver, President. Attest: Wm. M. Bailey, Vice President."

The answer of the intervener also sets up facts showing that the principal place of business of the defendant corporation is and always has been at Fulton, in the Northern District of New York, where all of its real estate and all of its property of a fixed nature or character is situated, and that it had none and has none in the Southern District.

The intervening creditor in the Northern District also files opposing affidavits, showing, if the allegations be true, that the Fulton Steel Corporation is a corporation of the state of New York, organized and doing business as a manufacturing corporation at the city of Fulton, Oswego county, N. Y., in the Northern District of New York, and that in its articles of incorporation its principal place of business is stated to be at Fulton aforesaid, and that in fact its principal place of business is and always has been at the city of Fulton, Northern District of New York, and that all its real property and all its property of a fixed nature or character and the greater part of its personal property was when the suit in the Southern District was instituted, and now is, in the Northern District of New York, and that such corporation had and has no real estate or property of a fixed character or nature in the Southern District of New York.

Wm. S. Elder, of Auburn, N. Y., for complainant.

Costello, Burden, Cooney & Walters and Chas. V. Byrne, all of Syracuse, N. Y., for intervening creditor.

RAY, District Judge (after stating the facts as above). The facts in this case are that a few years since the Fulton Steel Corporation was duly organized and incorporated under and pursuant to the laws of the state of New York as a manufacturing corporation for the purpose of manufacturing and selling certain steel products. Its articles of incorporation stated that its principal place of business was to be at Fulton, in Oswego county, N. Y., and at that city its principal place of business, active operations, and bookkeeping and offices have always been located and carried on. It became the owner of certain real es-

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tate at Fulton, on which was and is its principal and only plant, being its manufacturing plant and offices and storage rooms. This plant, with buildings and machinery thereon, was and is worth from $350,000 to $500,000. In New York City there were, it is said, rented three small rooms in one of the large office buildings in that city, furnished with desks and chairs, and at which offices stock in the corporation was sold. The corporation kept a bank account in one of the banks of the city of New York, in which was deposited about $4,000 when the bill in the Southern District was filed.

This was and is the only property of the defendant corporation in the Southern District of New York when the bill was filed there. That was the only business of the corporation being carried on there. It was incidental and collateral to the business of the corporation, which it was organized to carry on and which it was conducting, and constituted no part of its manufacturing business or operations. The bill filed in the Southern District alleged the involved financial condition and difficulties of the corporation; its large indebtedness, which it was unable to meet; that a suit had been brought against it, and that others were threatened; and various other facts showing a necessity for the appointment of a receiver, not of the assets and small rented offices in the city of New York, but of the corporation and all its assets and property, of every name, everywhere, and the taking thereof by such receiver for the purpose of protecting and conserving such assets and property. It was not an action in personam, or to recover a personal judgment against the defendant, and did not purport to be such, but was and is what is known as an action to conserve assets, and one looking to the sale of all the property. This was the object of the action and such was the subject-matter involved. That bill was silent as to the location or situs of the property of the defendant corporation, except it stated that the defendant had *an* office in the city of New York.

Later, when the question of jurisdiction was raised, an amendment to that bill was filed, alleging that the bank account mentioned was in the city of New York, and that defendant had a lease for a term of years of the three offices mentioned. Another creditor intervened in that suit specially to raise the question of jurisdiction, and did raise it, and moved to dismiss on the ground of want of jurisdiction in the District Court of the Southern District of New York of the subject-matter of the suit. That motion has been denied on the grounds, as I read the memorandum of opinion, that an intervening creditor cannot raise the question, as defendant appeared and submitted to the jurisdiction, and that there was some property in the Southern District, to wit, the lease of the three rooms and the bank account, when the bill was filed, over which that court had and has jurisdiction, and hence that it has jurisdiction, not only of the defendant, but of the subject-matter of the suit. The learned judge who heard and decided the motion, and who wrote the memorandum referred to, seems to concede that the court in the Southern District had and has no jurisdiction over the property in the Northern District, but contends that by ancillary proceedings and the appointment of ancillary receivers in

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the Northern District the whole property and subject-matter should, can, and will be brought in and acted upon in the Southern District. If this be so, then actions of a local nature and character occupy the same position, as to jurisdiction, as do actions in personam, substantially.

[1] Questions of jurisdiction in the United States courts are not free from perplexities. Article 3, § 1, of the Constitution provides that—

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

Section 2 of the same article provides that—

"The judicial power shall extend to all cases, in law and equity * * * between citizens of different states," etc.

These are limitations on the judicial power. Pursuant to the authority thus conferred, Congress has established in each of the states of the United States one or more judicial districts (Judicial Code [Act March 3, 1911, c. 231] c. 5, §§ 69–115, 36 Stat. 1105–1130 [Comp. St. 1916, §§ 1051–1106]), and has also divided the United States into judicial circuits. The boundaries of these districts and circuits are defined. The Congress has also provided for the appointment of one or more District Judges in each of such judicial districts (chapter 1, § 1, Judicial Code [Comp. St. 1916, § 968]), and for the appointment of Circuit Judges in each of the judicial circuits. Each District Judge must be an actual bona fide resident of the district in and for which appointed. The jurisdiction of each of these District Courts is coextensive with the boundaries of the judicial district in and for which it is established or created, and extends no further, except in those cases where the Congress has expressly extended it. The Judicial Code points out these cases.

The District Judges so appointed cannot act as such and exercise their judicial powers and functions outside their respective districts, except in those cases specially provided for by acts of Congress, and these cases are pointed out in the Judicial Code. "The circuit court (now District Court) of each judicial district sits within and for that district, and its jurisdiction as a general rule is bounded by its local limits." Toland v. Sprague, 12 Pet. 300, 328 (9 L. Ed. 1093); Devoe Mfg. Co., Petitioner, 108 U. S. 401, 2 Sup. Ct. 894, 27 L. Ed. 764; Barrett v. United States, 169 U. S. 218, 221, 18 Sup. Ct. 327, 42 L. Ed. 723.

[2] There is a well-defined distinction between actions in personam and actions of a local character or nature, where the court and judgment or decree is to act upon specific real property or property of a fixed nature or character. There is such a thing as jurisdiction of the person which can be given by consent of the defendant, he waiving his right to be sued in a given district, and there is such a thing as jurisdiction of the subject-matter of the suit, which cannot be conferred on any court by either assumption of jurisdiction or by consent of the parties, or of either or any of them, or by request of all

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the parties to the suit. Minnesota v. Northern Securities Co., 194 U. S. 48, 62, 24 Sup. Ct. 598, 48 L. Ed. 820; Mansfield, etc., v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; Parker v. Ormsby, 141 U. S. 81, 11 Sup. Ct. 912, 35 L. Ed. 654.

[3] When diversity of citizenship is the ground of federal jurisdiction, if diversity of citizenship does not in fact exist, there is an entire absence of jurisdiction, which cannot be waived by the parties, and the court will dismiss of its own motion. Shaw v. Quincy, etc., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; Empire Coal Co. v. Empire Mining Co., 150 U. S. 163, 14 Sup. Ct. 66, 37 L. Ed. 1037.

[4] Section 52 (chapter 4) of the Judicial Code (Comp. St. 1916, § 1034) provides that—

"When a state contains more than one district [and New York contains four districts], every suit not of a local nature, in the District Court thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the state, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides."

This provision relates to suits and actions in personam, and excludes actions of a local nature. In suits not of a local nature, if there be but one defendant, he may waive being sued in the wrong district, or consent to being sued anywhere; but when there are two or more defendants, residing in different districts of the state, then to reach the defendants not residing in the district where the suit is brought it must be brought as the statute directs, unless the other defendants waive or consent.

[5-14] Section 54 of the Judicial Code (Comp. St. 1916, § 1036) provides for the bringing of a suit of a local nature when the defendant resides in a different district in the same state from that in which the suit is and must be brought, for suits of a local nature must be brought in the district in which the subject-matter of the suit is located or situated, and section 54 provides that in such case the plaintiff may have original and final process against the defendant in any district of the state in which such defendant resides.

Then comes section 55 of the Judicial Code (Comp. St. 1916, § 1037), which reads as follows:

"Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in the District Court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted."

Here we have a provision for the bringing of a suit of a local nature in either of two or more districts in the same state, and such right and jurisdiction is limited to cases where "the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state." This means of course the land and buildings thereon which, as here, is the subject-matter of the suit, or, if there be no land, when the subject-matter is of a fixed character,

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such as fixtures attached to real estate, or buildings or structures rightfully erected on land not owned by the party, and which may be removed by the party erecting them. In such a case the suit may be brought in either district of the state where such property—"subject-matter"—is in part situated. Leasehold interests in land are personal property. Eidman v. Baldwin, 206 Fed. 428, 430, 124 C. C. A. 310 (C. C. A., 2d Circuit). A lease of real estate for a term of years is personal property. Broadwell v. Banks (C. C.) 134 Fed. 470.

In 3 Pom. Eq. Jur. § 1318, it is said:

"Where the suit is strictly local, the subject-matter specific property, and the relief, when granted, such that it must act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated. Northern Indiana R. Co. v. Michigan Cent. R. Co., 15 How. 233, 242 [14 L. Ed. 674]."

In Baltimore Building & Loan Association v. Alderson, 90 Fed. 142, 32 C. C. A. 542, the case and holding of the court was as follows:

"A resident and citizen of Maryland, who was a stockholder in a West Virginia corporation, brought a suit in the federal court in West Virginia against the corporation for the appointment of a receiver for its property, which was situated in Maryland, with authority to complete and furnish an unfinished hotel building thereon, and to issue receiver's certificates therefor. Lienholders who were citizens of Maryland were made defendants, but in an amended bill only the corporation was named as defendant. A receiver was appointed, who completed the building, issuing receiver's certificates for the cost. The Maryland lienholders, on their application, were permitted to become parties and to prove their liens. Under a subsequent order the property was sold, and an order distributing the proceeds made, which gave the receiver's certificates priority. *Held*, that the lienholders were necessary parties to the suit, and being citizens of the same state as complainant, and the property being situated outside of its district, the court was without jurisdiction, and the entire proceedings were coram non judice and void."

That decision rests in fact on the proposition that the federal court in the district of West Virginia where the corporation was domiciled had no jurisdiction over the real property of such corporation situated in the state of Maryland and could not confer power on its receiver appointed in West Virginia to incumber that property by receiver's certificates. The court said:

"It is more questionable whether the court in this case could put its receiver in control of realty situate in another district. * * * But an order appointing a receiver of realty has no extraterritorial operation, and cannot affect the title to real property which is located beyond the jurisdiction of the court by which the order was made. See Schindelholz v. Cullum, 5 C. C. A. 301, 55 Fed. 885, and 12 U. S. App. 242. See, also, Booth v. Clark, 17 How. 322 [15 L. Ed. 164]. In the case before us a receiver was appointed solely to take charge of and manage realty in another district, notwithstanding the fact that certain indispensable parties were not within the jurisdiction of the court. An order for sale of the same realty was made; the property not being within the jurisdiction, and the parties not being legally present. The suit was of a local nature; its object being, as stated in the original bill, to have a receiver appointed to take charge of an hotel in Maryland, with authority to borrow money on receiver's certificates to complete and furnish it, and then to lease it to a tenant. The amended bill, filed after the issue of the receiver's certificates, states its object to be the continuance of the possession and charge of the hotel property by the receiver until the sale

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asked for was had. The whole proceeding was coram non judice. The receiver was authorized to incumber property, outside of the judicial district of the court which appointed him, with debts declared to be prior to the vested liens; the holders of these liens not consenting, and not being within the jurisdiction of the court."

In Schindelholz v. Cullum, 55 Fed. 885, 889, 5 C. C. A. 293, 301, the court said:

"But an order appointing a receiver of realty has no extraterritorial operation, and cannot affect the title to real property which is located beyond the jurisdiction of the court by which the order was made. Booth v. Clark, 17 How. 322–328 [15 L. Ed. 164]. Such orders, therefore, only operate in personam, and upon those persons who are so related to the court, either as parties to the litigation, or by virtue of residence and citizenship, that they are bound to yield obedience to its orders."

In 1 Clark on Receivers, p. 78, § 53, the same is said.

In 34 Cyc. 484, it is said:

"And the rule, broadly stated, may be said to be that a receiver's power is only coextensive with that of the court which gave him his character, and cannot be asserted as a matter of right beyond the territorial jurisdiction of such court."

In Booth v. Clark, 17 How. 322, 328 (15 L. Ed. 164), it is held:

"An order appointing a receiver of realty has no extraterritorial operation, and cannot affect the title to real property which is located beyond the jurisdiction of the court by which the order was made."

This case of Booth v. Clark was expressly approved in Hale v. Allinson, 188 U. S. 56, 68, 23 Sup. Ct. 244, 47 L. Ed. 380, and again in Great Western M. & M. Co. v. Harris, 198 U. S. 561, 574, 576, 577, 25 Sup. Ct. 770, 49 L. Ed. 1163. In its opinion in the Harris Case the Supreme Court says:

"It will thus be seen that the decision in Booth v. Clark rests upon the principle that the receiver's right to sue in a foreign jurisdiction is not recognized upon principles of comity, and the court of his appointment can clothe him with no power to exercise his official duties beyond its jurisdiction. The ground of this conclusion is that every jurisdiction, in which it is sought by means of a receiver to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein, and not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court or its approval as to the officer who shall act in the holding and distribution of the property recovered. * * * It is doubtless because of the doctrine therein declared that the practice has become general in the courts of the United States, where the property of a corporation is situated in more than one jurisdiction, to appoint ancillary receivers of the property in such separate jurisdictions. It is true that the ancillary receiverships are generally conducted in harmony with the court of original jurisdiction, but such receivers are appointed with a view of vesting control of property rights in the court in whose jurisdiction they are located. If the powers of a chancery receiver in the federal courts should be extended so as to authorize suits beyond the jurisdiction of the court appointing him, to recover property in foreign jurisdictions, such enlargement of authority should come from legislative and not judicial action."

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In Northern Ind. R. Co. v. Mich. Cent. R. Co., 15 How. 233, 242 (14 L. Ed. 674), the court said:

"The jurisdiction of the Circuit Court of the United States is limited to controversies between citizens of different states, except in certain cases, and to the district in which it sits. In this case we shall consider the question of jurisdiction in regard to the district only. In all cases of contract, suit may be brought in the Circuit Court where the defendant may be found. If sued out of the district in which he lives, under the decisions he may object; but this is a privilege which he may waive. Wherever the jurisdiction of the person will enable the Circuit Court to give effect to its judgment or decree, jurisdiction may be exercised. But wherever the subject-matter in controversy is local, and lies beyond the limit of the district, no jurisdiction attaches to the Circuit Court, sitting within it. An action of ejectment cannot be maintained in the district of Michigan for land in any other district. Nor can an action of trespass quare clausum fregit be prosecuted, where the act complained of was not done in the district. Both of these actions are local in their character, and must be prosecuted where the process of the court can reach the locus in quo."

In the instant case the real property, plant, and business of the defendant corporation is not where the process or judgment of the court in the Southern District can reach it, for it is beyond its jurisdiction in the Northern District of New York. The District Court in the Southern District cannot take possession of and run that business and plant, for no part of it is in that district.

These cases settle beyond all controversy the proposition that the receivers appointed in the District Court in the Southern District of New York had no right or power to take possession of the property and business of the defendant corporation in the Northern District, or to execute and deliver receiver's certificates and make them a lien or charge on the property of such corporation situate in that district.

It is equally clear that the District Court in the Southern District of New York is not the court of main and principal jurisdiction. It will hardly be contended, I think, that a creditor, by going with the defendant, a corporation, and represented by its president, into a district where it does no business, such as it was organized to carry on at its domicile in another district in the same state, and where it has no property, except a small bank account, and where it rents two or three small offices for selling stock of the company, and there in the district foreign to its domicile, acting in concert with defendant, obtaining the appointment of a receiver, draws to the court of that district the main and controlling power and jurisdiction in administering the assets and affairs of the corporation, when it appears and cannot be denied (1) that the domicile of the defendant corporation was and is in such other district; (2) that at such domicile in such other district the main offices and place of business were and are located in fact and by the article of incorporation; (3) that in such other district all the real estate and personal property of the corporation, except a small bank account and a lease of three small office rooms, such property at the domicile aggregating in value from $300,000 to $500,000, was and is situated; and (4) that all its manufacturing, it being a manufacturing corporation, was and is carried on at such domicile in such other district.

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This suit is one to conserve and protect the assets of the corporation and to protect all interests, and it would seem plain enough that such a suit is one of a local nature, as the avowed purpose of the bill is, through a receiver, to take hold of, protect, and preserve the assets, real and personal, carry on the business, and it may be dispose of same and distribute the proceeds to creditors and stockholders. The object of the action cannot be accomplished, unless the court takes the property into its custody and possession, and this it cannot do unless it has jurisdiction of it, power to take hold and manage it, and dispose of it, not merely direct the corporation in the matter as to its management and disposition. The court must operate on the property itself directly, and not by directing and coercing the defendant corporation. In V. & G. R. Co. v. Atlanta & F. R. Co. (C. C.) 49 Fed. 608, 15 L. R. A. 109, it was expressly held that such an action is one of a local nature. In Pomeroy's Equity Jurisprudence (3d Ed.) § 1318, it is said:

"On the other hand, where the suit is strictly local, the subject-matter is specific property, and the relief when granted is such that it must act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated."

Such is this case. On this subject, see Columbia River Packers' Ass'n v. McGowan, 219 Fed. 376, 377, 134 C. C. A. 461, where jurisdiction was sought to be sustained over property in another district and state on the ground the court had jurisdiction of the parties. The court held jurisdiction of the parties did not give jurisdiction of the subject-matter of the suit.

We come, then, to the remaining proposition: Was there any property of a fixed nature or character, within the meaning of the statute, in the Southern District of New York, where the suit was instituted, for, if not, there was no jurisdiction, as the suit could not be brought there by consent of defendant? That a bank account is property of a fixed nature or character cannot be claimed with any degree of plausibility. The money deposited becomes the property of the bank, and the relation between the bank and depositor is simply that of debtor and creditor. The bank in which the alleged $4,000 was deposited owed the defendant corporation that amount of money. The debt is a mere chose in action, and not property of a fixed character, within the meaning of the statute.

What of the lease of the three small rooms in one of the large office buildings of the city? On the appointment of receivers they are at liberty to take possession of rooms rented, and occupy until they shall determine whether to retain or abandon, or to abandon at once. They are under no obligation to retain and occupy. It is not even shown or alleged here that they could assign—that is, sell the lease. It is not shown it was a written lease. If assignable, such a lease can be sold like any other article of personal property, for it is personal property, as we have seen, and if not assignable, or whether assignable or not, it is optional with the receivers to abandon it. Sunflower Oil Co. v. Wilson, 142 U. S. 313, 322, 12 Sup. Ct. 235, 35 L. Ed. 1025; Quincy, etc., Railroad Co. v. Humphreys, 145 U. S. 82, 99, 12 Sup.

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Ct. 787, 36 L. Ed. 632; 1 Clark on Law of Receivers, p. 597, § 521; Dietrich v. O'Brien, 122 Md. 482, 89 Atl. 717; Empire Distilling Co. v. McNulta, 77 Fed. 700, 23 C. C. A. 415; In re Mullings Clothing Co., 238 Fed. 58, 65, 151 C. C. A. 134, L. R. A. 1918A, 539; Intercontinental Rubber Co. v. Boston & M. R. R. (D. C.) 245 Fed. 127. The lease is a mere contract, which the receiver in equity cases may affirm or disaffirm. Penn Steel Co. v. N. Y. City Ry. Co., 198 Fed. 721, 728, 117 C. C. A. 503 (C. C. A., 2d Circuit), and cases cited in 1 Clark on Receivers, p. 597. I am unable to find any case, and am not pointed to any, where it is held that a lease of rooms is "property of a fixed nature or character." Property of a fixed character must be of the kind known as "personal property of an immovable character." 32 Cyc. 666, where it is said:

"To define personal property as consisting of movables is not, even in the sense of things personal, strictly accurate; for there may be personal property of an immovable character, such as growing crops, standing trees, sold, but not actually severed from the soil, and buildings and other structures affixed to the soil, but with the understanding that they may be removed."

In this case creditors with upwards of $100,000 of claims against the defendant corporation are protesting in this court, and challenging the jurisdiction of the United States District Court in the Southern District of New York to appoint receivers of and over the property of the defendant in the Northern District of New York, and take possession of, manage, and eventually sell same, and administer the proceeds, or to authorize receiver's certificates and make same a lien or a charge on such real property. These creditors claim and insist that the court in the Northern District of New York, where substantially all the property is situated, and where all of the real property and all the property of a fixed character is situated, and where the domicile of the corporation is, and where all the manufacturing business is being carried on, cannot and should not entertain or exercise any ancillary jurisdiction, treating the District Court in the Southern District of New York as a court of original and primary jurisdiction, and its orders of any validity whatsoever, and so merely ratify, or undertake to ratify, and approve and validate orders made in that district respecting the property in the Northern District and receiver's certificates issued under such orders.

These creditors insist that this court cannot under the circumstances validate such orders and that on a proper bill in equity it should exercise its own primary and independent jurisdiction over the subject-matter, and that if it does not it is refusing to perform its duty, exercise its jurisdiction, and is abrogating in favor of the District Court in the Southern District, a thing it cannot legally do. That course of exercising original jurisdiction this court has offered to pursue, and is willing to pursue, and regards it its duty to pursue, but is met by the proposition that, if it acts at all, it must exercise ancillary powers and jurisdiction only, and treat the court in the Southern District of New York as the court of principal and primary jurisdiction, and recognize the power and jurisdiction of that court to appoint receivers of the property in the Northern District, to manage it under direction of that court and authorize them to issue receiver's certificates (which

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they have done) and make such certificates a charge and lien on such property in the Northern District.

It is also insisted that as the defendant corporation has voluntarily appeared in the suit brought in the Southern District and admitted all the allegations of the complaint, the question of jurisdiction and power of that court cannot be raised or questioned by other creditors, and that this court cannot take notice of the facts when brought to its attention; in other words, that it must exercise an ancillary jurisdiction only, and in a suit the subject-matter of which is wholly in the Northern District, for the reason the defendant corporation consented to be sued in the Southern District and has appeared and submitted to the jurisdiction. This, of course, assumes that the consent of the defendant gave jurisdiction to the court in the Southern District over a subject-matter not otherwise within its jurisdiction, but constituting a local action, and which subject-matter is wholly in the Northern District. This I do not understand to be the law. It is the duty of this court to exercise its power and jurisdiction, when it has jurisdiction and is properly called upon to act, and to exercise its discretion the one way or the other in discretionary matters. A court can be compelled to act the one way or the other in matters properly before it, for it is its duty so to do; but it cannot be compelled to make a particular or specific decision one way when it has power or discretion to act the other.

Phelps v. McDonald, 99 U. S. 298, 308, 25 L. Ed. 473, may be misleading, unless properly read in connection with the facts. That was a suit to compel the doing by defendant of a certain act with respect to certain property not within the jurisdiction of the court, and the court held that in such case the defendant, who was within the jurisdiction of the court, could be compelled to obey the order of the court respecting same. The syllabus properly expresses the breadth and effect of the decision. That was not an attempt by the court in a suit in equity to take possession of, hold, manage, and dispose of property, real and personal, which was beyond its jurisdiction for the benefit of creditors and stockholders, but to act on the person of the defendant. Such, also, are the cases of Philadelphia Co. v. Stimson, etc., 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570; and Stone v. United States, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127. An action to restrain a trespass is quite different from an action to recover the value of timber.

In Picuet v. Swan, 5 Mason, 35, 40, Fed. Cas. No. 11134, Story, J., said:

"A court created within and for a particular territory is bounded in the exercise of its power by the limits of such territory. It matters not whether it be a kingdom, a state, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extraterritorial; if the latter, then the judicial interpretation is that the sovereign has chosen to assign this special limit, short of his general authority. It was doubtless competent for Congress to have authorized original as well as final process to have issued from the Circuit Court and run into every state of the Union. But it has conferred no such general authority." We must, therefore, determine the territorial extent of the jurisdiction of the federal courts from the United States statutes and decisions.

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And in that case, as in Johnson v. Gibson, 116 Ill. 294, 6 N. E. 205, and Tenth Nat. Bank v. Construction Co., 227 Pa. 354, 362, 76 Atl. 67, 136 Am. St. Rep. 884, it is expressly held that—

"When a court of equity attempts to act directly upon property, whether real or personal, by its decree, it is, in the absence of statutory regulation, essential to the power of the court to act that the property to be affected be within the territorial jurisdiction of the court."

And in Johnson v. Powers, 139 U. S. 156, 159, 11 Sup. Ct. 525, 526 (35 L. Ed. 112), it is held:

"A judgment in rem binds only the property within the control of the court which rendered it."

"Courts may not seize property without jurisdiction, and then claim jurisdiction over the property because it is in the possession of the court." Hawes v. First National Bank, 229 Fed. 51, 59, 143 C. C. A. 645, 653 (C. C. A., 8th Circuit).

And in that case it is also held that—

"Where a court appointing a receiver had no jurisdiction, it cannot claim jurisdiction over the property seized without jurisdiction and pay costs and expenses of the receivership therefrom."

Also held:

"That although no question of jurisdiction was raised by the parties, it was the duty of the court to take notice of the defect." 1 Clark on Receivers, § 70, p. 97.

The fact that the receivers appointed by the District Court of the Southern District of New York have taken actual possession of the plant, real estate, and personal property of the defendant corporation at Fulton, in the Northern District of New York, and are running the plant, does not give that court jurisdiction, or even possession of the property; nor does that fact require this court in the Northern District, or authorize it, to exercise ancillary jurisdiction. The court in the Northern District has full and complete jurisdiction notwithstanding, if it had such jurisdiction in the first instance, and the court in the Southern District did not. It is the same question, viz.: Was there property of a fixed character in the Southern District? The property is still within the Northern District of New York, where it always has been. No part of that property has been removed to the Southern District.

Lewis et al. v. American Naval Stores Co. (C. C.) 119 Fed. 391, decided in December, 1902, is relied on by the complainant in this suit; but the case presents no such questions as are involved here. In that case the defendant, American Naval Stores Company, was a corporation organized under and pursuant to the laws of the state of New Jersey, but it carried on no business in that state, and, so far as appears, had no property in that state. This corporation had complied with the laws of the state of Alabama to enable it to do business in that state, and had designated a person there on whom service of process could be made. The assets of the corporation consisted of real estate, part of which was situated in the Southern District of Alabama and the remainder in the Eastern District of Louisiana. This fact

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alone gave to the District Court of either district jurisdiction of the subject-matter, as we have seen. It also had personal property in Florida, Illinois, Kentucky, and Alabama. D. R. Lewis, a citizen of North Carolina, and W. P. Lewis, a citizen of the Southern District of Alabama, on the 25th day of September, 1902, filed a bill in equity in the United States Circuit Court of the Southern District of Alabama, where a substantial part of the real estate of the corporation and some of its personal property were located, and asked a receiver. The defendant American Naval Stores Company appeared in that action and filed its answer, admitting the allegations of the complaint and consenting to the appointment of a receiver. Thus there was jurisdiction in that court of both the defendant and of the subject-matter of the suit. A receiver was appointed September 26, 1902, by one of the Circuit Judges, pursuant to the prayer of the bill, and such receiver duly qualified. On that day, September 26th, an ancillary bill in the same matter for the same relief was forwarded to be filed by the same plaintiffs against the same defendants in the Eastern District of Louisiana, where the balance of the property of a fixed character, real estate, was located, and an order was made assuming ancillary jurisdiction and appointing the same receiver, etc. This ancillary bill was filed September 29th. September 29 and October 3, 1902, similar ancillary bills were filed by the same plaintiffs in the United States District Courts for Mississippi, Kentucky, and Illinois, where personal property was located. In all these proceedings the defendant corporation appeared and answered, admitting the allegations of the complaint. The creditors of the defendant were all in Florida, Alabama, and Louisiana. The same receiver was appointed in the several ancillary suits as in the main suit in Alabama. September 26, 1902, one Pearce, a citizen of Alabama, filed a petition against such defendant corporation, also asking the appointment of a receiver, in the state court of Louisiana, and, service as required by the laws of that state having been made, a receiver was appointed by the state court of Louisiana, on the 27th day of October, 1902. On the 30th day of October, 1902, said Pearce filed a bill against the same defendant in the United States Circuit Court for the District of New Jersey. In that suit he described the proceedings in the other suits above mentioned, both in the state court of Louisiana and the several Circuit Courts of the United States, and the Circuit Court of the District of New Jersey appointed a receiver of the property of the defendant.

It is self-evident, I think, that the main and primary jurisdiction was in the United States District Court for the Southern District of Alabama. True, the jurisdiction of that court did not reach to real estate or property in other states or districts, and hence the necessity and propriety of the ancillary suits. The subsequent suit in the United States District Court of the District of New Jersey, where the corporation had no property and had not done any business, brought by Pearce, who had also brought suit in the state court of Louisiana, did not in any way affect that jurisdiction over the subject-matter situate in Alabama, or of the ancillary actions as to property in other states where commenced, there being property in each of such jurisdictions.

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The subsequent suit at the actual place of incorporation and domicile of the defendant corporation did not and could not give that court jurisdiction over the real and personal property of the corporation situated in other jurisdictions, where the courts having jurisdiction of both the parties and subject-matter had taken actual possession of the property and were proceeding to administer it. The controversy arose between the receiver appointed by the District Court in Alabama and by the courts mentioned in other states, who in ancillary actions in those courts appointed the same receiver, and the receiver appointed by the state court in Louisiana and later by the District Court of New Jersey. It will be noted that the ancillary bill was filed in the United States District Court of Louisiana September 29, and the receiver appointed there and that the receiver in the state court of that state was not appointed until October 30, 1902. In the meantime the receiver appointed by the United States District Court in Louisiana had qualified and become entitled to the possession of the property in that state, so that it was legally in the custody of that court and lawfully so. The court held:

"The Alabama federal court first obtained jurisdiction by the filing of the bill and service of process, and by first appointing a receiver, and also by obtaining, through its receiver, actual possession of the property involved before the filing of the petition and service of process thereon in the state court. By the application, therefore, of any one of the rules stated, the Alabama federal court first acquired jurisdiction; and, having acquired jurisdiction of the controversy, and possession, through its receiver, of the property involved, the subsequent proceedings and decree in the state court conferred no authority or right on the receiver appointed by the latter court to take or obtain by suit the possession of the property. Gluck & B. Rec. (2d Ed.) 97."

This, of course, was right, and accords with all the decisions.

In the instant case, if it could be properly held that the District Court of the Southern District of New York had jurisdiction to appoint receivers of the real and personal property of the defendant corporation situated in the Northern District of New York, and authorize them to take possession of and incumber same by issuing receiver's certificates, that would end this controversy; for, while it might be necessary to take ancillary proceedings, the proceedings in the Northern District in their very nature would be ancillary to the primary suit and in aid of that court. The court in that district would have jurisdiction of the parties and of the subject-matter of the suit, and in such case "jurisdiction to hear and decide the suit and cause mesne or final process to be issued and executed as fully as if the said subject-matter were wholly within" that district. The difficulty is, as I view the case, that the District Court of the Southern District had and has no jurisdiction whatever over the property of the defendant in the Northern District, for the reason there was no real estate or other subject-matter of a fixed character belonging to the defendant in the Southern District, and hence the suit could not be brought there, even by consent of the defendant, it being of a local character, inasmuch as the property to be seized and acted upon was real and personal, that is, of a mixed character, and situated wholly in the Northern District. Section 55, Judicial Code.

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If the District Court of the Southern District of New York had jurisdiction of this suit, that is, if "the land or other subject-matter (of the suit) of a fixed character" did lie partly in the Southern District, the remainder being concededly in the Northern District, I do not see any necessity for action by the court in the Northern District, for in such a case the suit—

"may be brought in the District Court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted."

That is, the fact that such real estate or subject-matter of a fixed character exists and is situated partly in the one district and partly in another of the same state gives to the court of either district full power to hear, try, and determine the case and issue mesne or final process. This must mean that the court exercising jurisdiction has full power to make interlocutory orders and decrees, as well as final ones, in the case and respecting the property. Section 55 of the Judicial Code (Comp. St. 1916, § 1037) gives full and complete jurisdiction to either court in such case. This is the plain purpose of the section, which is but a re-enactment of section 742, R. S. U. S., which was enacted May 4, 1858.

It seems to me this matter may be summarized thus:

1. This is a local action; that is, "a suit of a local nature" in equity.

2. The land and subject-matter of a fixed character lies wholly in the Northern District of New York, and no part of it lies in the Southern District of New York.

3. A bank account or a lease of two or three rooms for subsidiary office purposes does not constitute a subject-matter of a fixed character, within the meaning of section 55, Judicial Code.

4. The domicile or residence of the defendant was and is in the Northern District of New York, where its actual business offices and books are.

5. The subject-matter of the action is real estate and personal estate, and jurisdiction of the subject-matter of the suit could not be given and was not given to the District Court in the Southern District by the appearance there and answer of the defendant admitting all the allegations of the complaint.

6. The District Court in the Southern District of New York had and has no jurisdiction of the subject-matter of the action.

7. The District Court of the Northern District of New York cannot lawfully exercise ancillary jurisdiction in that suit, as the exercise of ancillary jurisdiction presupposes jurisdiction in the Southern District.

8. When want of jurisdiction of the court in the main suit appears it is the duty of the court asked to exercise ancillary jurisdiction to raise the question itself and decline to act if want of jurisdiction in that court appears. Conklin v. United States Shipbuilding Co. (C. C.) 123 Fed. 913, 917.

[15] In that case Judge Putnam, of the First Circuit, was asked to exercise ancillary jurisdiction and confirm the appointment of a receiver, and he said (page 917):

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"The first substantial question I have to consider is whether the Circuit Court for the District of New Jersey had jurisdiction in equity on the bill filed there."

Stewart v. Laberee, 185 Fed. 471, 109 C. C. A. 351, has nothing to do with the vital questions presented here. In that case a railroad corporation organized under and pursuant to the laws of the state of Washington constructed, owned, and operated a railroad in Alaska, and the railroad company owned and operated a construction company, which was also operated with its property in Alaska. An equity suit similar to the one here was brought in the District Court of the District of Alaska, and a receiver of all its property appointed by that court. The court had jurisdiction, not only of the parties, but of the subject-matter of the suit. The order appointing the receiver directed the officers of the companies to turn over to the receivers all the property of the companies, including bills, notes, accounts, and books. The defendant Laberee had been treasurer of the construction company in Alaska, and it was claimed he was indebted to it in the sum of $22,000. To recover this sum the receiver brought suit in the District Court of Alaska. Defendant pleaded that he had settled with the construction company by giving to it his notes for $6,000, and on the trial he produced notes to the company for $6,000, marked "Canceled," but at a date several months subsequent to the appointment of the receiver, and also a resolution of the board of trustees of the construction company, passed several months later, ratifying and approving the settlement of the notes for $6,000. This was the only evidence of authority to make the settlement, and there was no evidence the notes were ever delivered to the corporation, or that its manager had authority to make the settlement. This resolution of confirmation and ratification was passed at Seattle, Wash., where the company was incorporated.

The court held that the settlement, if made, was in violation of the rights of the railroad company and its creditors, and of the order appointing the receiver, which order required the notes, if in existence, to be turned over to the receiver, and that a finding by the trial court in Alaska that the alleged settlement, if made, was fraudulent and void, was warranted by the evidence. If the case is of any importance here, it is in that it holds the court in Alaska, where the companies were doing business, and where all the property was located, and where jurisdiction was obtained of both companies and also of their officers, had jurisdiction to appoint the receiver and require the delivery to him of the property, including the notes in question. This was, of course, true. That court had jurisdiction of the officer owing the debt, and he could not, after the receiver was appointed, go to the state of Washington and there settle a cause of action against him belonging to the corporation in violation of such order of the court.

The case of Horn v. Pere Marquette R. Co. (C. C.) 151 Fed. 626, has been cited as authority for the proposition that the District Court in the Southern District of New York has jurisdiction in the instant case, but, far from it, for it is a decision sustaining each proposition herein stated. That was a suit in equity concerning a railroad running through two districts of the same state, Michigan (see page 631), and the ob-

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ject of the bill was the same as here. Judge Lurton held that the suit was one of a local nature, and cited East Tenn., etc., R. Co. v. Atlanta, etc., 49 Fed. 608, 15 L. R. A. 109, supra, and Goddard v. Mailler (C. C.) 80 Fed. 422 (see pages 632, 633); that diversity of citizenship existed, as Horn was not a citizen of Michigan (page 630); that the question of being sued in the right district was out of the way, as the defendant appeared voluntarily and answered, admitting the allegations of the complaint (page 630); that the bill was one to place a great system of going railway, whose lines covered each of the Michigan districts, in gremio legis, and have same preserved and operated, etc. (page 631); that is, that the property which was the subject of the suit was situated partly in one district and partly in another district of the same state, part in the district where the suit was brought, and hence the case was covered by and within the provisions of section 742, R. S. U. S., now incorporated into the Judicial Code as section 55, and hence the learned judge said:

"Horn's bill was undoubtedly one which might be filed in either of the Michigan districts."

And (see the same page) the judge also held that on such facts jurisdiction of both the person and subject-matter of the suit, which lay in two districts of the same state, existing ancillary bills were not necessary. The second subdivision of the syllabus may be misleading, if we assume it is implied that jurisdiction of the subject-matter in a local action is given when wholly without the district wherein the suit is brought, provided the defendant appears and answers. The case itself does not so hold or suggest.

City of Shelbyville, Ky., v. Glover, 184 Fed. 234, 237, 106 C. C. A. 376, is another case where the property, the subject of the action, was partly in one district and partly in another district of the same state, and the action was local in its nature.

This court holds that on the papers it appears conclusively that the suit is one of a local nature and character, and that all the land and subject-matter of the suit of a fixed character is located and situated wholly in the Northern District of New York, and does not lie partly in the Southern District of New York, and hence this court should not and cannot properly exercise ancillary jurisdiction; and, further, that if it be true that any part of the land or other subject-matter of the suit lies partly in the Southern District of New York there is no necessity for the exercise by this court of ancillary jurisdiction or power in the suit brought in that district, as in such case the court in the Southern District has full and complete power and jurisdiction over the parties and subject-matter of the suit.

This is an important matter. It involves hundreds of thousands of dollars and the title to real estate of great value. The court in the Northern District, as we have seen, cannot validate invalid orders made by the court in the Southern District, or validate invalid receiver's certificates by ancillary proceedings.

This court is also of the opinion that, as all creditors of the defendant corporation are invited by the ancillary bill to come in and become

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parties to this suit, and have the right to come in, when they do come in and find the facts are such that there is no jurisdiction to proceed and take possession of the property and run the business, and do the things necessary to be done to carry on the suit and accomplish the purposes sought to be accomplished, they may present the facts to the court, and at least call upon it to exercise its judicial power in the premises and refuse to make orders it has no power to make. It cannot be that creditors holding over $100,000 in valid claims against this corporation, by the action of one creditor acting with the defendant, have been precluded from having a proper suit brought in the proper district and valid orders and decrees made, or from objecting to the making of invalid ancillary orders and decrees in a suit where no jurisdiction exists. If this property is to be possessed and the business continued, or the property incumbered, it should be done pursuant to valid orders and decrees, and if it is to be sold it should be sold pursuant to a valid decree, made by a court having jurisdiction to pronounce it.

This court is not informed of any case in the Supreme Court of the United States holding that in such a suit as this, or of this character, the question of the jurisdiction of the court over the subject-matter may not be raised and brought to the attention of the court at any time and by any interested party. Is it possible that creditors who come into this suit may not raise the question of diversity of citizenship and want of jurisdiction, should it be discovered that plaintiff is an actual resident and citizen of the state of New York? May they not inform the court of that fact? If the defendant has admitted that the plaintiff was a nonresident, *it* may be precluded from raising the question; but does that bar other interested parties or the court itself? This is not a question of jurisdiction over the debtor corporation—Fulton Steel Corporation. The defendant has submitted to the jurisdiction, as it had the power to do. It is a question of the jurisdiction of the court over the subject-matter, real property, which the statute does not confer on the court in the Southern District, and which no consent can confer.

Nor is this a question of the sufficiency of the bill of complaint to confer equitable jurisdiction in the proper court. It is all-sufficient in that respect. The objection goes to the right and power of the court in the Southern District to entertain the suit and adjudicate as to and respecting the subject-matter. On the facts stated it appears that Congress has not conferred the jurisdiction, and by not conferring it such jurisdiction is denied to that court. In Horn v. Pere Marquette R. Co., supra, Judge Lurton said it would lead to absurd consequences if, after the defendant had submitted to the jurisdiction of the court, other parties coming in might "reopen the matter of jurisdiction over the debtor corporation." This is, of course, true. The learned judge had taken great pains to show jurisdiction of the subject-matter. The right to be sued in a particular district or state is personal, and may be waived (Pollard v. Dwight, 4 Cranch, 421, 2 L. Ed. 666; St. Louis, etc., Railway v. McBride, 141 U. S. 131, 132, 11 Sup. Ct. 982, 35 L. Ed. 659); but jurisdiction over a subject-matter is not personal, and cannot be waived, or conferred by consent. So, if the question in an equi-

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table suit be as to the sufficiency of the allegations to confer equitable jurisdiction, it must be raised at the earliest opportunity, as, "if a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for *him* to object that the plaintiff has a plain and adequate remedy at law." Brown v. Lake Sup. Iron Co., 134 U. S. 530, 536, 10 Sup. Ct. 604, 606 (33 L. Ed. 1021). In that case, in stating the rule, the court adds what is the law and what makes the true rule:

"The above rule must be taken with the qualification that it is competent for the court to grant the relief sought, and that it has jurisdiction of the subject-matter."

In Cincinnati Equipment Co. v. Degnan, 184 Fed. 834, 842, 107 C. C. A. 158, 167, the headnotes give the rule without the qualification stated, but in the case itself the judge who wrote the opinion says:

"True, as stated in Brown v. Lake Superior Iron Co., the subject-matter must be within the jurisdiction of the court."

And also:

"We are therefore constrained to hold, for the purposes of this case, that the court below through diversity of citizenship obtained jurisdiction, not only of the parties to the original suit, but also of a subject-matter equitable in its nature and embracing admitted facts sufficient to justify the appointment of the receiver."

This court must decline to grant any ancillary order in the suit which recognizes jurisdiction in the District Court of the Southern District over the subject-matter of the suit, situated as it is in the Northern District, as it has no power so to do. To make orders as a matter of comity, which this court would be glad to do, and willingly would do, were it a question of comity, and not of jurisdiction, would only involve the situation, delay action, precipitate litigation, add expense, and, in the opinion of the court, result in disaster to a corporation and its property, when it is and should be the desire of all concerned to conserve and rescue the corporation from its financial difficulties if possible—at least bring about a successful operation of the business while in the hands of the court, and secure a sale, if necessary, at a fair price, and a division of the proceeds, without unnecessary diminution, amongst the creditors and stockholders entitled thereto.

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In re DRAG et al.

Petition of HOLMES & KELSEY CO.

(District Court, E. D. Michigan, N. D. October, 1918.)

No. 441.

1. CHATTEL MORTGAGES ⟸235—SETTLEMENT—DISCHARGE.
Whether the giving of a second chattel mortgage was accompanied by such a settlement of the previously existing indebtedness as to constitute payment thereof, and discharge the first, *held* a question of fact, to be determined in the light of all the circumstances surrounding the transactions and showing the intention of the parties.

2. CHATTEL MORTGAGES ⟸124—AFTER-ACQUIRED PROPERTY—INCLUSION.
It is the rule in Michigan that a chattel mortgage does not include after-acquired property, unless a provision to that effect is expressly included in its terms, or unless the property to which it is added is so mingled with it as not to be readily distinguishable therefrom, so, where the first mortgage including after-acquired property was discharged, such property was not embraced within the second mortgages as they did not expressly include the same.

3. CHATTEL MORTGAGES ⟸101—CONSTRUCTION—STATUTES APPLICABLE.
A chattel mortgage having been executed and performed within the state of Michigan, a bankruptcy court, in determining rights thereunder, will follow the decisions of the court of that state concerning the construction and effect of the instrument.

4. BANKRUPTCY ⟸293(4)—JURISDICTION.
Where a creditor, who claimed under its chattel mortgage exemptions to which the bankrupts were entitled out of the firm property, consented that the bankruptcy court might take possession of the property pending determination of its rights, *held* that, the bankruptcy court having properly acquired jurisdiction over such property, it might retain the same in order to determine the rights of the claimants.

5. BANKRUPTCY ⟸293(4)—JURISDICTION—CONSENT.
Where a creditor voluntarily submitted its claim to property to the jurisdiction of the bankruptcy court, and not only agreed that the referee might determine its right to the proceeds of the sale of the property, but voluntarily appeared and participated in the hearing before the referee, *held*, that it could not thereafter urge that the referee was without jurisdiction.

In Bankruptcy. In the matter of the bankruptcy of Ole Drag and Jacob Svang, doing business as copartners under the firm name of Drag & Svang. Petition by the Holmes & Kelsey Company for review of an order of the referee denying the right of petitioner to enforce a chattel mortgage against the exemptions of the bankrupts. Order affirmed.

I. S. Canfield, of Alpena, Mich., for petitioner.
L. G. Dafoe, of Alpena, Mich., for bankrupts.

TUTTLE, District Judge. This is a petition for review of an order of one of the referees in bankruptcy denying the right of the petitioner, the Holmes & Kelsey Company, which is one of the creditors of the bankruptcy partnership, to enforce a chattel mortgage

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against the exemptions of the bankrupts, now in the custody of the bankruptcy court.

In 1900 a partnership by the name of Ole Drag & Co., the predecessor in interest of the bankrupts, gave to the petitioner a chattel mortgage for $700, covering the stock of merchandise and fixtures then in its store, and also after-acquired additions to such stock, to secure an existing indebtedness of about $250 and future advances of about $450. In 1901 the mortgagor sold its business to the bankrupts, partners trading under the name of Drag & Svang, who took over the stock mentioned, subject to said chattel mortgage, which they assumed. In 1902 a settlement was made between the bankrupts and petitioner, and a new note was executed for $800, representing the indebtedness then existing from bankrupts to petitioner, and a new chattel mortgage was given to secure such indebtedness. This mortgage covered the stock of goods and merchandise then owned by the mortgagor, but did not cover any after-acquired property, except future book accounts. Two years later another settlement was made between the parties and a bill of sale covering the stock of merchandise then owned by the bankrupts was given to the petitioner for the purpose of securing its indebtedness to the latter, which had then increased to the sum of $2,800. While this instrument was in form a bill of sale, it was in fact and in law a chattel mortgage. This mortgage did not cover any after-acquired property. During the next five years the bankrupts continued to purchase goods from the petitioner, making payments from time to time.

In 1909 a voluntary petition in bankruptcy was filed. Shortly prior to the filing of such petition in bankruptcy the petitioner herein commenced replevin proceedings in one of the state courts in the city of Alpena, where both it and the bankrupts were located, to obtain possession of the stock of goods then owned by the bankrupts, which petitioner claimed under its mortgages. Soon afterwards it consented that the bankruptcy court might take possession of these goods pending the determination of its rights therein. It is conceded that, as none of the mortgages were renewed as required by law, any rights of the mortgagees thereunder are limited to the bankrupts' statutory exemptions. The petitioner then expressed its willingness to have the property thus claimed sold with the assets of the bankrupt estate at the bankruptcy sale, with the understanding that the proceeds would be paid to the person found to be entitled thereto. On the day of the sale, and just prior thereto counsel for the petitioner filed a formal objection to the sale, which stated no grounds for such objection, and which was promptly overruled by the referee as being made too late, in view of the expenses incurred and the arrangements made for such sale in reliance upon the consent of the petitioner previously given. The sale was thereupon made, and the proceeds of the exemptions retained by the referee, pending a decision on the conflicting claims of petitioner and the bankrupts. Both parties consented to have the referee determine these claims, and testimony and arguments in support of the respective claims were submitted. The referee entered an order denying petitioner any rights in these exemptions or in their proceeds. The referee found that the first mort-

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gage had been superseded by those given subsequently, that all of the merchandise belonging to the bankrupts at the time of the bankruptcy had been acquired after the giving of the last of said mortgages, and that there was no property then in existence subject to said mortgage. To review this ruling the present petition was filed.

[1] Whether the giving of the second and third chattel mortgage was accompanied by such a settlement of the previously existing indebtedness as to constitute a payment thereof, with the consequent discharge of the chattel mortgage given to secure such indebtedness, was a question of fact to be determined in the light of all the circumstances surrounding the transactions and showing the intention of the parties. Cadwell v. Pray, 41 Mich. 307, 2 N. W. 52; Brown v. Dunckel, 46 Mich. 29, 8 N. W. 537.

A careful examination of the record satisfies me that there was sufficient evidence to justify the finding of the referee to the effect that each mortgage was intended to secure a new indebtedness, supplanting the one previously existing. Each transaction constituted a settlement of the previous account between the parties. Hence the first mortgage, which was the only one covering after-acquired merchandise, was superseded and rendered inoperative by the giving of the subsequent mortgages.

[2] It is undisputed that at the time of the commencement of these proceedings none of the property located in the store of the bankrupts at the time of the execution of the last mortgage and covered by such mortgage was still in existence and owned by the bankrupts. As, therefore, the latter mortgage did not embrace any property to be acquired after the date of its execution, there was no property in possession of the bankrupts in 1909 subject to this mortgage. It is a well-settled rule in Michigan that such a mortgage does not cover after-acquired property, unless a provision to that effect is expressly included in its terms, or unless the property to which it is added is so mingled with it as not to be readily distinguishable therefrom. Fowler v. Hoffman, 31 Mich. 215; Dickey v. Waldo, 97 Mich. 255, 56 N. W. 608, 23 L. R. A. 449.

[3] This chattel mortgage having been executed and performed within the state of Michigan, this court will follow the decisions of the courts of that state concerning the construction and effect of such an instrument. Bryant v. Swofford Bros. Dry Goods Co., 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997; Title Guaranty & Surety Co. v. Witmire, 195 Fed. 41, 115 C. C. A. 43 (C. C. A. 6). There was, therefore, no error in the ruling of the referee with respect to the matter just considered, and the contentions to the contrary must be overruled.

[4] It is further urged by the petitioner that the referee was without jurisdiction to determine the conflicting claims to this exempt property, on the ground that the power of the bankruptcy court is limited to the setting aside for the bankrupts of their exemptions. It will be noted that this exempt property came into the possession of the bankruptcy court with the consent of the petitioner. It would seem, therefore, that, having acquired jurisdiction over such property, the bankruptcy court might properly retain such jurisdiction

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in order to determine the rights of these adverse claimants thereto. Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Lucius v. Cawthon-Coleman Co., 196 U. S. 149, 25 Sup. Ct. 214, 49 L. Ed. 425; In re National Grocer Co., 181 Fed. 34, 104 C. C. A. 47, 30 L. R. A. (N. S.) 982 (C. C. A. 6).

[5] Aside, however, from this question, the record clearly shows that the petitioner also voluntarily submitted its claims to this property to the jurisdiction of the bankrupcty court. It not only agreed that the referee might determine its rights to the proceeds of the sale thereof, but it voluntarily appeared and participated in the hearing before the referee concerning this very dispute between it and the bankrupts. It failed to raise the question of jurisdiction until after the decision of the referee adverse to it, and by its actions and language plainly indicated its consent to such jurisdiction. It therefore manifestly waived the right to afterwards urge such objection.

For the reasons stated, the order of the referee is affirmed.

THE DOROTHY.

THE ELM BRANCH.

(District Court, E. D. Virginia. December 19, 1918.)

COLLISION ⟸75—STEAM AND SAILING VESSELS—NAVIGATING AT NIGHT.

A steamship navigating at night without lights *held* solely in fault for collision with a schooner, for failing to see the latter's lights until a mile distant, when she showed her own lights, and for continuing her course and speed after she observed that the schooner was wearing ship.

In Admiralty. Libel for collision by William C. Reid, managing owner of the American schooner Dorothy, against the British steamship Elm Branch, with cross-libel. Decree for libelant.

Hamilton Anderson, of New York City, and John W. Oast, Jr., of Norfolk, Va., for the Dorothy.

Hughes, Little & Seawell, of Norfolk, Va., for the Elm Branch.

WADDILL, District Judge. A few minutes after midnight of the 26th of June, 1917, a collision occurred between the schooner Dorothy and the British steamship Elm Branch, off the northwest coast of Haiti; the libelant, the Dorothy, describing the same as happening about 35 miles northerly of Mole St. Nicholas, and the cross-libelant, the Elm Branch, about 28 miles from Cape Maysi.

The Dorothy was a four-masted American schooner, on a voyage from Puerto Columbia to Monte Christo, light, to secure a cargo from the last-named port to New York. The Elm Branch was a large ocean-going steamship, on a voyage from the west coast of Africa, through the Panama Canal, via Kingston, to Norfolk, Va., for orders.

The Dorothy's case is that at the time of the collision the weather was clear, with a strong wind from east of north, and high seas running; that she was sailing on the port tack, and concluded, after carefully searching for vessels or lights in her vicinity, and finding none,

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to wear ship by putting her helm hard aport, which caused her to make a rapid swing from port to starboard, and while under the influence of the strong wind and sea, and so swinging, a white light was suddenly flashed a mile away, nearly ahead; that shortly thereafter a red light was flashed; that the schooner, which was still swinging to starboard, continued to complete the maneuver, which was the only thing she could do to bring her into the wind. Meantime the steamship was swinging from her starboard to port; that shortly thereafter the vessels reached a nearly parallel course, and came together, the bluff of the starboard bow of the steamship colliding with the bluff of the port bow of the schooner, with great force, causing serious damage.

The Elm Branch's position is that, while steering northeast half east, with her lights darkened by order of the British admiralty, and because of a wireless warning that day received as to an enemy raider in that vicinity, she sighted the green light of a sailing vessel about two points on her port bow, approximately a mile distant; that she immediately switched on her lights, the positions of the two vessels then being that the schooner was showing the steamer her green light, and the steamship showing the schooner her red light; that the steamship's helm was immediately put hard astarboard, so that the ship was proceeding to port, the sailing vessel at the time being two points on the starboard bow of the steamship; that when about half a mile apart it was observed that the schooner was apparently wearing ship, and changing her course to starboard; that previous to the latter maneuver of the schooner the positions and courses of the two vessels avoided risk of collision; that, upon the schooner changing her course, the steamship's helm was kept hard astarboard in an endeavor to bring her round and clear; but the schooner, having jibed, bore down under press of sail, struck the steamship on the starboard, bumping alongside, and causing damage to both vessels.

The conflict in the testimony in this case is not very great; indeed, the parties are in agreement as to the essential facts bearing upon the merits of the controversy. The schooner admits that, upon observing the white light of the steamer as it was flashed about a mile away, she had departed from her port tack about two points; that she thereafter rapidly fell off under the effect of the wind and sea, which she says was the only thing she could do in the circumstances; that some half minute to a minute elapsed between observing the ship's white light and her red light, that the change from red to green was from two to three minutes, and the green light showed up about a minute and a half before the collision.

The steamship, on the other hand, admits seeing the green light of the schooner about two points on her port bow when a mile away; that, without abating her speed, she starboarded and went to port; that when the vessels were about half a mile apart the schooner showed her red light, and that she still kept her speed, with her wheel hard astarboard, until the vessels came in collision; also, that her lights were covered until she had seen the green light of the schooner about a mile away, when she suddenly switched the same on, and that she had not theretofore observed the lights of the schooner.

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From these undisputed facts, the court has to determine the responsibility for the collision, which is not difficult, having regard to the rules of navigation properly governing the vessels in their then situation. The steamship was charged with the duty of avoiding as well as risk of collision as collision with the schooner. She had seen the green light of the schooner a mile away, and she should have done more, considering the condition of the weather and sea, than continue full speed ahead under hard astarboard helm. The fact that the lights of the ship were not exposed to the schooner until the vessels were a mile apart should have made her the more careful in her navigation. She was charged with knowledge of the fact that the schooner had been deprived of the opportunity of earlier observing the ship's lights. Under the international rules of navigation—article 2, §§ (a), (b), and (c)—her white light should have been observed at least five miles, and her colored lights at least two miles, away. The mere fact that the placing of the ship's helm to starboard, upon observing the schooner's green light, was a proper maneuver at the moment, would not warrant her in so doing, and continuing at full speed ahead. It so happened, although the schooner was showing her green light, which indicated she was going to port, that she had actually fallen off two points from the wind on the port tack, and was wearing ship with a view of going about, and rapidly changed her course from green to red, which tended to throw the vessels together, instead of apart, making the steamship's course cross that of the sailing vessel, unless the steamship again changed her course. This risk the steamship took, by continuing at full speed ahead under her starboard helm, failing to take into account the wind, weather, and sea conditions, and possible dangers and eccentricities of the two ships navigating, with the knowledge on her part of the ignorance of the schooner's navigators as to her presence.

The steamship is, moreover, at fault for continuing at full speed ahead under her starboard helm, after observing the change of course of the schooner, while wearing ship and jibing, changing her course from green to red; the red light having made its appearance when the vessels were half a mile apart. The steamship could at that time, in the judgment of the court, have avoided the collision by hard aporting her wheel, and not continuing to port under a starboard helm; and, in any event, if there was doubt about this, she should have sounded danger signals, slackened her speed, or stopped or reversed, and not have continued on her original course full speed ahead, and across the schooner's course. The latter maneuver should certainly not have continued after the schooner's red light showed up. The schooner had the right, if, in the judgment of her navigators, it was proper, to wear ship and change from the port tack at the time she did. There was nothing to indicate that any vessel was near. The Elm Branch admits that her lights were obscured at the time, and she should not escape responsibility, or call upon others to share her losses, by finding fault with the vessel for the collision, on the theory that the latter, having departed two points from her port tack, upon seeing the steamship's white light, ought to have returned to her

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port tack. The schooner says it was impracticable to do other than what she did; that is, wear ship and continue on the starboard tack. At this juncture, to have the burdened vessel, charged with avoidance of risk of collision, continue her course and speed, and relieve the schooner, the privileged vessel, from obligation to keep her course and speed, and require her to change to another course, would be to impose on her a highly improper and most dangerous act, in positive violation of the plain maritime regulations governing the situation. To hold the schooner liable for this collision, or require her to share in the loss incurred thereby, would be to reverse the well-known rules of the road governing the navigation of steam and sail vessels, by placing the burden upon the sailing vessel, the privileged one, and not the steamship, the burdened one.

Further, the steamship cannot be said to be free from fault for failing to see the lights of the schooner earlier. The regulations prescribe that the lights shall be such as can be seen two miles away. The ship's lights were obscured, but the schooner's lights were properly set and burning brightly, and ought to have been seen by the steamship before getting within a mile of her; and the ship was charged, knowing that she herself was running without visible lights, with maintaining a specially vigilant lookout for other persons lawfully navigating those waters, in order that they might not be run into.

An exceedingly interesting and important legal question was presented in this case, both by exception of the schooner to the answer and cross-libel, and upon the introduction of testimony by the steamship, as to whether the ship was not relieved from conforming to the international rules of navigation, by reason of special instructions of the British admiralty, under which it is claimed she was navigating; and the further question was raised as to whether or not this defense could be interposed, and also whether the special orders of the British admiralty were sufficiently and legally proved, to permit them to be used as evidence in this case. In the view taken by the court, assuming, though not deciding, that the contentions of the ship regarding the effect of these special regulations are binding, and the proof offered sufficient, still it does not materially affect this case, as the liability of the steamship is indisputably established from its acts of omission and commission, had in connection with her navigation as hereinbefore stated, after the presence of the schooner became known, as well as for her failure to observe it earlier.

It follows that the steamship Elm Branch is solely responsible for the collision, and a decree so ascertaining will be entered on presentation.

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BARNETT OIL & GAS CO. v. NEW MARTINSVILLE OIL CO.

(District Court, N. D. West Virginia. December 20, 1918.)

No. 43.

1. CONTRACTS ⟸94(5)—FRAUDULENT REPRESENTATIONS—PERSONS LIABLE.
The law will not permit one to defend his making false and fraudulent representations to secure a contract on the ground that his dupe ought not to have trusted him and believed his falsehoods.

2. CONTRACTS ⟸95(1)—VALIDITY OF CONSENT—DURESS.
What constitutes duress, under the more liberal modern views, depends upon the particular facts, and in each case the court, in the exercise of a sound discretion, must endeavor to determine the question in accord with right and justice.

3. MINES AND MINERALS ⟸64—CONTRACTS INDUCED BY FRAUD—RATIFICATION—DURESS.
A corporation, induced by fraudulent representations to contract for purchase of an oil lease at several times its value, and which in good faith made the same representations to purchasers of its stock, *held* not estopped by ratification, because it failed to repudiate the contract immediately on discovering the fraud, but made further payments, until by other purchases it brought its stock to the value represented and avoided insolvency, but to have acted under such duress as to render it inequitable to permit the seller to enforce the contract for more than the actual value of the property.

In Equity. Suit by the Barnett Oil & Gas Company against the New Martinsville Oil Company. Decree for complainant.

John A. Howard and Jas. M. Ritz, both of Wheeling, W. Va., for plaintiff.

Robert McV. Drane, of Piedmont, W. Va., Osman E. Swartz, of Fairmont, W. Va., and E. Bryan Templeman, of Clarksburg, W. Va., for defendant.

DAYTON, District Judge. This case has been submitted for final hearing after all the evidence has been taken in open court and time given counsel to file briefs. Such briefs have been filed, and they, as well as the ones filed in relation to the preliminary motions heretofore made in the cause, have been most carefully considered. I have already filed two memorandum opinions as to the disposition of these preliminary motions.

The contention arising in this case grows out of the sale made by the defendant to the plaintiff of an oil lease in Wetzel county, this state, known as the Morgan lease. The plaintiff claims that this sale was effected by and through the effort of W. T. Robinson. Plaintiff contends he was acting as the agent for defendant in effecting this sale. Defendant denies this agency. Plaintiff further contends that Robinson induced Barnett, acting as agent for and in its behalf, to make the contract of purchase by gross fraud and misrepresentation. The defendant denies this, and in addition insists that, if fraudulent and false misrepresentations were made by Robinson in securing the contract, afterwards, after it had been fully informed of such,

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the plaintiff ratified it, secured additional contracts, in which the times of payment were changed and extended, instead of repudiating the contract promptly on discovery of its condition and value, and the falsity of Robinson's representations of it, whereby it is estopped from further remedy on account of such fraud and misrepresentation, if any there were.

There is no question as to the change of the terms and conditions of the contract after the plaintiff was informed of the true oil and gas yielding production from the wells situate on the lease. In fact, the whole character of the original contract was changed. This original contract bore date February 29, 1916. By its terms Barnett undertook for $350,000 to purchase all the capital stock of the defendant company, for which he was to pay $10,000 March 4, 1916, and $10,000 on Saturday of each week thereafter until the whole purchase price was paid. If a default of seven days was made in any payment, he was to forfeit all previous payments made to the New Martinsville Oil Company, and the stock certificates for the stock were to be returned to its stockholders, from whom they had been obtained. The stock certificates of defendant, indorsed in blank, so as to properly transfer them, were to be delivered to Robinson as trustee for the New Martinsville Oil Company, and he was to deposit them in the West Virginia Bank at Clarksburg in escrow, and in his name, to be turned over to Barnett only when all payments had been made. In the meantime, while the management and control of the property was to pass immediately to Barnett, no oil produced by the property was to be sold, except by consent, and if Barnett defaulted in any payments this oil was to belong and go to the New Martinsville Company, as well as all sums that had been paid. This contract was executed solely by J. W. Barnett, W. T. Robinson and A. R. Stallings.

On March 7th following it was modified by an agreement, signed only by the same three parties, to the effect that if Robinson and Stallings could not secure all the stock, but could deliver more than 60 per cent. of it, Barnett was to take and pay for the same at a proportionate rate of $350,000 for the whole. Barnett paid, under this contract, a total sum of $25,000. That Barnett was in fact acting for the plaintiff, the Barnett Oil & Gas Company, is not denied. He, C. W. Barnett, and L. M. Stephens were the leading organizers of that company, and it seems, immediately after this contract was signed, proceeded to advertise, in connection with Clark, a New York broker, its stock for sale, asserting and setting forth that it owned, among other property, this Morgan lease, having a settled daily production of 255 barrels of oil per day, and did sell enough thereof to realize the sum of $25,000, which was paid as above stated upon this contract.

It is claimed by plaintiff that these representations were made by Stephens and Clark, the broker, in good faith, upon the representations made by Robinson to Barnett and Stephens; that upon consultation with counsel they discovered and realized that they, under the contract, had in fact no direct right nor title whatever to this Morgan lease; that their purchase was solely that of the stock of the New

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Martinsville corporation, and that by failure to meet the weekly payments this stock could be withdrawn and their payments forfeited; that for this to occur would involve them in disgrace, financial embarrassment, and possibly subject them to criminal prosecution. Howard, their attorney, undertook to relieve this grave and serious condition. He secured a meeting of the stockholders to be had on April 24, 1916, at which time an agreement was arrived at whereby the property, real and personal, of the defendant, instead of its stock, was to be transferred and sold to the plaintiff corporation, and this agreement was subsequently incorporated in a contract of sale under date of May 2, 1916, executed by the defendant corporation to the plaintiff, and secured by a deed of trust the same day upon the property, executed by the plaintiff company to Dyer, trustee. By these instruments, after allowing credits for payments made, and after assuming a balance of $34,600 due to Robinson and Stallings from the defendant for their services in making the sale, and a cash payment of over $40,000 was made, a balance of $255,400 was ascertained to be due from plaintiff and was secured by the deed of trust.

In the meantime the operation of the wells had been under the control of Culp as manager of the plaintiff, but the oil produced had been run into the pipe lines and the run tickets had been sent to McFarlane, the defendant's treasurer. Culp had reported to Barnett that he had been deceived in the producing capacity of the wells, but to what extent had not been set forth, and Barnett about this time disposed of his interests in plaintiff company, resigned his office of president and his directorship, and no investigation of the extent of the deception was made by him. The run tickets were asked for, at or about the time of this May meeting, of McFarlane, who promised to send them to plaintiff's attorney and subsequently he did send them. In September following still another meeting between representatives of the plaintiff and officers and stockholders of defendant was held at Cumberland, Md. At this meeting, it seems, the failure in production was quite vigorously discussed, and demands made for rescission or readjustment of the contract. The defendant refused any other settlement than one involving extension of time and modification of the number and amounts of payment, and the result was the release of the old deed of trust, the execution of a new one to secure a balance, $185,400, upon this Morgan lease and other property owned by plaintiff. This trust was executed October 1, 1916. It was expressly provided that none of the wells should be shot, except by consent of defendant.

In June (apparently the 19th), 1917, a conference was had between the attorneys and some of the officers of these companies, the result of which was that on the 22d a check was sent by plaintiff's treasurer for $5,000 to the attorney for the defendant, with a letter setting forth what its writer understood had been agreed upon, among other things that plaintiff should have permission to shoot any of the wells in such manner as good practice warranted, and was to be granted permission to surrender any of the Culp leases (covered by the deed of trust), other than the Morgan one, unproductive and causing outlay in the payment of rentals, and in case the debt in full was paid on or be-

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fore October 1, 1917, a deduction of $40,000 of the contract price should be made. This proposition was rejected, and the defendant proceeded at once to cause advertisement of sale under the deed of trust to be made.

Thereupon this bill was filed, and upon notice and hearing had Circuit Judge Pritchard awarded a restraining order, afterwards continued by my order. The bill in effect charges that during all these 15 months from March, 1916, to June, 1917, when these proceedings were had, the plaintiff's officers were laboring under the oppressive fear of the disastrous results that would arise from litigation and exposure of the untrue representations made by them, in the sale of stock, solely by reason of their faith in Robinson and his misrepresentations; that the defendant and its officers knew this, and took advantage of it to enforce a fraudulently procured and grossly unjust and outrageous contract; that the wells never did have a settled production of 255 barrels per day, or more than a third of it; that not until November, 1916, did any opportunity offer for any relief from this embarrassing condition; that then certain of its officers, by purchase with their own funds, secured and transferred to their company additional properties which turned out to be valuable, and, at the time of filing the bill in July, 1917, had been so productive as to put the company upon a sound and substantial basis, so that it could, without fear, assert its determination to resist the defendant's oppressive demands.

The first question that arises is: Was Robinson acting as agent for the defendant company in this sale, and are it and its stockholders legally bound by his acts in that regard?

I cannot doubt it. It is not denied that these stockholders, with a very few exceptions, ratified the provision of the first contract that constituted him their trustee to receive from them their stock and place it in escrow in the bank at Clarksburg. They recognized their obligation to pay him and Stallings over $40,000 for their services in this behalf, and provided for its payment out of the purchase price that was to be paid for the property. They at no time, so far as the evidence discloses, during the months prior to the advertisement of the sale, denied his right to make on their behalf the sale, but, on the contrary, strenuously insisted upon its enforcement.

The second question, then is: Did he make the false representations charged in the bill as to the settled production of the property, which were relied on and constituted the moving cause of the contract's execution?

As to this I am not in doubt. It is fully testified to by Barnett, who at the time he testified was no longer concerned as stockholder in the Barnett Company. He testifies that, prior to the agreement, Robinson furnished a detailed written statement purporting to show the condition of each well on the lease and its producing capacity; that the aggregate of all exceeded 350 barrels daily; that some of this production was initial or "flush," and some what might be considered "settled," or fairly so; and that from this statement they figured that the fixed daily production could be reasonably estimated at 255 barrels, and that upon this basis the contract was made. This

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paper was shown to Stephens, who has fully corroborated Barnett's evidence as to its substantial contents. Its unfortunate loss and the failure to produce it has been reasonably accounted for. There is no single word of contradiction of this evidence. I have heard these men testify. I have noted their demeanor on the stand. The impression of counsel for defendant that their evidence, on its face, was incredible, "a cock and bull story," was entirely foreign to me, as I saw them on the stand and heard them testify. On the contrary, they seemed to me to be fair-minded, frank, and sincere in their statements, to the extent that I felt compelled to concede their entire truthfulness. This conviction, after earnest reflection, is confirmed rather than weakened, for two reasons: First, because, as I have said, no word of denial was made by defendant. Robinson still lives. His evidence was procurable. It seems clear, if the defendant desired this evidence to be discredited, at least a basis therefor could have been secured by a denial of it by Robinson.

[1] But another thought arises in this connection. What possible motive could actuate two business men, well known in their respective communities, to pay or agree to pay so large a sum for a lease on some 200 acres, if it were their purpose to promote a "wild-cat" oil company stock scheme? What need had these men, if this was their purpose, to go outside the leases they already had in Wirt county, or why not buy up any number of larger leases, where wells had been drilled and exhausted, but whose production could as easily have been misrepresented? Nor to my mind does it discredit these men that they believed Robinson's representations and did not make a preliminary and exhaustive investigation before contracting. It is a common saying that honest men are generally the most credulous. It is common knowledge that great competition has existed here in our oil fields in securing productive oil leases. Such properties do not go begging for purchasers, and contracts for their purchase are generally made quickly. In this case, Barnett was a merchant, while Robinson was an expert oil operator. Barnett had been interested with Robinson in some other leases. It was not unnatural that Robinson's statements as to the productive value of this lease should be controlling, because he had been one of the original organizers of the New Martinsville Company, which owned only this one lease, and he had sold out, just before, his interest to Dyer and McFarlane at proportionately the excessive price he was seeking to secure Barnett to pay for the property. It may be, as suggested by counsel, that, in order to square himself with Dyer and McFarlane for the imposition upon them, he was seeking a greater imposition, for a $40,000 consideration added, upon Barnett and his company; but Barnett could not know this, and certain it is the law does not suffer another to defend his making fraudulent and false representations to secure a contract on the ground that his dupe ought not to have trusted him and believed his falsehoods.

[2, 3] But the third question that arises in this case, whether the ratification of this contract and purchase, after full knowledge of the fraud that had been perpetrated was disclosed to and known by plaintiff, estops it from relief in the premises, is far more perplexing

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and difficult of determination. It goes without saying that the general rule has been established by an enormous number of cases that it is incumbent upon the deceived party in a contract procured by fraud and misrepresentation, upon ascertaining the truth, to promptly repudiate and seek its rescission. It is true, also, that this rule is subject to limitation and exception in rare instances. The counsel on both sides in their very able briefs have discussed these legal propositions and cited many authorities pro and con. I have made a long and weary examination of these authorities and an independent investigation on my own part, to ascertain whether under the decisions the facts here warrant any modification of this general rule. The grounds sought for such modification, as claimed by the plaintiff, may be summarized as follows: (a) That the misrepresentations were so great as to secure a wholly unjust and unconscionable contract; (b) that, being misled by these false and fraudulent representations, the officers and principal stockholders had unwittingly repeated them, for the purpose of securing stock subscriptions, and were in consequence in such condition as to suffer greatly in honor, business reputation, and to the extent of possible criminal prosecution; (c) that litigation at the time and before opportunity to retrieve by additional acquirement of property making the company solvent meant its entire financial destruction and ruin; (d) that defendant and its officers, knowing this duress and strain under which the plaintiff and its officers were laboring, took advantage thereof to enforce the contract knowing it to be unreasonable, unjust, and oppressive.

On this subject of duress, in U. S. v. Huckabee, 16 Wall. 431, 21 L. Ed. 457, it is said:

"Duress, it must be admitted, is a good defense to a deed, or any other written obligation, if it be proved that the instrument was procured by such means; nor is it necessary to show, in order to establish such a defense, that actual violence was used, because consent is the very essence of a contract, and if there be compulsion there is no binding consent, and it is well settled that moral compulsion, such as that produced by threats to take life or inflict great bodily harm, as well as that produced by imprisonment, is sufficient in legal contemplation to destroy free agency, without which there can be no contract, because in that state of the case there is no consent. Unlawful duress is a good defense to a contract, if it includes such degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in apprehension or severity to overcome the mind and will of a person of ordinary firmness."

This ruling of the Supreme Court would seem to justify the statement made in the note to Hatter v. Greenlee, 26 Am. Dec. 374, that—

"This branch of the law may be considered to be in or to have just passed through a state of transition, the old and harsh doctrines of the common law of the time of Lord Coke, on the subject, everywhere giving way to more liberal views; more especially is this so upon this side of the Atlantic."

In another of these very admirable notes (covering 18 closely printed pages) to the case of Mayor of Baltimore v. Lefferman, 45 Am. Dec. 153, the subject is exhaustively treated, a vast number of authorities are cited, and an attempt is made to define wherein and upon what conditions the "more liberal views" held by the courts "upon this side of the Atlantic" are applicable. The result to my mind leads to

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the very familiar conclusion that such application must, in the final analysis, depend upon the facts of each case, and that the chancellor or judge must be controlled by a sound discretion in each; that no hard and fast rule can be established; the effort must be to see the right and justice in the case and do it.

In this note it is said, upon authority of Moses v. Macfarlane, 2 Burr. 1009:

"The action for money had and received, which is the form in which a party must sue to recover back a payment which he has made by compulsion, is an equitable action, and it proceeds on equitable principles. It does not lie, therefore, unless the payment was made under circumstances rendering it inequitable and unjust to retain the money paid."

If this were the extent of the law's limitation, there would be little trouble in determining this case, for I think it is plainly apparent that this contract, originally, was procured to be executed by the fraudulent and false representations of Robinson, acting as agent for the defendant corporation and its stockholders, and for which, therefore, they should be held bound; that it was a grossly inequitable and unjust contract; and that plaintiff and its officers were induced, by the compelling fear of financial ruin to the company, loss of business standing and reputation to its officers and principal stockholders, and their possible criminal prosecution, to execute the after contracts ratifying it and make the further payments they made. But the writer goes on and says:

"There must be some culpability on the part of the defendant to enable the plaintiff to recover back money paid on the ground that the payment was involuntary. If the party receiving the payment acts in the supposed exercise of a legal right, using no coercion or unlawful measures to compel payment, but the other party pays the money under the compulsion of a third person, for whose acts the payee is in no way responsible, the action will not lie."

How shall we apply this limitation here? It cannot be said that the defendant corporation, its officers, or its stockholders were directly threatening either loss financially or of reputation or criminal prosecution. Nor were the persons to whom the stock of plaintiff had been sold. They were ignorant of the situation, and it was vital, it seemed to the plaintiff's officers, that they should remain so until they were able to change conditions. The situation in brief may be stated thus: While not threatening in any way these men with loss or prosecution, the defendant, through its agent, was responsible for the compelling fear that the purchasers of plaintiff's stock would cause it to suffer great loss, and its officers to be prosecuted, and instead of aiding them to escape from such embarrassing position, on the contrary, in a sense at least, used it as a means of securing the ratification of their unjust and oppressive contract.

Does the liberality of the law, in transition from the harsh rules laid down by the common law as enunciated by Lord Coke, go far enough in the application of its doctrine of duress to apply to such condition of affairs? I have found no decision exactly in point, and it would be entirely burdensome to attempt a discussion of the multitude of cases relating to the general principles. In addition to the many cit-

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ed in the two notes I have referred to, others will be found cited in the notes to Adams v. Irving Nat. Bank, 6 L. R. A. 491, and to Shattuck v. Watson, 7 L. R. A. 551. An interesting case from Virginia will be found in Pilson, Trustee, v. Bushong, 29 Grat. 229. See, also, 1 Story, Eq. Jur. § 239.

Pomeroy in his Equity Jurisprudence (2d Ed.) § 948, says:

"Whenever one person is in the power of another, so that a free exercise of his judgment and will would be impossible, or even difficult, and whenever a person is in pecuniary necessity and distress, so that he would be likely to make an undue sacrifice, and advantage is taken of such condition to obtain from him a conveyance or contract which is unfair, made upon an inadequate consideration, and the like, even though there be no actual duress or threats, equity may relieve defensively or affirmatively."

A long and earnest study of this case has led me to doubt whether the law relating to duress relied upon by counsel can be applicable, except to a limited extent, in aid of another ground for relief now to be considered; and this for the reason that its principles seem to be confined to personal transactions, and not to corporate control and management. Be this as it may, I am constrained to the conclusion that the contract price for this property was an exorbitant one, possibly three times what it was worth, and it was secured to be paid by the false and fraudulent representations of defendant's agent; that its enforcement would be unjust and inequitable; that the ratifications of this contract were made by plaintiff and its officers when they were "in pecuniary necessity and distress," driven thereby "to make an undue sacrifice," and that defendant, knowing this condition, took an unfair advantage to secure them; that in consequence the plaintiff corporation, on its own behalf and on behalf of its innocent stockholders, who were no parties to the transaction, is entitled to some relief in this court of equity, under this principle set forth by Pomeroy and the cases cited by him and by many others.

What shall be the measure of this relief? It is not denied that the lease had some intrinsic value, and that the personal property conveyed in connection with it also had value, all of which plaintiff has secured under the contract. Whether such value could now be ascertained accurately may be questioned. If it could, it would be beyond the power of a court of equity to attempt to make a new contract for the parties, based upon the value of the property. I think it is only within its power to abate the purchase price to the extent that the defendant sold what it did not have, because it did not exist; but such abatement must be at the rate of value the parties contracted to pay for it, if it had existed. A very serious trouble here arises because of the anomalous character of the property. Oil and gas, in a sense, are sui generis. When dormant in mother earth, they are realty. When produced on top the ground, they become personalty. Archer, Oil and Gas, 558, and numerous cases there cited.

It is impossible to tell how much of this peculiar kind of realty exists under a given tract of land until by the drill and pump the quantity in personalty has been secured above ground. It is well settled that a failure of quantity of land sold is subject to abatement of purchase price any time, at least, before the purchase price per acre is

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fully paid. It seems to me that this principle of abatement can well be applied here. It cannot be strictly accurate and satisfactory, because it cannot be applied to the number of acres of surface land embraced in the lease. It must be based here, it seems to me, upon the 255 barrels of settled production which Robinson represented it to be making. Here, too, complication springs in determining whether it had any "settled" production at all, as it is in evidence that its production ran down in less than two years to 3 barrels per day. As to this, however, I think Barnett took the risk of this occurring.

I therefore have reached this conclusion: First—That, if the defendant company elects, by answer filed within 10 days, to have the contract rescinded rather than the contract price abated, I will direct a decree to that effect and refer the cause to a master, to ascertain and report an accounting between the companies as to the oil obtained by the plaintiff, the money paid to and received by the defendant, and other matters arising as to the use and consumption of the personal property involved. If the defendant shall not so elect to rescind the contract, I will enter a decree abating the purchase price, basing it upon the difference between the misrepresented 255 barrel daily production and what was the actual daily production at the time the first contract was made. If parties cannot agree what this actual production was on that date, I will direct a master to ascertain the daily production for each of the 30 days just preceding the date of this contract, and ascertain the average for such number of days, and fix it as the actual daily production. This may be considered in a measure an arbitrary basis, but it is as nearly equitable as, I conceive, can be arrived at under the existing conditions.

PEOPLES v. PEOPLES BROS., Inc.

(District Court, E. D. Pennsylvania. December 12, 1918.)

No. 1647.

1. SUBROGATION ⟸1—NATURE OF RIGHT—SUPERIOR EQUITIES.
The right of subrogation rests upon purely equitable grounds, and will not be enforced against superior equities.

2. SUBROGATION ⟸28—SURETY OF CONTRACTOR—CONDITIONS OF BOND.
The surety on the bond of a contractor, conditioned for payment of claims for labor and material, which on the contractor's insolvency paid the amount of its obligation into court, which paid only 65 per cent of claims of creditors secured by the bond, on completion of the contract by a receiver, was not entitled by subrogation to the amount due thereon until claims for labor and materials were paid in full.

In Equity. Suit by David Peoples against Peoples Bros., Incorporated. On exceptions to report of special master. Sustained in part.

Horace M. Schell, of Philadelphia, Pa., for receiver.

Edward Hopkinson, Jr., of Philadelphia, Pa., for American Surety Co.

Murdoch Kendrick, of Philadelphia, Pa., for Massachusetts Bonding & Ins. Co.

J. Wilson Bayard, of Philadelphia, Pa., for American Bridge Co.

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THOMPSON, District Judge. On October 29, 1915, the city of Philadelphia, hereinafter called the city, and the Pennsylvania Railroad Company, hereinafter called the railroad, entered into a contract with the defendant Peoples Bros., Incorporated, hereinafter called the contractor, for the construction of a bridge on Fifty-Fourth street over the tracks of the Philadelphia, Baltimore & Washington Railroad for the sum of $37,000, of which the city was to pay $22,000 and the railroad $15,000.

On the same day, in pursuance of the ordinances of councils, the contractor, as principal, and the Massachusetts Bonding & Insurance Company, hereinafter called the surety, as surety, executed and delivered to the city a penal bond in the sum of $11,100, conditioned upon the payment by the contractor of all claims for labor performed or material furnished in the performance of the said contract.

Upon a creditors' bill, Robert W. Finletter was, on December 10, 1916, appointed receiver of Peoples Bros., Incorporated. The contractor having failed in the performance of its contract for the Fifty-Fourth street bridge, the receiver completed its construction at a total cost of $1,479.94. Claims for material supplied to the contractor in the construction of the bridge have been proved in the sum of $15,946.28.

Upon petition of the surety presented May 11, 1917, leave of court being given, the amount of its liability, namely, $11,100, was paid into court on April 19, 1918. Upon completion of the contract by the receiver, there was due to the contractor by the city $5,184, and by the railroad $4,632. These amounts were paid by the city and the railroad to the receiver.

The surety, on February 16, 1917, presented a petition praying that the receiver be ordered to pay the balance due by the city and the railroad, less the amount expended by the receiver in the completion of the contract, to the surety, upon the ground that it was subrogated to the rights of the contractor in that fund.

The issues raised by the petition of the surety and the several answers thereto were referred to a special master. The master, after deducting from the amount paid into court by the surety, $11,100, the costs and master's fee, amounting to $781, awards the balance, $10,310, pro rata to the materialmen, subject, as appears by the record, but not set out in the master's report, to the clerk's poundage. The dividend amounts to 64.8 per cent. After deduction of the cost of completion of the contract in the respective proportions the city and railroad were liable for under its terms from the sums paid the receiver by them, respectively, there remains of the amount paid by the city to the receiver a balance of $4,310.84, and of the amount paid by the railroad a balance of $4,025.22. The master awards out of the balance of each of these funds an allowance to the receiver, for services in completing the contract, of $250, a fee to counsel for the receiver of $250, and a fee to the master of $250. He awards the balance of $3,560.84 of the fund received from the city to the surety, and the balance of $3,275.22 of the fund received from the railroad to the receiver for the general creditors.

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Exceptions have been filed on behalf of the surety to the failure of the master to award to it the fund received from the railroad, and to the awards of allowances to the receiver for his services in completing the contract, of fees to counsel for the receiver, and of fees to the master out of the funds claimed by the surety. Exceptions have been filed on behalf of the receiver and the American Bridge Company, a claimant for material, to the award to the surety of the balance of the sum received from the city.

The learned master held, under the authority of Prairie State Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, and Henningsen v. U. S. Fidelity & Guaranty Co., 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547, that a right of subrogation arose as to the reserved fund retained by the city and paid to the receiver, in favor of the surety, by reason of its having paid into court for the payment of claims of the materialmen the full amount of its liability under its bond. The master appears to have overlooked a very important distinction between the facts in the Prairie Bank Case and the Henningsen Case and those in the case at bar.

In the Prairie Bank Case the dispute was between the surety, which had entirely completed the contract, and the bank, which claimed under an assignment by a contractor all moneys due by the government to him. So far as appears, there were no other claimants against the fund.

In the Henningsen Case the dispute was between the surety and a bank which held a similar assignment. The surety company had paid the claimants for labor and material in full under the provisions of a penal bond given to the United States under the provisions of Act Aug. 13, 1894, c. 280, 28 Stat. 278, to secure the payment of claims for labor and material. So far as appears, there were no other claimants upon the fund.

There was no dispute in either case that the claims of those protected by the surety's bond were satisfied in full. There could therefore be no doubt of the application of the principle of subrogation, and the question was as between the equities of one claiming by subrogation arising when the bond was given and one claiming under a subsequent assignment of the fund. The very important fact was present in each of those cases, which is essential to one of the fundamental propositions upon which the right of subrogation rests, namely, that the claim of the creditor protected by the surety's bond had been fully satisfied, while in the case at bar the indebtedness of the contractor to the materialman protected by the bond given to the city is not fully satisfied by the payment into court of the amount of the surety's liability, but these creditors have received out of that fund but 65 per cent. of their claims, and if the fund paid to the receiver by the city is awarded to the surety it will be to their prejudice.

[1] "Subrogation is an equity called into existence for the purpose of enabling a party secondarily liable, but who has paid the debt, to reap the benefit of any securities or remedies which the creditors may hold as against the principal debtor and by the use of which the party paying may thus be made whole." Bispham's Equity (6th Ed.) p. 450.

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It rests upon purely equitable grounds, and will not be enforced against superior equities. Unless the surety pays the debt in full, he is not entitled to subrogation, and until this is done the creditor will be left in full possession and control of the debt and the remedies for its enforcement.

It must not be enforced to the detriment of equal or superior equities existing in other parties, nor where its enforcement would operate to the prejudice or injury of the creditor, and cannot, therefore, be insisted upon until the creditor is fully paid and satisfied. Dering v. Earl of Winchelsea, 1 Leading Cases in Equity, 114; Kyner v. Kyner, 6 Watts (Pa.) 221; Bank v. Potius, 10 Watts (Pa.) 148; Hoover v. Epler, 52 Pa. 522; Allegheny National Bank's Appeal, 19 Wkly. Notes Cas. 78; Musgrave v. Dickson, 172 Pa. 629, 33 Atl. 705, 51 Am. St. Rep. 765.

[2] In the present case the creditors protected by the bond, namely, the materialmen, have not been paid in full. They are entitled as creditors of the contractor to look for payment to the fund paid by the city and the railroad to the receiver upon completion of the contract, and, until they are paid in full, the surety has no equity superior to theirs. The surety is merely a general creditor of Peoples Bros. to the extent of the amount which it paid into court, thus relieving the contractor, its principal, to that extent. It follows that the master properly awarded to the receiver the sum received from the railroad for the general creditors, but that he erred in awarding the sum received from the city to the surety. This sum should also have been awarded to the receiver for general creditors.

There is no apparent reason for allowances to the receiver for his services and fee to his counsel at this time. These claims may more properly be considered upon the final audit of the receiver's account.

The first, second, fifth, sixth, seventh, and eighth exceptions of the Massachusetts Bonding & Insurance Company are dismissed, and its third and fourth exceptions are sustained, in so far as they apply to the allowances to the receiver and his counsel for services and fee, respectively, without prejudice to the presentation of such claims at the audit of the receiver's accounts, and in all other respects the said exceptions are dismissed.

The first exception on behalf of the receiver is dismissed, as its application to the master's report is not apparent. The second exception is sustained. The third, fourth, fifth, and sixth exceptions are sustained, except in so far as they relate to the master's fee, and in that respect are overruled.

The exceptions filed on behalf of the American Bridge Company are sustained.

It is ordered that the awards made by the learned special master be modified, in accordance with this opinion, and in other respects the report be confirmed.

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STANDARD FASHION CO. v. MAGRANE HOUSTON CO.*

(District Court, D. Massachusetts. March 9, 1918.)

1. SALES ⟸7—CONSTRUCTION OF CONTRACT—SALE OR AGENCY.
A contract by which defendant, a mercantile company, was in terms designated as agent for sale of complainant's patterns, but which required defendant to pay for the patterns when received at stated prices, with the privilege of returning those unsold each six months at a reduced price for exchange, *held* one of sale, and not of agency.

2. MONOPOLIES ⟸17(2)—CLAYTON ACT—RESTRICTION ON COMPETITION.
A contract for the sale of patterns to a retail store for a term of years, during which it agreed to buy and keep on hand a certain quantity at all times, and "not to sell or permit to be sold on its premises during the term of the contract any other make of patterns and not to sell Standard patterns, except at label prices," *held* illegal and void, as in violation of Clayton Act, § 3 (Comp. St. 1916, § 8835c).

In Equity. Suit by the Standard Fashion Company against the Magrane Houston Company. Decree for defendant.

Storey, Thorndike, Palmer & Dodge, of Boston, Mass., for plaintiff.

James W. Sullivan, of Lynn, Mass., for defendant.

JOHNSON, Circuit Judge. November 25, 1914, the plaintiff entered into a contract with the defendant, containing, among others, the following provisions:

"The first party hereof grants to second party an agency for the sale of Standard patterns for their store in the city of Boston, state of Massachusetts, for a term of two years from date hereof, and from term to term thereafter until this agreement is terminated, as hereinafter provided, and agrees to sell and deliver f. o. b. New York or at its branch office in Boston, Mass., to second party, Standard patterns, at a discount of 50 per cent. from retail prices, and advertising matter at the prices and on the conditions named on the reverse side hereof; also such other publications as may be issued by first party at regular agents' rates; to allow second party to return discarded patterns semiannually between January 15th and February 15th, and July 15th and August 15th, in exchange, at nine-tenths cost, for other patterns to be shipped at the time of return or thereafter, but not in exchange for other goods than patterns. Patterns returned for exchange must have been purchased by second party from first party direct, and must be delivered in good order to first party at its general office in New York."

In consideration of the above the second party agreed to purchase a certain number of Standard fashion sheets and handy catalogues per annum and to pay transportation charges on same, and on all goods ordered or returned, and to purchase and keep on hand at all times, except during periods of exchange, $1,000 value in Standard patterns, at the net invoice prices, and to pay first party for the first order of pattern stock $500, thirty days after shipment of the same, it being agreed that the balance of the purchase price, $500, should remain unpaid as a standing credit during the continuance of the agreement and become due and payable at its termination, upon which sum the second party agreed to pay interest at the rate of 3 per cent. per annum on January 15th of each year, and to pay for all other

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*Judgment affirmed, 251 Fed. 559.

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purchases on or before the 15th day of the month succeeding the date of shipment.

The second party also agreed—

"not to sell or permit to be sold on its premises during the term of the contract any other make of patterns, and not to sell Standard patterns except at label prices."

The contract contained this provision in regard to its termination:

"Either party desirous of terminating this agreement must give the other party 3 months' notice in writing within 30 days after the expiration of any contract period, as above specified, the agency to continue regularly during such three months."

No notice of its desire to terminate the contract was given by the defendant to the plaintiff within 30 days after the expiration of the first period of 2 years after the date of the contract; but on April 7, 1917, it gave to the plaintiff notice in writing of its decision to terminate the sale of Standard patterns in 3 months from the date of the notice, and about the 1st of July, 1917, discontinued the sale of the Standard patterns and placed on sale in its store patterns made by the McCall Company.

In its bill the plaintiff prays that the defendant may be enjoined until February 25, 1919, the earliest date at which it claims the contract can be terminated—

"from advertising, selling or distributing the patterns, periodicals, catalogues and other literature or printed matter of said McCall Company or any pattern manufacturer other than the plaintiff, and from using its store, business, agents, clerks, parties or connections to further advance the interests of the said McCall Company or any other pattern manufacturer other than the plaintiff, and from permitting to be sold at said store during the term of said contract, and until the aforesaid date, any make of patterns other than those of the plaintiff."

The plaintiff also asks to be awarded "such damages as may be ascertainable."

The defendant claims:

(1) That the contract was terminated on July 7, 1917, by the notice given by it on April 7, 1917.

(2) That the contract is one for sale and that, because it contains the negative covenant "not to sell or permit to be sold on the premises of second party during the term of the contract any other make of patterns," it is in violation of Act Oct. 15, 1914, c. 323, § 3, 38 Stat. 731 (Comp. St. 1916, § 8835c), known as the Clayton Act.

[1, 2] I find that the defendant did not give notice of its desire to terminate the contract in accordance with its provisions, and that it would continue in force until terminated as therein provided, unless it can be successfully attacked by the defendant as unlawful under section 3 of the Clayton Act, which is as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession

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or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

If an agency only were created by the contract in question it is clear that the provisions of this act would not apply, because by its terms it is made applicable only to leases, sales or contracts for sale. Although the plaintiff, by the terms of the contract, grants to the defendant an agency for the sale of Standard patterns, the court will search beneath the language employed to discover the real nature of the contract and will place its own construction upon it without reference to its characterization by the parties themselves.

The plaintiff in fact agreed to sell and deliver to the defendant—

"Standard patterns at a discount of 50 per cent. from retail prices and advertising matter at the prices and on the conditions named * * * also such other publications as may be issued by first party at regular agents' rates."

All transportation charges and expenses of sale were to be paid by the defendant. No accounting by the defendant to the plaintiff was required. While the defendant had the right to return discarded patterns between January 15th and February 15th, and between July 15th and August 15th in each year, and could receive in exchange nine-tenths of their cost in other patterns, there is nothing in the contract to compel it to make the exchange, and patterns which are returned for exchange must have been purchased by the second party from first party direct.

One-half the contract price to be paid for the first order of patterns was entered upon the books of the plaintiff company as an obligation which the defendant was to pay at the termination of the contract, and upon which it agreed to pay interest yearly. No condition was to be performed by the defendant before the title to the patterns delivered would vest in it, and the fact that the defendant could return discarded or unsold patterns in no way prevented the title to the patterns from vesting absolutely in the defendant. While the defendant agreed to return unsold patterns at the termination of the contract, yet this right of return was evidently inserted for its benefit rather than to insure the return of patterns to the plaintiff, for the contract provides:

"That neglect to return the pattern stock within two weeks after expiration of three months notice shall relieve first party from all obligation to redeem the same."

That it was the intent and understanding of the parties to the contract that this return of unsold patterns constituted a repurchase by the plaintiff, plainly appears from the typewritten section which appears upon the back of the contract, by which it is provided that in case the premises of the defendant company or a substantial part

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of the same should be sold, the defendant company should have the privilege of terminating the contract, and "may" then deliver its stock of patterns to the plaintiff "for repurchase under the repurchase clause of this contract."

It will be noted that the defendant is not compelled by this provision to return its unsold stock, but that it "may deliver" the same to the plaintiff "for repurchase." The purpose of the whole contract is plainly to sell patterns at a reduced rate to the defendant on the condition that it will resell at the retail prices fixed by the plaintiff, and also refrain from selling the goods of any other pattern manufacturer. The credit extended for one-half the purchase price of the original order for patterns is intended to serve the purpose of holding the defendant to its contract.

The reports of the judiciary committees of the House of Representatives and the Senate accompanying the Clayton Act were introduced in evidence for the purpose of showing that it was not the intent of Congress to include "exclusive agencies" within the scope of the act. They contain this statement relative to the purpose of the act:

> "It not only does not prohibit or forbid exclusive agencies, but on the contrary it in no way whatsoever relates to agencies, properly so termed."

It will be noticed that the committees were very careful to state that only "agencies, properly so termed," are excluded from the provisions of the act.

I do not think the contract establishes an agency, "properly so termed," although it is made to assume this aspect in some of its features, but that it is a contract for sale; and in this view I find support in the recent opinion of the Supreme Court in Straus et al. v. Victor Talking Machine Co., 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E, 1196, Ann. Cas. 1918A, 955, and of Circuit Judge Knappen in Ford Motor Co. v. Union Motor Sales Co. et al., 244 Fed. 156, 156 C. C. A. 584.

Counsel for the plaintiff relies upon Wilcox & Gibbs Co. v. Ewing, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882, as decisive of the question whether the contract was one of agency or one for sale; but admitting under the authority of this case that the defendant was created an agent for certain purposes, it is also nevertheless true that the contract contained an agreement for an absolute sale of patterns and the plaintiff's publications to the defendant as its agent.

If the contract is one for sale, is it unlawful under the Clayton Act because its effect "may be to substantially lessen competition or tend to create a monopoly"?

Neither the Supreme Court nor any other court of last resort has yet passed upon section 3 of the Clayton Act.

The cases from state courts that have been cited by the plaintiff were all decided before the passage of the Clayton Act and all dealt with the construction of a state statute, and therefore afford no assistance in the construction of a statute which is declared to be supplemental to the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209), after a construction had been placed by the Supreme Court upon

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that act by which the restraint of trade prohibited by it was declared to be an unreasonable restraint.

In Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46, 141 C. C. A. 594, the court had under consideration section 2 of the Clayton Act, which deals with discriminations between different purchasers in the sales of commodities and makes such discriminations unlawful—

"where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The last clause of the section, however, provides:

"That nothing herein contained shall prevent persons engaged in selling goods * * * from selecting their own customers in bona fide transactions and not in restraint of trade."

The court there held that it was not unlawful for the Cream of Wheat Company to refuse to sell its product to retailers and confine its sales exclusively to wholesalers, and held that "neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular," and found it unnecessary to go into a consideration of the Clayton Act, which was discussed by District Judge Hough when the case was before him, and whose opinion in 224 Fed. 566, is cited upon the brief of counsel for the plaintiff.

In Motion Picture Patents Co. v. Universal Film Manufacturing Co., 235 Fed. 398, 148 C. C. A. 660, it was claimed in the Circuit Court that the contract there under consideration was unlawful because in violation of section 3 of the Clayton Act, and Judge Hand said:

"If the prohibitions of the Clayton Act mean anything at all, this case falls within them, and the restrictions as to use of films other than complainant's with the projecting machines are therefore void.

"Indeed, the report of the Judiciary Committee of the House concerning the Clayton Act shows that its purpose is to reach the film monopoly."

When the case reached the Supreme Court, however, it was decided upon other grounds, the court stating its conclusion as follows (243 U. S. 502, 517, 37 Sup. Ct. 416, 421 [61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959]):

"Our conclusion renders it unnecessary to make the application of this statute to the case at bar which the Circuit Court of Appeals made of it; but it must be accepted by us as a most persuasive expression of the public policy of our country with respect to the question before us."

In the dissenting opinion of Mr. Justice Holmes he also "leaves on one side the question of the effect of the Clayton Act."

In Coca-Cola Co. v. J. G. Butler & Sons (D. C.) 229 Fed. 224, Judge Trieber found that the refusal of the Coca-Cola Company to sell its syrup for bottling to other than its licensed bottlers and permit such parties to use its trade-mark in connection with the bottled product was not a violation of the Clayton Act, in view of the possibility of adulteration and the hardship to the manufacturer in maintaining

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such supervision over the bottling as it deemed necessary if required to sell to every intending purchaser.

In Pictorial Review Co. v. Curtis Publishing Co., 255 Fed. 206, decided June 23, 1917, Judge Hand found that the Curtis Publishing Company had established a system for the promotion of the sale of its publications by forming a "league of Curtis salesmen," and that a restriction in its contract with district agents or wholesalers of the defendant's publications that they should not sell to the Curtis newsboys publications other than those of the defendant without first obtaining the defendant's approval, was not in violation of the Clayton Act; but his decision was placed upon the ground that the league of newsboys had been formed by the Curtis Company through its "ingenuity, labor and capital," and that the complainant was attempting to secure a preliminary injunction in order that it might avail itself of the plaintiff's system for the sale of its own publication, and that in making this attempt the complainant is itself engaging in unfair trade. He intimates in the following language, however, what his opinion might be if nothing but a sale were involved:

"If nothing but a sale were involved, I might support plaintiff's contention that defendant has violated the Clayton Act by preventing these wholesale dealers from selling the Pictorial Review through subdealers and boys."

In United States v. United Shoe Machinery Co. (D. C.) 234 Fed. 127, 150, District Judge Trieber, after having quoted part of the opinion of the Supreme Court in the Standard Oil Company Case, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, discusses the Clayton Act as follows:

"On the other hand, the act now under consideration, instead of using the generic words of the Sherman Act, in plain and unequivocal language states what acts shall be unlawful, if they 'substantially lessen competition or tend to create a monopoly.' This being the case, the presumption is, not that Congress intended that the construction of the Sherman Act should control, but, on the contrary, that it should not control. Had Congress intended that the construction placed upon the Sherman Anti-Trust Act in those cases should apply to the Clayton Act, it would have used the same or like generic words, instead of defining what acts shall be unlawful, if the natural result of such acts tends to substantially lessen competition or create a monopoly in any line of commerce. * * *

"Evidently Congress was not satisfied to only prohibit actual lessening of competition, or monopolizing, but to make it unlawful for any person to do those acts, which may put it in his power to do so."

The Clayton Act is entitled:

"An act to supplement existing laws against unlawful restraints and monopolies and for other purposes."

The report of the Senate committee of the judiciary upon the bill contains the following statement of its purpose:

"Broadly stated the bill in its treatment of unlawful restraints and monopolies seeks to prohibit and make unlawful certain trade practices, which as a rule singly and in themselves are not covered by the act of July 2, 1890, or other existing anti-trust acts, and thus by making these practices illegal, to arrest the creation of trusts, conspiracies and monopolies in their incipiency and before consummation."

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While the Clayton Act reaffirms the general terms of the Sherman Act as construed by the United States Supreme Court in the Standard Oil Company Case, supra, and American Tobacco Company Case, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, it goes further and deals in specific terms with certain acts and practices which are declared by it to be unlawful if their effect may be "to substantially lessen competition or tend to create a monopoly."

The court is not to inquire into the wisdom of such legislation, and in Standard Manufacturing Co. v. United States, 226 U. S. 20, 49, 33 Sup. Ct. 9, 57 L. Ed. 107, its duty is clearly stated by Mr. Justice McKenna:

"The law is its own measure of right and wrong, and what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intentions of parties, and it may be, of some good results."

I am satisfied with the reasoning of Judge Trieber that Congress, with the full knowledge of the construction which had been placed upon the Sherman Act by the Supreme Court, did not intend that the same construction should be placed upon the specific terms of the Clayton Act; for it chose to define the lessening of competition which it declared to be unlawful, and to do this used the word "substantially" to make it apparent that a real, as opposed to an imaginary or fanciful lessening of competition, was intended.

Doubtless a substantial lessening of competition would amount to an unreasonable restraint of trade; but I do not think it is the duty of the court to find this before it can pronounce a contract unlawful, the effect of which it has found may be to "substantially lessen competition." The reports of the committees of both houses of Congress, as well as the legislative history of the bill, show the intent of Congress to protect the public from practices which it believed to be inimical to the public good by preventing these practices from being put in operation.

I think, therefore, it is the duty of the court to determine whether or not the contract has provided means for a real or substantial lessening of competition, irrespective of what use has been or is being made of these means.

By the use of the word "may" the intent is manifest to deal with the potential evil which a contract may contain, and to make the attempt to substantially lessen competition unlawful.

The contract must be considered as part of a widely extended system and a conclusion reached as to the legality of the system. There are in the United States and Canada about 52,000 so-called pattern agencies, and of these the plaintiff and two other companies allied with it through a common holding company control about 20,000, with all of whom a contract like the one we are considering is in force.

The contract by its terms destroys all competition in the sale of patterns and establishes a complete monopoly in the territory which it covers—a large retail dry goods store at the corner of Temple Place and Washington street, in the center of the dry goods district of a large city.

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The plaintiff has made a contract containing a like negative covenant with R. H. White Company, whose store is nearly opposite the defendant's store upon Washington street, both of which stores the plaintiff claims are very desirable locations for the sale of its patterns, because goods are sold there from the piece for the manufacture of women's and children's clothing by use of patterns.

If the plaintiff could make a contract like the one under consideration with all the proprietors of retail dry goods stores in this district, it would have a complete monopoly of the sale of patterns in it, and there is nothing in the contract to prevent it doing this, or even covering the whole state of Massachusetts or the whole country. If there were but one dry goods store in a village and the plaintiff could make this contract with the proprietor of that store, it would secure a practical monopoly of the pattern business in that village.

I am of the opinion that the negative covenant in the contract is prohibited by the Clayton Act, and therefore that the bill should be dismissed, with costs to the defendant.

A decree in accordance with the above may be submitted.

UNITED STATES v. FUNG SAM WING et al.

(District Court, N. D. California, First Division. March 21, 1918.)

No. 5896.

1. ALIENS ⇐27—CHINESE EXCLUSION ACT—PREINVESTIGATION OF CLAIM OF CHINESE PERSON TO BE MERCHANT.

Under the Chinese Exclusion Acts (Comp. St. 1916, § 4324), the Department of Labor was authorized to promulgate its rule for the investigation, in advance of his departure, of the claimed mercantile status of a Chinese person desiring to go abroad temporarily, and to require such person to furnish with his application the names of two witnesses able to testify that for one year preceding proposed departure the applicant had been engaged in mercantile pursuit named, so the securing of approval of the application of one not entitled would work a fraud on the government.

2. CONSPIRACY ⇐33—TO DEFRAUD GOVERNMENT.

A conspiracy to secure the approval of the application of a Chinese person, desiring temporarily to go abroad, for preinvestigation of his claimed mercantile status, when he is not entitled to the same, is a violation of Criminal Code, § 37 (Comp. St. 1916, § 10201), denouncing conspiracies to defraud the government.

3. CONSPIRACY ⇐43(10)—CHINESE PERSONS—OFFENSES—INDICTMENT.

An indictment alleging that defendants conspired to secure the approval of the application of a Chinese person desiring to go abroad for preinvestigation of his claimed mercantile status *held*, in view of the requirement of the rule of the Department of Labor that application should be made 30 days before proposed departure, and the Chinese Exclusion Acts (Comp. St. 1916, § 4324), to be insufficient, as it merely alleged defendants knew the applicant had not been a merchant for one year before his application.

Fung Sam Wing, alias Sam Fong, and others, were indicted, charged with conspiracy to defraud the United States by securing from the Commissioner of Immigration, etc., approval of the application of

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Fung Sam Wing for preinvestigation of his claim that he was a domiciled merchant. On demurrer to the indictment. Sustained.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

John T. Thornton and Heim Goldman, both of San Francisco, Cal., for defendants.

DOOLING, District Judge. The defendants are charged with a conspiracy to defraud the United States by securing from the Commissioner of Immigration at Angel Island for Fung Sam Wing, a Chinese person, claiming to be a merchant domiciled in this country, the approval of the application of said Fung Sam Wing, pursuant to the provisions of rule 15 of the Department of Labor, governing the admission of Chinese, for the preinvestigation of his claim that he was such domiciled merchant, with the intent that said application should, when approved, enable the said Fung Sam Wing to go abroad and return to the United States without difficulty, because of his approved status as such domiciled merchant.

The indictment further avers that a lawfully domiciled Chinese merchant, within the meaning of the Chinese Exclusion Laws (Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 8 [Comp. St. 1916, § 4324]), is a Chinese person who, for at least one year immediately preceding the date of the application for a preinvestigation of his status, had been engaged in the occupation of a merchant and had not performed any manual labor, except such as was necessary in the conduct of his business as such merchant. It is then averred that the said Fung Sam Wing was not, as defendants well knew, a lawfully domiciled merchant, within the meaning of the Chinese Exclusion Laws, at the time of his said application; that is to say, a Chinese person who had been engaged, for a least one year immediately preceding the date of the said application, in the occupation of a merchant, and had not performed any manual labor, except such as was necessary in the conduct of his said occupation. The indictment then charges the commission of certain overt acts in furtherance of the conspiracy.

[1, 2] The Chinese Exclusion Law provides that the term "merchant," as employed therein, shall have the following meaning and none other:

"A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary * * * as such merchant."

Here is found no mention of the continuance of this status for a year or any other period. The same act, however, declares (the declaration following immediately the language quoted):

"Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses, other than Chinese, the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States,

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and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing."

The act also authorizes the Department of Labor to make such rules and regulations, not inconsistent with the laws of the land, as it may deem necessary and proper to carry the laws into effect.

Pursuant to this authority, and in order to avoid delay in securing admission upon the return of a Chinese merchant to this country, the Department of Labor promulgated rule 15, providing for the investigation in advance of his departure of the claimed mercantile status of a Chinese person who desires to go abroad temporarily. This rule provides that such person may make application upon a prescribed form for such investigation, which application must be filed at least 30 days prior to the date of proposed departure.

In the application must be furnished the names and addresses of two (or more) credible witnesses other than Chinese, who are able and willing to testify of their own knowledge that for at least one year immediately preceding the date of proposed departure, the applicant has been engaged exclusively in the pursuit named by him. The officer to whom the application is made shall examine the applicant, such witnesses as he shall produce, and such other witnesses as may be necessary.

If the officers are satisfied that the applicant is such Chinese merchant as is entitled to leave the country and return, the application is approved in writing, and upon the production of such approved application, when the applicant returns from abroad, he shall in the language of the rule "be promptly admitted without further examination or investigation."

I have no doubt that the rule is one which the Department of Labor has the power to make under the law, and that the securing of an approved application by one not entitled thereto would be a fraud upon the government. It would also be an offense under section 37 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1916, § 10201]) for two or more persons to conspire to defraud the government by fraudulently securing such an approval for one not entitled to it. So that the offense attempted to be charged here is one that might well be committed. It does not seem to me, however, that the present indictment states an offense, if we bear in mind the provisions of the act and the rule above cited.

[3] The act requires of a returning merchant proof that he was such for at least one year immediately preceding his departure. The rule, based thereon, requires the naming of at least two witnesses by the applicant for preinvestigation, who will testify that he was a merchant for at least one year immediately preceding the date of proposed departure. This application must be filed at least 30 days prior to the date of the proposed departure.

The indictment, however, charges that the conspiracy was to secure the approval of an application fraudulently, because the applicant had not been a merchant for one year preceding the date of his application, and that the witnesses well knew that he had not been a

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merchant as defined by the statute for a period of one year immediately prior to the date of his application. But this fact might well be true, and still no fraud committed or attempted, as neither the law nor the rule requires proof of the existence of the mercantile status for a year prior to the date of the application, but for a year prior to the date of the proposed departure, which by the very terms of the rule must be at least 30 days subsequent to the date of the application.

Of course, the portion of the indictment charging the forming and existence of the conspiracy is not aided by the statement of the commission of the overt acts.

The demurrer to the indictment will therefore be sustained.

In re SOLOMON & JOHNSON.

(District Court, E. D. Michigan, N. D. October, 1918.)

No. 438.

1. COURTS ⟸366(19)—EXEMPTIONS—WHAT LAW GOVERNS.
Under Bankruptcy Act July 1, 1898, § 6 (Comp. St. § 9590), providing that exemptions allowed to bankrupts by the state laws shall not be affected, the bankruptcy court, in determining the nature and amount of the exemptions to which the bankrupts are entitled, will follow and adopt the laws of the state of the bankrupts' residence.

2. EXEMPTIONS ⟸61—PARTNERS—RIGHT TO.
Under Comp. Laws Mich. 1897, § 10322, and before the enactment of the Uniform Partnership Act, each partner was entitled to exemptions out of the partnership assets to the same extent and in the same manner as if he were carrying on business as an individual.

3. EXEMPTIONS ⟸61—PARTNERS—RIGHT TO EXEMPTIONS.
Where Michigan partners were entitled to exemptions in the partnership assets, under Comp. Laws Mich. 1897, § 10322, the right of the partners to exemptions cannot be denied on the theory that one of the partners had drawn from the firm assets a larger share than he was entitled to, for the other partner was not objecting, and creditors could not urge such objections.

4. BANKRUPTCY ⟸398(3)—EXEMPTIONS—SALE.
Where each partner was entitled to exemptions in the stock owned by the partnership, *held*, that the partners' sale of the exemptions before bankruptcy was valid, and the purchaser was entitled to enforce his rights in the bankruptcy proceedings.

In Bankruptcy. In the matter of Solomon & Johnson, bankrupts. Petition to review an order of the referee refusing to set aside to the petitioner, as assignee of the bankrupt, certain exemptions. Order set aside, and cause remanded for further proceedings.

I. S. Canfield, or Alpena, Mich., for petitioner.
Lewis J. Weadock, of Bay City, Mich., for objecting creditors.

TUTTLE, District Judge. This is a petition to review an order of the referee in bankruptcy refusing to set aside to the petitioner, as assignee of the bankrupts, certain exemptions, on the ground that

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such bankrupts were not entitled thereto as against creditors of the partnership.

The bankrupts were copartners engaged in the grocery business at Alpena, Mich., under the firm name of Solomon & Johnson. One of the partners contributed a larger amount of cash than the other, although they agreed to share equally in the profits; the superior experience and knowledge of one of the partners being considered as the equivalent of the difference in the money actually invested. It was agreed that each partner should draw a certain amount each week as living expenses, and it is the claim of the trustee, which was upheld by the referee, that both partners had, at the time of the filing of the involuntary petition in bankruptcy, drawn from the partnership funds more than they were entitled to draw under the partnership agreement. Shortly before bankruptcy the partners sold their exemptions to the petitioner herein for the sum of $200 each, and this purchaser is seeking to recover the proceeds of the sale of the exempt property.

This sale was made by the bankruptcy court with the consent of the parties interested, and with the understanding that any rights of the purchaser to the exempt property should be transferred to the proceeds thereof. The referee denied the right of one of the partners to any exemptions, and materially reduced the exemptions allowed to the other partner, on the ground that such partners had drawn out more than their proper shares of the partnership assets before the filing of the petition in bankruptcy, and that, therefore, as against creditors, their right to exemptions should be to that extent diminished. The correctness of this ruling is the matter involved on this petition to review.

[1] The meritorious question presented is whether a member of a bankrupt Michigan partnership, who has drawn from the partnership assets more than his share as between himself and his copartner is thereby deprived of the right to claim the full amount of the exemptions provided by the Michigan statute, as against creditors of the bankrupt partnership.

Section 6 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 548 [Comp. St. § 9590]) is as follows:

> "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

In determining the nature and amount of the exemptions to which these bankrupts are entitled, this court will follow and adopt the Michigan statute and the decisions of the Michigan Supreme Court construing and applying such statute. Holden v. Stratton, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018; In re National Grocer Co., 181 Fed. 34, 104 C. C. A. 47 (C. C. A. 6), 30 L. R. A. (N. S.) 982; In re Baker, 182 Fed. 392, 104 C. C. A. 602 (C. C. A. 6).

[2, 3] The Michigan statute on the subject of exemptions in force at the time of the filing of the petition in bankruptcy herein was sec-

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tion 10322 of the Michigan Compiled Laws of 1897, which provided, among other things, that—

"The following property shall be exempt from levy and sale under any execution, or upon any other final process of a court: * * * The tools, implements, materials, stock * * * to enable any person to carry on the profession, trade, occupation or business in which he is wholly or principally engaged, not exceeding in value $250."

While in many, if not most, states, it is held that the members of a partnership are not entitled to exemptions in the partnership assets, in Michigan at the time in question, and before the enactment of the Uniform Partnership Act (Pub. Acts 1917, Mich. No. 72) now in force, the rule was otherwise, and it was settled that each partner was entitled to his exemptions in partnership property to the same extent and in the same manner as if he were carrying on business as an individual. Skinner v. Shannon, 44 Mich. 86, 6 N. W. 108, 38 Am. St. Rep. 232; Waite v. Mathews, 50 Mich. 392, 15 N. W. 524; McCoy v. Brennan, 61 Mich. 366, 28 N. W. 129, 1 Am. St. Rep. 589.

Each of these partners, therefore, was entitled to claim his exemptions in the stock of merchandise owned by this bankrupt partnership. It does not appear that the partners individually were adjudicated bankrupts, or that the property owned by them as individuals has been brought into the possession or under the jurisdiction of the bankruptcy court. Neither partner is complaining of any of the acts of the other nor seeking any accounting as between the members of this partnership. Only the creditors of the partnership are denying the rights of the partners to claim their statutory exemptions, and this solely on the ground that to allow such exemptions will enable each of such partners to draw from the firm assets a larger share than that to which he is entitled under the partnership agreement. It seems clear that these creditors are not in a position to make any such objection. Each of these partners was entitled to the same exemptions in the partnership stock as that allowed to an individual person. His right thereto as against creditors of the partnership is not affected by equities existing between himself and his copartner, any more than the right of an individual to such exemptions is affected by equities existing between himself and third persons. In both cases, the right to the statutory exemptions is an absolute and fixed privilege afforded by the state. The purpose of the exemption is not only to protect every debtor from total destitution, but also to protect the public from the resultant necessity of providing for him as a public charge. The right of an individual to the exemptions prescribed by the statute does not depend upon the extent or character of his indebtedness or his obligations to other persons; nor does the right of a partner to such exemptions depend upon the question whether he has drawn out from the partnership more than his proper share. McCoy v. Brennan, supra.

[4] As each partner was entitled to his exemptions in the stock of merchandise owned by the partnership, the sale thereof to the petitioner was rightfully made and the latter is entitled to enforce his rights as purchaser in the bankruptcy proceedings. In re National Grocer Co., supra.

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I am clearly of the opinion that the referee erred in the respect indicated. The order complained of will be set aside, and the cause remanded for further proceedings in conformity with the terms of this opinion.

In re CHAMBERS.

(District Court, N. D. Iowa, E. D., at Dubuque. January 2, 1919.)

No. 977.

BANKRUPTCY ⟸200(4) — LIENS — JUDGMENTS RECOVERED WITHIN FOUR MONTHS.

Under Bankruptcy Act July 1, 1898, § 67f (Comp. St. 1916, § 9651), providing that judgments obtained against an insolvent within four months of the filing of a petition in bankruptcy against him shall be deemed void, a judgment recovered by an Iowa landlord the day before the tenant filed a voluntary petition in bankruptcy is not entitled to priority over a chattel mortgage given and recorded some 20 months prior to the bankruptcy, regardless of the landlord's right to a lien under Code Iowa, § 2992.

In Bankruptcy. In the matter of Milton O. Chambers, bankrupt. Petition of the Commercial Trust & Savings Bank of Charles City for review of an order of the referee denying its claim to priority under a chattel mortgage, and allowing a judgment of Mrs. Margaret E. Gladwin as a lien prior and superior thereto. Order reversed, and matter referred back to the referee for further proceedings.

Submitted on petition of the Commercial Trust & Savings Bank of Charles City (called the petitioner) for review of an order of the referee denying its claim to priority under a chattel mortgage upon certain property of the bankrupt, made and recorded in the proper county more than four months prior to the adjudication in bankruptcy, and allowing a judgment of Mrs. Margaret E. Gladwin, recovered in the district court of Floyd county, Iowa, January 15, 1917, against the bankrupt, as a lien upon the property covered by the petitioner's mortgage, as prior and superior thereto.

J. C. Campbell, of Charles City, Iowa, for petitioner.
J. H. Lloyd, of Charles City, Iowa, for claimant.

REED, District Judge. The adjudication in bankruptcy was upon the voluntary petition of the bankrupt, prepared and signed January 12, 1917, filed and adjudicated January 16, 1917; the schedules of his assets and liabilities showing that he was then insolvent.

February 2, 1917, the petitioner filed its claim against the bankrupt estate, based upon a promissory note of the bankrupt dated March 15, 1915, for $1,661, due in two years, with interest, for money loaned to the bankrupt, secured by a chattel mortgage of the same date upon certain horses, cattle, and other live stock, which property, it is recited in the mortgage, "is free and clear of all claims and liens of every kind whatsoever," which mortgage was duly filed and recorded in the proper record in Floyd county, Iowa, where the property was

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then situated, on March 17, 1915, two days after the mortgage was made, and asked that its claim be established and allowed as a prior lien on the property covered by its said mortgage.

January 12, 1917, the date the petition in bankruptcy was prepared and signed, Mrs. Gladwin, a sister of the bankrupt, who will be called the claimant, filed in the district court of Floyd county, Iowa, a petition to recover from the bankrupt some $450, alleged to be rent due her from him for certain land described in the petition, which she alleged was verbally leased by her to the bankrupt in December, 1914, for two years from March 1, 1915, and claimed a landlord's lien therefor under the Iowa Code (section 2992), and an attachment enforcing the same upon the property covered by the petitioner's mortgage, alleging that such property was used upon the land so leased by her to the bankrupt, during the term of such lease. Such action was commenced by Mr. Lloyd as her attorney, who was also attorney for the bankrupt in procuring the adjudication in bankruptcy. No notice or summons of the petition so filed was served upon the bankrupt; nor was the petitioner, whose mortgage was then of record in Floyd county, made a party to the suit, and it was never served with notice thereof. On the same day, January 12, 1917, Mr. Lloyd, as attorney for the claimant, procured from the bankrupt a writing, duly signed by him, admitting the debt and amount thereof as claimed by the claimant, filed the same in the state court as an appearance therein, consenting to the jurisdiction of the state court to entertain the suit at that term, though the term had actually commenced at the time required by law, some days before, and a judgment by default was entered against the bankrupt on January 15, 1917, for the amount claimed by the claimant, and a landlord's writ of attachment was issued and levied by the sheriff of Floyd county upon the property covered by the petitioner's mortgage, which property was later sold under such attachment, and the proceeds arising therefrom brought into the court of bankruptcy in this proceeding.

January 22, 1917, the claimant filed, or caused to be filed, in this proceeding a claim based upon her judgment so recovered in the state court for $474.90, and asked that it be allowed and established as a prior lien for rent upon the property covered by the petitioner's mortgage, and that petitioner's claim be denied as a claim or lien upon the property so covered by its mortgage. The referee allowed the claim as prayed by the claimant, and denied the claim of the petitioner under its mortgage.

Such in brief is a statement of the facts as shown by the record, so far as deemed material, which are not disputed, except that both parties claim the prior right to the property covered by petitioner's mortgage.

To the claim of Mrs. Gladwin is attached a letter of attorney by the claimant, appointing J. H. Lloyd as her attorney in fact, to act for and represent her in the bankruptcy proceeding.

To such claim the petitioner objected for the reasons, among others: (1) That the judgment upon which the claim is based was fraudulently procured and entered in the district court of Floyd county

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within four months immediately preceding the adjudication in bankruptcy, without notice to the petitioner, and is of no effect against it; (2) that said judgment is invalid as a lien upon or claim against the bankrupt estate, under section 67 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564 [Comp. St. 1916, § 9651]). That section provides:

"Sec. 67f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same. * * *"

See Collier on Bankruptcy, p. 1084 et seq. (11th Ed.).

Under this section all attachments and other liens recovered in any legal proceedings against the bankrupt within four months immediately preceding the adjudication in bankruptcy are annulled, and the property affected by any such lien is wholly discharged therefrom. Clarke v. Larramore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555; Chi., B. & Q. R. Co. v. Hall, 229 U. S. 511, 33 Sup. Ct. 885, 57 L. Ed. 1306; In re Richards, 96 Fed. 935, 37 C. C. A. 634; In re Forbes, 186 Fed. 79, 108 C. C. A. 191; Cook v. Robinson, 194 Fed. 785, 114 C. C. A. 505; In re United Motor Chicago Co., 220 Fed. 772, 136 C. C. A. 378; Stone-Ordean-Wells Co. v. Mark, 227 Fed. 975, 142 C. C. A. 433; In re Southern Arizona Smelting Co., 231 Fed. 87, 145 C. C. A. 275. And see Casady & Co. v. Hartzell et al., 171 Iowa, 325, 151 N. W. 97.

As the claimant relies alone upon the judgment of the state court as establishing her lien upon the property covered by the petitioner's mortgage, as prior thereto, the objection of the petitioner challenges the validity of her claim at its foundation.

That the Iowa statute (Code, § 2992) gives a landlord a lien upon all crops grown upon the leased premises, and other personal property of the tenant, not exempt from execution, that has been used upon such premises during the term of the lease, if properly established, is not and cannot be successfully challenged; but whether or not the judgment of a state court establishing such a lien against a bankrupt alone only one day before his adjudication, without service or summons upon him, but upon his voluntary appearance and consent to the judgment and lien of the landlord, is valid as against a good-faith mortgagee of certain property of the bankrupt, duly made and recorded nearly two years before the adjudication, who has had no opportunity to challenge or contest such lien, is quite another question, and especially a judgment recovered under the circumstances shown by this record.

The objection of the petitioner to the judgment of this claimant so recovered may not strictly reach to the question of the validity of a landlord's lien, regardless of the attachment or decree establishing the same; but that question is not raised in this proceeding, and need not be considered.

In Chi., B. & Q. R. Co. v. Hall, 229 U. S., above, it is said of section 67f of the Bankruptcy Act·

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"Barring exceptional cases, which are especially provided for, the policy of the [Bankruptcy] Act is to fix a four months period in which a creditor cannot obtain an advantage over other creditors nor a lien against the debtor's property. 'All liens obtained by legal proceedings' within that period are declared to be null and void."

As the finding and order of the referee is based wholly upon the judgment of the state court, which judgment is annulled by section 67 of the Bankruptcy Act, the order of the referee must be and is reversed, and the matters referred back to the referee for further proceedings not inconsistent with the views herein expressed.

It is ordered accordingly.

THE ST. CHARLES.

THE MONT CENIS.

(District Court, E. D. Virginia. December 19, 1918.)

SALVAGE ⟹30—RESCUE OF STRANDED STEAMSHIP—COMPENSATION.

The steamship Mont Cenis, with a cargo of iron and valued at $2,000,000, in September 1917, on a voyage from New York to Marseilles, stranded near the Mediterranean coast of Spain, and in answer to her calls the steamer St. Charles, part of a convoy to Marseilles, valued at $500,000, contrary to orders, came to her assistance and within three hours released her without danger. The St. Charles later rejoined her convoy. Being in the submarine zone, quick passage was desirable for both vessels. *Held*, that the St. Charles was entitled to a salvage award of $15,000.

In Admiralty. Suit for salvage by the Maru Navigation Company, owner of the steamship St. Charles, against the steamship Mont Cenis. Decree for libelant.

Butler, Wyckoff & Campbell, of New York City, and Mr. Loomis and Hughes & Vandeventer, of Norfolk, Va., for libelant.

Kirlin, Woolsey & Hickox and Mark W. Maclay, Jr., all of New York City, and Edward R. Baird, Jr., of Norfolk, Va., for respondent.

Loyall, Taylor & White, of Norfolk, Va., for crew of the St. Charles.

WADDILL, District Judge. About 6 o'clock on the morning of August 26, 1917, the Mont Cenis, a large ocean-going steamship, proceeding to Marseilles, France, from New York, laden with steel, stranded on the Mediterranean coast of Spain, some 2½ miles off Villaricos, and within the 3-mile territorial limits of Spain. The St. Charles was an old steamer, en route to Genoa, Italy, and formed part of a convoy of several ships bound to Marseilles, and was valued at $500,000. The Mont Cenis was under requisition by the French government, which tended to reduce her market value at the time, but she was appraised at about $2,000,000.

The two ships left Gibraltar at approximately the same time, on the 25th of August, 1917, and when about a half day's journey out, some 150 miles from the place of grounding, a submarine was sighted, which quickly submerged. The Mont Cenis was equipped with a gun

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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mounted on her stern. While thus proceeding, the Mont Cenis stranded, and remained so from 6:30 in the morning until 9. She had been unable to secure assistance until the St. Charles responded to her call for help. The latter ship came alongside shortly after 9 o'clock, planted anchors, and made fast to the Mont Cenis, and pulled her off the bar shortly before 12 o'clock. The total time consumed in this part of the service was less than 3 hours, and the time of actual pulling did not exceed 15 minutes. The wind was moderate, the sea smooth, and good weather conditions, generally favorable to the successful completion of the service, prevailed. No particular skill was required, nor hazard nor danger incurred. The St. Charles, in making fast to the Monte Cenis, collided with her, and in attempting to clear herself, her hawser pulled out from the lug on the stern of the ship, and, becoming taut, raked along her rail, taking off a great part of the rail and poop deck, and, before the cable could be gotten clear, it caught in, and entwined itself in her propeller. This, however, was later cleared, and, aside from the injury to the rail and poop deck, no special harm resulted from the ships coming together. Their colliding was doubtless because of the existence of an unknown current, which could have been avoided, if its presence had been known to the navigators of the St. Charles.

The libelant laid much stress upon the presence of submarines, as evidenced by the one mentioned above. The court does not consider there was any danger from the one seen, or anything to indicate that others were present, at and about the time of the collision. It is a fact that those waters were in the submarine zone, through which it was desirable vessels should pass quickly, though it was not likely much danger would happen to vessels navigating as close inshore as the Mont Cenis was. The place of stranding, also, was, by reason of the shifting sands of the beach, an undesirable place for navigation, and dangerous to vessels stranding there.

After the Mont Cenis was released, each vessel continued its journey, the St. Charles first rendering every assistance necessary and required, and she overtook and joined her convoy at 12 o'clock the next day, the time when she left her convoy the day before, to the time of overtaking it, being some 26 hours, and no actual time was lost by either vessel in reaching her destination.

The services rendered by the St. Charles were entirely salvage. They were rendered promptly and intelligently; the St. Charles leaving her convoy contrary to orders to perform the same. They were valuable to the salved ship, and considerately rendered when she had not been able to procure other assistance, and it was important alike to both vessels that they should be detained as short a time as possible.

Taking into consideration all the circumstances of the case, the large values involved, the urgency of the service, and the promptness with which it was performed, an award of $15,000 would be fair to the St. Charles; and a decree to that effect will be entered, upon presentation.

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In re PFLEIGER.

(District Court, S. D. New York. December 10, 1918. On Further Hearing, December 17, 1918.)

1. ALIENS ⟸61—NATURALIZATION—GERMAN SUBJECTS.

An Alsatian born before the cession of Alsace to Germany, who was a child at that time, and whose parents remained, and hence became German subjects, is not entitled to admission to citizenship under Naturalization Act June 29, 1906, § 4, par. 11, as added and amended by Act May 9, 1918, § 1 (Comp. St. 1918, § 4352), except by consent of the President as therein provided.

On Further Hearing.

2. ALIENS ⟸68—NATURALIZATION—ALIEN ENEMIES.

Under the proviso in Naturalization Act June 29, 1906, § 4, par. 11, as added and amended by Act May 9, 1918, § 1 (Comp. St. 1918, § 4352), that aliens classed therein as alien enemies may be admitted to citizenship by consent of the President, where such consent is procured, no notice of the application is required to be given to the Department of Labor.

On application of Paul Pfleiger for naturalization. Granted.

Henry C. Quinby, of New York City, for petitioner.

The Chief Naturalization Examiner, for the United States.

LEARNED HAND, District Judge. [1] This case presents the case of an application for naturalization by an Alsatian born before the cession of Alsace to Germany, but at that time a child. His parents did not remove to France in accordance with the provisions of the treaty between France and Germany, and by the cession to Germany they became subjects of the German emperor. This change in their allegiance was effected regardless of their will, and was the result of the enforced consent of their sovereign at that time. Regardless of the personal feelings of the Alsatians, their status became so established, and they must be treated as German subjects until there has been some change in status which can be recognized by our courts.

The petitioner is entitled to relief under the third proviso of paragraph 11 as added to section 4 of Act June 29, 1906, c. 3592, 34 Stat. 596, by Act May 9, 1918, c. 69, § 1 (Comp. St. 1918, § 4352), upon consent granted by the President, but it seems to me unquestionable that this is his only remedy. I shall therefore decline to act upon the present petition until peace has been declared.

Hearing adjourned sine die.

On Further Hearing.

[2] Upon rehearing it appears that this applicant has now procured the consent of the Department of Justice, acting with the authority of the President, to his admission. The Department of Labor suggests in opposition that no notice has been given to it as required under the first proviso to the eleventh paragraph of section 4 of the

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Naturalization Act, as amended. It is, however, an error to suppose that such a notice is necessary in cases of Germans where the declaration was made after April 6, 1915. In such cases the President alone may grant consent to the naturalization of an alien enemy under the third proviso of that section, and the inquiry precedent to that consent must be conducted by the Department of Justice. As the Department of Labor has no duties to perform respecting such cases, it is obviously unnecessary that notice should be given to it, and, indeed, to give such notice might presuppose the possibility of a decision by the Department of Labor different from the Department of Justice, an untoward result. The words in the third proviso, "foregoing exemption," mean the condition or exception set forth in the body of the eleventh paragraph, beginning with the words "unless he made," etc. The first proviso is attached both grammatically and in its meaning to this condition, but to nothing more. The third proviso reaches all cases within the general prohibition of the eleventh paragraph, except those included within the condition or exemption, but it does not reach those which are within the exclusive purview of the Department of Labor.

There is, therefore, no need to give notice to the Department of Labor of applications made by alien enemies upon declarations made after April 6, 1915, if they be Germans, or December 7, 1915, if they be Austrians. The petitioner will therefore be admitted.

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ATCHISON, T. & S. F. RY. CO. v. WEEKS et al.

(Circuit Court of Appeals, Fifth Circuit. December 20, 1918.)

No. 3226.

RAILROADS ⟸33(2)—FOREIGN CORPORATIONS—LIABILITY TO SUITS—DOING BUSINESS IN STATE.

A foreign railroad company, not undertaking to do within the state any of those things for which it is incorporated, although having managers in the state who direct its operations in other states, employing only the clerical force necessary for that purpose and using the mails and interstate telegraphs in transmitting orders, is not to be regarded as doing that character of business which renders it subject to personal judgment in the courts of the state for a tort committed in another state.

Appeal from the United States District Court for the Western District of Texas; William R. Smith, Judge.

Suit by the Atchison, Topeka & Santa Fé Railway Company against J. F. Weeks and others. Decree for defendants, and complainant appeals. Reversed.

For opinion below, see 248 Fed. 970.

A. H. Culwell, of El Paso, Tex., and J. W. Terry, of Galveston, Tex. (Terry, Cavin & Mills, of Galveston, Tex., Turney Culwell, Holliday & Pollard, of El Paso, Tex., and Robert Dunlap, of Chicago, Ill., on the brief), for appellant.

George E. Wallace, of El Paso, Tex. (Weeks & Owen, of El Paso, Tex., on the brief), for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

BATTS, Circuit Judge. The suit was by appellant to restrain collection of a judgment by default of a court of Texas upon a cause of action arising in tort in California. The pertinent facts are:

The appellant company, not a Texas corporation, has lines of railroad in a number of states, including Oklahoma, New Mexico, and Arizona. It has no line in the state of Texas. It formerly operated a line into El Paso, Tex., under a lease. The Railroad Commission not giving its necessary approval, the lease was not renewed. It has no permit to do business within the state, and has complied with none of the laws with reference to the doing of business by foreign corporations. It is incorporated to operate a railroad, and could not secure a permit to do business within the state. R. J. Parker, upon whom service was had, is the general manager of the appellant's Western lines. He directs the operation of the appellant's railroads by letters and telegrams to its officers and agents from his office at Amarillo, Tex. He is chief operating officer of the Pan Handle & Santa Fé Railway Company, and is required to maintain his office, as such, under the laws of the state of Texas, at Amarillo. As a matter of convenience, he directs from that point the operations of the Western lines of the appellant, the lines lying outside the state, but connecting at the state line with the Pan Handle & Santa Fé. Appellant's general superintend-

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ent, trainmaster, general foreman, and mechanical superintendent are also at Amarillo. These officers maintain their residences at that place, and assist in directing the operation outside of the state of appellant's lines under their jurisdiction. The general manager and other officers have the necessary clerical force at Amarillo. Appellant does not own and maintain a railway extending to Amarillo, and does not maintain any local agent at that place, or have any office or agency there, or elsewhere in the state, except as stated. The principal offices of appellant are not in Texas.

The holding of the trial judge that jurisdiction over appellant could not be based on the relations between it and the Pan Handle & Santa Fé Railway Company is sustained by Peterson v. C., R. I. & P. Ry. Co., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841. The matter for determination is the validity of a judgment by default upon service of citation upon R. J. Parker, manager.

A suit for damages for personal injuries is a transitory action, cognizable in the courts of any state in which the defendant may be found. A corporation, foreign to a state, may so subject itself to the jurisdiction of the state as to place itself, with reference to such an action, in the same position as an individual. This may result from the establishment in the state of the main office of the corporation, and the discharge there of the principal corporate functions, or from doing business therein in such a way and to such an extent that it will be held to be present within the state. With reference to the proposition last made, in the case of People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537, it is said:

"The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents, present within the state or district where service is attempted."

In connection with this rule it is said: "Each case depends upon its own facts." When such a statement may be made, a doubt arises as to whether that which is spoken of as a rule has been properly characterized.

While the formulated legal principles are too indefinite to be very useful, the adjudicated cases indicate the judicial trend. In the case of Peterson v. Chicago, Rock Island & Pacific Ry. Co., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841, it was held that the fact that the defendant railroad company owned stock in the local subsidiary company, that its officers were the officers of the subsidiary company, and that the lines of the local company connected with its lines, did not bring it "into the state in the sense of transacting its own business there."

It is also established that the continued practice of advertising its wares in a state, and the maintenance of a staff of soliciting agents, does not subject a corporation to the local jurisdiction for the purpose of service of process (Green v. C., B. & Q. Ry. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916); although, if the agents have authority

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to receive payment and checks or drafts on behalf of the company, and to take notes payable and collectible at banks in the state, it is doing business in such a way as to subject it to process (International Harvester Co. v. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479).

It is well established that, when acting under the laws of the state with reference to foreign corporations, such a corporation secures a permit, and designates agents upon whom service may be had, it subjects itself, in all respects, to the jurisdiction of the courts of the state as to any business covered by its permit; but it is doubted if such designation of an agent for service constitutes a subjection of the corporation to the courts of the state with reference to business or transactions outside the state, and not within the permit. By making application for the permit to do business, and receiving it, the corporation clearly defines the extent to which it subjects itself to the state jurisdiction. This limitation would no longer be applicable if it acted beyond the permit given. The residence within the state of the governing officers of the corporation does not constitute presence of corporation.

The doing of business which is entirely incidental to the main business, especially if it be interstate in its character, will not evidence an intention of the corporation to subject itself to the local laws. This may extend even to the maintenance of offices within the state, and the employment of such clerical help as may be necessary, without having such effect. Green v. C., B. & Q. Ry. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916.

In determining whether appellant has subjected itself generally to the jurisdiction of the Texas courts, may be considered:

(1) The business of the Atchison, Topeka & Santa Fé Railway Company is the operation of a railroad. It had no authority to operate a railroad in the state of Texas. It could acquire no such authority. The laws specifically inhibit the operation of a railroad within the state by a corporation not chartered by the state.

(2) It made no effort to secure a permit to do business as a foreign corporation, and made no effort to comply with the laws relative to foreign corporations. When it ceased to do business through the operation of a leased line, the state authorities would not permit a renewal of the lease. The state has taken no steps to compel compliance by the company with the laws affecting foreign corporations.

(3) The general manager and other officers of the corporation had their offices at Amarillo, Tex. From that point they directed the operation of the railroad outside the state. The power which they exercised had all its effect outside the state. That which was done by them in the state was not unimportant, but was purely incidental to the business for which the company was chartered, and which was conducted exclusively in other states. These incidental duties were performed by transactions interstate in their character, all orders being transmitted across the state line.

(4) The principal corporate functions of the corporation were performed at its general offices in another state by its controlling officers.

(5) The employment and payment of clerks at Amarillo could have

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no effect not resulting from the employment and payment of officers. In the cases of Green v. C., B. & Q. Ry. Co., and People's Tobacco Co. v. American Tobacco Co. there were local employés and clerks hired and paid, and who worked within the state.

(6) The appellant corporation had no permit from the state of Texas to do the character of business which was done, nor was there any law which would have required or authorized the issuance of such permit. That which was done was within the rights of the corporation and of the persons who represented the corporation, as citizens of the United States. The state of Texas could not have prevented the doing of that which was done, and could not have regulated the manner in which it was done, and had no right to impose any burdens or duties or obligations or incidental liabilities as the result of that which was done.

(7) There are no facts evidencing an intention on the part of the railway company to subject itself to suit within the state of Texas on a cause of action arising outside the state, or with reference to any matter or thing other than the conduct of its offices at Amarillo. There is no fact evidencing an intention on the part of the railway company to transfer its citizenship and its corporate existence from the state of its incorporation to the state of Texas.

The conclusion is reached that, where a corporation is not undertaking to do within the state any of those things which it is incorporated to do, the only business done within the state being by managers who give direction for the operation of the business of the corporation in other states, using only the necessary clerical force to that end, and utilizing the United States mails and interstate transportation in the conveyance of directions, the corporation is not to be regarded as doing that character of business which would be equivalent to the presence within the state of the corporation, and which would be the essential basis for a personal judgment against the corporation within the state for a tort committed in another state.

It is recognized that the correctness of the conclusion is not free from substantial doubt. It can be insisted that the negative of the proposition is supported by the authorities. Such rulings as have been made in the state of Texas are contrary to the conclusion reached, though the Supreme Court has not passed upon the matter. Railway Co. v. Chisholm (Tex. Civ. App.) 180 S. W. 58. Basing his ruling largely upon Washington & Va. Ry Co. v. Real Estate Co., 238 U. S. 185, 35 Sup. Ct. 818, 59 L. Ed. 1262, the trial judge, in an able opinion, has forcibly presented the opposite view. The following cases, and a number of state cases, may be cited in support of his judgment: St. L. S. W. Ry. Co. v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77; A., T. & S. F. Ry. Co. v. Sowers, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. Ed. 695; Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 35 Sup. Ct. 37, 59 L. Ed. 220.

It is believed, however, that the weight of authority from the governing court sustains the conclusion herein reached. In the case of People's Tobacco Co. v. American Tobacco Co., supra, the Supreme Court denied the jurisdiction of the state court, although at that time

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the company was selling goods in Louisiana, where the service was had, to jobbers, and sending its drummers into that state to solicit orders of the retail trade, the charges being made by the jobbers against the retailers, and it was also carrying out a decree of dissolution under the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209).

The case of P. & R. R. R. Co. v. McKibbin, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710, was instituted by McKibbin in the Southern District of New York; service being had on the president of the company while passing through New York. McKibbin was a brakeman in one of the New Jersey freight yards of the defendant, a Pennsylvania corporation. No part of the railway line was located in New York. It sent into that state, however, loaded freight cars, which were returned by connecting lines; tickets were issued in New York, good over the connecting lines and that of plaintiff in error. At various places on the terminal ferry at New York are signs bearing the name "Philadelphia & Reading," "P. & R.," or "Reading," and in the New York telephone directory are the words: "Phila. & Reading Ry. Ft. W. 23d St. Chelsea, 6550." The Supreme Court held that the company was not doing business in New York under such circumstances as to give the courts of New York jurisdiction to render a personal judgment.

In Toledo R. & L. Co. v. Hill, 244 U. S. 49, 37 Sup. Ct. 591, 61 L. Ed. 982, suit was filed in a New York court to recover on bonds issued by the Toledo Company, an Ohio corporation. Service was had upon the directors and vice president of the company residing in New York. The corporation had issued its bonds and secured them by mortgage; the United States Mortgage & Trust Company of New York being trustee. They were delivered to that company to be certified, and they were subject to registry and became due and payable at the office of the company in New York, where the semiannual interest was also payable. Prior to 1909, when the company defaulted, the bonds and coupons were paid at the office of the commercial firm in New York representing the company for that purpose. It was held that the company was not doing business in New York in the sense which would authorize a personal judgment in the courts of that State.

In Green v. C., B. & Q. Ry. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, the plaintiff brought an action in a United States Circuit Court of Pennsylvania to recover damages for personal injuries in Colorado. The eastern point of the defendant's line of railroad was Chicago, the track extending westward. It was incorporated to carry freight and passengers, and to operate a railroad for that purpose. To solicit freight and passenger traffic, the person upon whom service was had was employed at Philadelphia, where he rented an office, and where he was advertised as district freight and passenger agent. Clerks were employed under him, and reports were made to him by traveling freight and passenger agents, who acted under his direction. The court says:

"Its validity [the service] depends upon whether the corporation was doing business in that district in such a manner and to such an extent as to warrant the inference that through its agents it was present there. * * * With-

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out undertaking to formulate any general rule defining what transactions will constitute 'doing business,' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon him."

This case would seem to amply warrant the conclusion reached herein. Many additional cases, which seem to support the conclusion reached, include Goldey v. Morning News, 156 U. S. 519, 15 Sup. Ct. 559, 39 L. Ed. 517; Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; Peterson v. C., R. I. & P. Ry. Co., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841.

When the law is so doubtful in its terms or its application, there can be no impropriety in considering in its development the public policy involved. As applicable to railroad corporations, the recognition of a right to sue for damages for injuries in any place other than in the state of the injury is of very questionable policy. While the rule may be justified as to an individual on account of the ease with which the right to recover might otherwise be defeated, no such reason exists as to a railroad, whose residence and business are permanently localized. Manifestly, there are many advantages in trying such a case where the cause of action arises. The law of the cause of action is the law of the place. It may be assumed that the courts of the state can more satisfactorily administer the laws of the state than can the courts of any other state. The expense incident to a trial would usually be materially less at the place of the tort than elsewhere. The imposition upon a state of the expense of maintaining courts to try causes in which the state has no interest would be difficult to justify. The maintenance of the judicial machinery involves no light burden. Many of the states, including Texas, have been unable to provide adequate machinery. No good reason could probably be made to appear why her overworked courts should be compelled to carry any part of the burdens of other states. Considerations of this character are manifestly more for the legislative than the judicial department, but they cannot be entirely ignored when the weights of two opinions are so nearly equal.

The judgment is reversed; the cause is remanded, with instructions to enter a decree in favor of the appellant, perpetually enjoining the defendant, as prayed in the bill.

Reversed.

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FLOWERS v. BUSH & WITHERSPOON CO.

(Circuit Court of Appeals, Fifth Circuit. December 17, 1918.)

No. 3248.

1. EVIDENCE ⊂⊃151(1)—WITNESSES ⊂⊃240(4)—EXAMINATION—LEADING QUESTIONS.
It was proper to refuse to allow defendant as a witness to answer a leading question calling for undisclosed state of mind of defendant upon a subject-matter which was vital to the case and upon which it was impossible to contradict him.

2. GAMING ⊂⊃12—GAMING CONTRACTS.
The uncommunicated intention of either party to a contract for the sale of cotton for future delivery, that no cotton was to be actually delivered, will not establish the gaming character of the transaction, and it must appear that the parties mutually, either expressly or impliedly, understood no delivery was to be made or accepted.

3. EVIDENCE ⊂⊃184—SIMILAR TRANSACTIONS—INTENT—GAMING CONTRACTS.
In an action for breach of a contract to sell cotton for future delivery, which defendant contended was a gaming contract, in that no actual delivery was contemplated, evidence that similar contracts were settled on a monetary basis by payment of difference between contract and market price, *held* inadmissible; such evidence not showing intent.

4. GAMING ⊂⊃49(3)—CONTRACTS—EVIDENCE.
In an action for breach of a contract for the future delivery of cotton, evidence *held* to warrant a finding that the contract was not a gaming contract.

5. PRINCIPAL AND AGENT ⊂⊃119(1)—AUTHORITY OF AGENT—BURDEN OF PROOF.
Defendant, who relied on the cancellation of a contract by plaintiff's agent, has the burden of proving the authority of the agent.

6. PRINCIPAL AND AGENT ⊂⊃111(1)—AUTHORITY OF AGENT—SCOPE.
Authority of an agent to make a contract does not imply authority to cancel it.

7. PRINCIPAL AND AGENT ⊂⊃111(3)—AUTHORITY OF AGENT—SCOPE.
That plaintiff's agent accepted settlement of one contract for the future delivery of cotton, on payment of the legal measure of damages after breach, does not establish the agent's authority to cancel another contract.

8. TRIAL ⊂⊃48—EVIDENCE—EXCLUSION.
Exclusion of evidence inadmissible for the purpose for which it was offered is proper, though evidence was admissible on another theory.

In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge.

Action by the Bush & Witherspoon Company against Felix A. Flowers. There was a judgment for plaintiff, and defendant brings error. Affirmed.

L. T. Williams and N. B. Williams, both of Waco, Tex., for plaintiff in error.

J. D. Williamson, of Waco, Tex., for defendant in error.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. This was an action in the District Court for the breach of two contracts for the purchase and sale each of

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100 bales of cotton for future delivery. The plaintiff in error, defendant in the District Court, was the seller, and defendant in error, plaintiff in the District Court, was the purchaser. The breach was alleged by the plaintiff to have consisted in the failure of the defendant to deliver the cotton, as called for by the two contracts. The defendant set up as a defense to the first contract (that of May 11, 1916) the Texas statute (articles 538 and 539, Penal Code), which prohibits the making of contracts where no actual delivery of the cotton is contemplated by the parties, and to the second contract (that of June 21, 1916) that it was canceled by the agent of the purchaser shortly after it was entered into by the parties. The District Judge directed a verdict for the plaintiff, under both of the contracts, for the amount of the differences between the contract prices and the market prices at the dates of the respective deliveries. The court held that there was no evidence that at the time of entering into the first contract the parties to it intended to enter into a wagering or gambling contract, and that there was no evidence that the plaintiff's agent, Hooper, who it was contended had agreed to the cancellation of the second contract at defendant's request, had any authority from the plaintiff to make such an agreement.

[1, 2] The plaintiff in error complains of the action of the District Judge in refusing to permit him as a witness in his own behalf to answer this question:

"Mr. Flowers, was it your intention, at the time you made the first contract with Mr. Hooper, that actual cotton was to be delivered?"

The grounds of objection were that the question was leading, and because the secret intention of one party, not expressed to the other, was immaterial. The witness would have answered, if permitted, that it was not his intention, at the time he made the first contract, to deliver actual cotton to the plaintiff. The District Court properly exercised its discretion in refusing to permit the witness, who was a party and solely interested in the result, to answer a question which suggested the answer desired by counsel, and which called for an undisclosed state of mind of the witness upon a subject-matter which was vital to the case, and upon which it was not possible to contradict him. It is not clear that the expected evidence was competent, had the question been properly framed. The issue was whether the parties to the trade, when it was made, contemplated that there was to be an actual future delivery of the cotton. Anything said or done by either party, brought home to the other party, which reflected his intention as to delivery, would undoubtedly be material. The offer did not go to this extent. The uncommunicated intention of either or both parties would fall short of showing a gambling transaction. It must have appeared that the parties, mutually, either expressly or impliedly understood that no delivery was to be made or accepted. Showing a secret intent upon the part of one was not even competent as a step to show such a mutual understanding.

[3] The plaintiff in error also complains of the District Judge's refusal to permit his witness, H. S. Hooper, to answer this question:

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"You settled those contracts [referring to contracts with others similar to those with defendant] on a money basis, did you not?"

The witness, if permitted, would have answered that on some contracts made with plaintiff for the delivery of cotton in the fall of 1916, when the sellers did not deliver the cotton, they made settlements with plaintiff by paying the difference in money between the contract price and the market price at the time of delivery. Another question of the same purport went to specific instances. The offer went no further than to show that, in instances where the seller had breached his contract by failing to deliver, the right of action for such breaches had been liquidated, without suit, upon the basis of the legal measure of damage for such breaches. The evidence did not tend to illustrate the intent of the parties when the contract was made, and it is only the then intent not to make and receive delivery that the Texas statute inhibits. If the similar instances had shown an intent not to make and receive delivery, they might have served to illustrate the intent in the instant case; but they did not. They only tended to show what transpired long after the making of the trades, and not what was in the minds of the parties when they entered into the trades.

[4] The plaintiff in error also complains that a verdict was directed against it upon the first contract. We think the testimony of the plaintiff in error himself is convincing that he contemplated making deliveries under this contract, unless providentially hindered by storms or crop failure. His unwillingness to trade until assured by Hooper that he would be entitled to liquidate his contracts, in the event of such providential interference, on a money basis, only goes to show that deliveries were contemplated, barring such disasters. The language and conduct of the plaintiff in error are satisfying that he intended to deliver the cotton, and traded on the basis of his expected ability to procure the cotton for such delivery.

[5-8] The plaintiff in error lastly complains that the court directed a verdict against him upon the cause of action based on the second contract. As to this contract, the plaintiff in error set up its alleged cancellation by agreement between defendant in error's agent, Hooper, and himself, shortly after it was made. Hooper denied such agreement. The District Court determined the issue upon the ground that Hooper was not shown to have been authorized by defendant in error to cancel. The record very clearly shows that Hooper could only make contracts for defendant in error after having been specifically authorized in each instance. It also shows that Hooper did not make the contract sued on for his principal, unless delivery of an already signed paper evidencing it, to the plaintiff in error, is to be so considered. There is a conflict as to whether or not Bush made the contract over the telephone, but no evidence that Hooper made it, otherwise than as stated. There is no evidence of Hooper's authority to cancel, unless it is to be implied from the authority to make, or from his actually having made, the contract. Both failing to be shown, and the burden being on the plaintiff in error to show the authority of the agent, the defense fails. Nor does authority to make

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a contract imply authority to cancel it. Ye Seng Co. v. Corbitt (D. C.) 9 Fed. 423.

Plaintiff in error, however, contends that, if the District Court had permitted the witness Hooper to answer as to his having settled with parties, who had breached other similar contracts for his principal, there would have been evidence of his authority to cancel. The distinction between authority to bind his principal by accepting for him the legal measure of damage after breach, and releasing the seller, before breach, gratuitously, is obvious. Again, the evidence excluded was not offered by the plaintiff in error in support of the authority of Hooper to cancel the second contract, but to support the plaintiff in error's contention that the first contract was a gambling transaction. The District Court could not be criticized for excluding it for the only purpose for which it was offered, because it is now contended it might have been material for another different and undisclosed purpose.

We think the court properly ruled on the questions of evidence, and properly directed a verdict for the plaintiff upon both contracts sued on, and the judgment is affirmed.

Affirmed.

UNITED STATES v. GREAT NORTHERN RY. CO.

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3165.

1. PUBLIC LANDS ⟸81(1)—RAILROAD GRANT—LAND SUBJECT TO SELECTION AS LIEU LAND.

The right of a railroad company to select indemnity land on any public nonmineral land to which no adverse claim has attached at the time of selection does not extend to land then occupied by a qualified settler as a homestead, although, the land being unsurveyed, no filing has been made.

2. PUBLIC LANDS ⟸81(3)—SUIT TO ANNUL PATENT—LIEU LANDS.

The proviso to Act March 2, 1896, § 1 (Comp. St. 1916, § 4901), that no suit shall be brought to recover lands patented in lieu of other lands lost by the grantee through failure of the government to withdraw the same from entry, is a curative provision, and does not apply to lands patented after its enactment.

3. PUBLIC LANDS ⟸120—SUIT TO CANCEL PATENTS—PARTIES.

The United States may maintain a suit to cancel a patent to land erroneously issued, although the beneficial interest in the land has become vested in another.

4. COURTS ⟸356—FEDERAL COURTS—APPEAL—RECORD.

A bill of exceptions is not required on appeal in equity cases, under equity rule 75 (198 Fed. xl, 115 C. C. A. xl), but only a condensed statement of the evidence, approved by the court or judge.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Suit in equity by the United States against the Great Northern Railway Company. Decree for defendant, and the United States appeals. Reversed.

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Robert C. Saunders, U. S. Atty., and Ben L. Moore and Edwin H. Flick, Asst. U. S. Attys., all of Seattle, Wash.

F. V. Brown, F. G. Dorety, and R. J. Hagman, all of Seattle, Wash., for appellee.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. This is a suit to cancel a patent issued to the Great Northern Railway Company by the United States for the land in controversy, on the ground of alleged inadvertence and mistake of the Land Department in issuing the same. The land in question was selected in lieu of land which the St. Paul, Minneapolis & Manitoba Railway Company relinquished to the United States in pursuance of the Act of Congress of August 5, 1892, c. 382, 27 Stat. 390. The defendant is the successor in interest of the St. Paul, Minneapolis & Manitoba Railway Company. The lands subject to selection are described by the act as—

"nonmineral public lands, so classified as nonmineral at the time of actual government survey which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection lying within any state into or through which the railway owned by said railway company runs, to the extent of the lands so relinquished and released."

The St. Paul, Minneapolis & Manitoba Railway Company, under the act, was entitled to make selection from surveyed or unsurveyed lands; but, in case such selection was from unsurveyed lands, it was required to designate the lands with reasonable certainty, and was further required to file a new selection list describing the tracts selected according to survey within three months after the survey and plats thereof had been filed in the local land office. Selection was made by such railway company of the land in dispute May 5, 1902, and adjustment was made according to the public survey February 23, 1907; the plat of survey having been filed February 6, 1907. On April 13, 1908, patent was issued by the land office to the defendant herein as successor in interest to the St. Paul, Minneapolis & Manitoba Railway Company, and the legal title now stands in the name of the patentee.

[1] The evidence shows quite satisfactorily that one L. C. Thebo settled on the land in dispute some time prior to March, 1902, claiming it as a homestead, and continued to live there for 2 or 2½ years. Thebo was a native of Michigan, and was otherwise qualified to enter the land as a homestead. In 1904 Hugh H. Boggs settled on the same land, claiming it as a homestead, and continued to live there until August 18, 1906, when he sold his relinquishment to Edmund Magner, who entered the land at the land office as his homestead, and has continued to reside thereon and to claim and improve the same as such ever since. The record at the local land office shows that Magner entered the land February 6, 1907, alleging settlement April 18, 1904. The papers in the Magner application did not reach the General Land Office until after the issuance of the patent to the rail-

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way company, and on June 1, 1909, the Commissioner rendered a decision adverse to Magner, on the ground that he did not allege settlement until August 18, 1904, which was subsequent to the railway company's selection. The action of the Commissioner was affirmed by the Department January 22, 1910. Magner was, however, notified that—

"If, as a matter of fact, the land was occupied by a settler at the time of the company's selection, an allegation to that effect, duly verified, would furnish the basis for a hearing to determine the actual status of the land at the time of its selection by the company."

The requisite papers having been filed, a hearing was ordered by the Commissioner, which was set by the local land office for January 9, 1911, and notice was given to the parties interested. The hearing resulted in a decision by the local officers favorable to Magner, and this was confirmed by the Commissioner May 12, 1911. On the same day demand was made upon the railway company for a reconveyance of the land to the government.

The basis of the suit is inadvertence and mistake on the part of the Land Department in issuing the patent to the railway company, when it is alleged that the land was at the time of the railway company's selection occupied by a qualified settler. This brings upon the record the question for consideration whether the selection was valid and should be sustained as against the claim of the settler, or in this case the claim of Magner, who has succeeded to the right of the settler. The question is not new, or one of first impression with the federal courts. Without attempting to trace the history of the judicial solution of the inquiry, it will suffice to refer to a few of the leading cases of the Supreme Court dealing with the subject.

Preliminarily, it should be stated that, both under the pre-emption law and under the homestead law, after the act of 1880, the right of the settler was initiated by settlement. St. Paul, Minn. & Man. Ry. Co. v. Donohue, 210 U. S. 21, 31, 28 Sup. Ct. 600, 52 L. Ed. 941. And it has been further held that, if either a pre-emption or homestead right had been initiated before lieu selection was made, the parcels to which the right attached were not subject to appropriation as indemnity lands. Osborn v. Froyseth, 216 U. S. 571, 577, 30 Sup. Ct. 420, 54 L. Ed. 619. The court, answering the contention that the mere fact that there was no record of the homestead claim when the lieu selections were made was enough to give efficacy to the selections, and to vest the legal title under the patent thereafter issued, said:

"If at that date this land was actually occupied by one qualified under the law, who had entered and settled thereon before that time, with the intent to claim it as a homestead, the land had ceased to be public land and as such subject to selection as lieu land."

In the Donohue Case, the court further specifically held that (quoting from the syllabus):

"Under the Land Grant Act of August 5, 1892 (27 Stat. 390, c. 382), the right of the railway company to select indemnity lands, nonmineral and not reserved, and to which no adverse right or claim had attached or been ini-

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tiated, does not include land which had been entered in good faith by a homesteader at the time of the supplementary selection, and on a relinquishment being properly filed by the homesteader the land becomes open to settlement and the railway company is not entitled to the land under a selection filed prior to such relinquishment."

To the same effect is Osborn v. Froyseth, supra, wherein it is further said that:

"With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed."

See, also, Sjoli v. Dreschel, 199 U. S. 564, 26 Sup. Ct. 154, 50 L. Ed. 311.

If, therefore, the Land Department issued the patent to the railway company, through inadvertence and mistake respecting the fact of its being entitled thereto, when in reality there was a qualified settler upon the land when selection and supplementary selection were made, the suit would lie to cancel the patent. The proof, as we have previously indicated, shows quite clearly that the land in dispute was so occupied by a qualified settler, and it follows that the railway company's selection never attached, and it was never entitled to the patent.

[2] It is, however, strenuously insisted that complainant's right of action is precluded by the Act of Congress of March 2, 1896, c. 39, § 1, 29 Stat. 42 (Comp. St. 1916, § 4901), wherein it is provided that—

"No suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry."

This is a curative statute, rather than one of limitations, and, if it had prospective effect, the present case would come directly within its letter and spirit. It has been recently decided, however, by the Supreme Court, in the case of United States v. St. Paul, Minneapolis & Manitoba Railway Co., that it has no such effect. No. 75, October Term, 1917, 247 U. S. 310, 38 Sup. Ct. 525, 62 L. Ed. 1130. That case is analogous on its facts to the present case, and is, without question, controlling here. The holding of the court is that the proviso was not a bar to that suit, "brought to annul a patent applied for and issued long after its enactment." So was the patent in the suit at bar issued long after the enactment of the statute. The issuance was on April 13, 1908. It would be a work of supererogation for us to attempt to elaborate upon the exhaustive opinion of the Supreme Court, and we need but to refer to it for the reasoning upon which it is based.

[3] Some question has been made as to whether this is a suit for the benefit of Magner, or one in the right of the United States. Magner was not a party in any way, but was allowed in the course of the proceeding to appear by counsel and to adduce evidence touching settlement and occupation by himself and his predecessor. There was no intervention, however, and the suit proceeded as one by the

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government only. Being the party entitled to the legal title, it had a legitimate right and was duly authorized to maintain the suit as it was instituted.

[4] The motion to strike what is termed the bill of exceptions is without merit. A statement of the evidence with the approval of the judge is all that is required in an equity cause, where an appeal is to be prosecuted. Federal Equity Rule 75 (198 Fed. xl, 115 C. C. A. xl). An approved statement of the evidence is really what was filed in the present case, and not a bill of exceptions.

The complainant being entitled to recover, the decree of the court below will be reversed, and one here entered in pursuance of the prayer of the bill.

WOODALL v. CLARK et al. (two cases).

MILLS v. HUNTINGTON DEVELOPMENT & GAS CO.

(Circuit Court of Appeals, Fourth Circuit. October 16, 1918.)

Nos. 1643–1645.

1. REMOVAL OF CAUSES ⟸107(5)—REMAND—EFFECT OF PETITION.
Where the petition for removal of suits to cancel disclaimers to land alleged that the actual value of the property, exclusive of costs, etc., was in excess of $3,000, and such averments were not challenged, complainants' petition to remand must be denied; the petition for removal furnishing the basis of jurisdiction.

2. QUIETING TITLE ⟸29—REMOVAL OF CLOUD FROM TITLE—LACHES.
Where complainants were at all times in possession of the land, their delay in beginning suit to set aside disclaimers to the land does not constitute laches, which will bar relief.

3. EQUITY ⟸363—MOTION TO DISMISS—EFFECT.
A motion to dismiss a bill is in the nature of a demurrer, and for the purpose of the motion the allegations of the bill must be taken as true.

4. QUIETING TITLE ⟸35(2)—BILL TO REMOVE CLOUD—SUFFICIENCY OF ALLEGATION.
Allegations, in a bill to set aside as clouds on their title disclaimers, as to minerals, *held* to sufficiently aver complainant's title to the minerals mentioned.

5. MINES AND MINERALS ⟸55(2)—DISCLAIMERS—CONSTRUCTION.
In view of Code W. Va. 1913, c. 72, § 3 (sec. 3780), disclaimers of minerals in lands in West Virginia land *held* quitclaim deeds.

6. VENDOR AND PURCHASER ⟸231(9)—BONA FIDE PURCHASERS—RECORD—DIRECTION.
Where the predecessors of the title of defendants, who claimed under disclaimers to the minerals in land, directed that such disclaimers be recorded in the release docket, such recordation is binding on them.

7. VENDOR AND PURCHASER ⟸231(9)—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE.
Where disclaimers to the minerals in land were at the instance of those asserting title thereunder, recorded in the release docket, *held* that, under Code W. Va. 1913, c. 73, §§ 2, 7 (secs. 3805, 3810) and chapter 76, § 5 (sec. 3862), such disclaimers were not constructive notice to bona fide purchasers from the original owner, and the purchasers took as against those asserting title under the disclaimers.

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Appeals from the District Court of the United States for the Southern District of West Virginia, at Huntington; Benjamin F. Keller, Judge.

Suits by T. J. Woodall and by Alonzo Woodall against Herbert L. Clark and another, trustees of the Lincoln County Land Association, a voluntary unincorporated association, and others, and by Oad Mills against the Huntington Development & Gas Company, a corporation, begun in the state court, and removed to the federal court. From decrees dismissing the suits, complainants appeal. Reversed and remanded, with instructions.

D. E. Wilkinson, of Hamlin, W. Va., for appellants.

Cary N. Davis and W. C. W. Renshaw, both of Huntington, W. Va. (Henry A. McCarthy, of Philadelphia, Pa., and Meek & Renshaw and Campbell, Brown & Davis, all of Huntington, W. Va., on the brief), for appellees.

Before PRITCHARD and WOODS, Circuit Judges, and CONNOR, District Judge.

PRITCHARD, Circuit Judge. In disposing of the three above-stated causes, the learned judge who heard the same, in referring to the nature of the suits, said:

"The above suits were instituted, in equity, in the circuit court of Lincoln county, W. Va., and later duly removed to this court. The matter is now before me upon motion to dismiss the bills of complaint, all three suits involve the same question, and the bills of complaint in each case are practically identical. Each seeks to have canceled, set aside, and held for naught, as a cloud upon their title, a certain paper writing, commonly called a 'disclaimer,' purporting to have been executed by one W. C. Wiley on the 3d day of June, 1887.

"The substantial and material allegations of the bills are as follows:

"That the plaintiffs are the owners in fee of the land involved in these proceedings, having obtained title thereto through mesne conveyances, tracing title to the commonwealth of Virginia; that the plaintiffs and their various predecessors in title have had open and notorious possession of said property and paramount title thereto, and have paid taxes thereon since the formation of Lincoln county and the grant from the commonwealth of Virginia; that the records of such title were destroyed by the fire which burned the Lincoln county courthouse in November, 1909, but that subsequently, by evidence taken before the commission of destroyed instruments, such instruments of title were readmitted to record; that some time after such fire there was also readmitted to record in a deed book of said county a paper writing, purporting to be a disclaimer, signed and sealed by one W. C. Wiley, a prior owner of said property, which said paper appears to have been recorded in said clerk's office in a certain release docket, some time prior to the recordation of plaintiffs' muniments of title, disclaiming all right, title, and interest in and to the property here in dispute, which said writing is in the words and figures following:

" 'Whereas, certain actions of ejectment are now pending in the District Court of the United States for the District of West Virginia, in favor of "Henry McFarlan and others against Louis Adkins and others," "John P. Yelverton and others against Louis Adkins and others," "John P. Yelverton and others against Jeremiah Witcher and others," "Gustavus A. Sacchi against James A. Holley and others," "Gustavus A. Sacchi against John M. Reese and others," and "Gustavus A. Sacchi against A. J. Barrett and others," for the recovery of a tract of land heretofore conveyed by Henry McFarlan and others, trustees of the Guyandotte Land Company, to Gustavus A. Sacchi, by deed bearing date on the 27th day of June, 1865, and recorded in the office of the recorder of Cabell county, in Book A (New Series), page 104; and,

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" 'Whereas, William C. Wiley is in possession of and claiming title to a portion of said land, so sought to be recovered, and is desirous of settling any and all conflicting claims to lands so occupied and claimed by him:

" 'Now, therefore, the said Wiley in consideration of the premises, and being released from all litigation in relation to the land hereinafter described, and from liability for costs in relation to the lands sought to be recovered, as aforesaid, doth hereby disclaim all right, title, claim, demand, or interest in and to all and any land set out and described in said declaration in said action of ejectment, except, all that certain piece or parcel of land, situate, lying, and being in the county of Lincoln and state of West Virginia, on Sugar Camp branch of Middle fork, and being part of a survey made for B. E. & Harvey Barrett and St. C. Ballard on the 3rd day of November, 1849, for 1,400 acres; the tract herein excepted being 130 acres out of said survey, and more particularly described in a deed from J. V. Sweetland to the said Wiley, dated March 15, 1884, recorded in Deed Book F, page 318.

" 'But the said W. C. Wiley hereby disclaims all title or interest in all coal (except so much as shall be required for domestic purposes) and iron ore, hydro-carbon oils, salt brine, natural gas and all other minerals in, upon or under the said tract of land herein excepted, with the exclusive right to the said plaintiffs, and those claiming under them, for rights of way for tram, rail, and wagon roads through said land so excepted, and to dig for and mine coal, iron ore, bore for oil or natural gas, and the necessary conveniences on said land for storing oil and coal, and the transmission of the same by the best and most convenient means to market.

" 'And the said William C. Wiley further agrees that the plaintiffs in either of said actions may take judgment against him in ejectment, for the interest by him herein disclaimed, and to that end he empowers any attorney of said court to appear for him in either of said actions, and consent that such judgment be entered, and that this disclaimer be filed as part of the record in such cause.

" 'Given under my hand and seal this 23d day of June, 1887.

" 'W. C. Wiley. [Seal.]'

" 'State of West Virginia, Lincoln County—to wit:

" 'I, H. Hager, a Clerk Co. Ct. in and for said county, do hereby certify that ———, whose name is signed to the foregoing writing, bearing date the 22d day of June, 1887, this day acknowledged the same before me in my said county.

" 'Given under my hand this 22d day of June, 1887.

" 'H. Hager, Clerk.

" 'Clerk's Office County Court, Lincoln County, W. Va.

" 'This disclaimer was this day presented to me in my said office for record; thereupon the same, together with the certificate of acknowledgment thereon indorsed, is duly admitted to record in my said office this 12th July, 1887.

" 'H. Hager, Clerk.'

"Note.—The following indorsement was on the back of the above instrument: 'W. C. Wiley. Disclaimer. 130 A. Release Docket, page 168, 169, Ex. No. 38.'

"Note.—The following indorsement also appears:

" 'Clerk's Office of the County Court of Lincoln County, 14th day of March, 1911, to wit:

" 'The deed book containing the record of the foregoing deed and certificate of acknowledgment, and certificate of recordation thereof, having been lost by fire, consuming the records of said clerk's office, occurring on the 19th day of November, 1909, the foregoing deed or disclaimer was this day presented to me, the clerk of the said court, in the clerk's office aforesaid, for record anew. And thereupon, the said deed together with the certificate of acknowledgment, and certificate of recordation have, by me, been duly admitted to record anew in said clerk's office.

" 'Given under my hand this 14th day of March, 1911.

" 'W. C. Holstein,

" 'Clerk County Court of Lincoln County.

" 'Recorded in Deed Book No. 62, page 91.

" 'A true copy. Attest: 'Albert F. Black, Clerk,

" 'By ———, Deputy.'

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"The certificate to this paper, it will be noted, omits the name of the maker thereof.

"It appears from the pleading before me that while this disclaimer was executed in connection with certain ejectment cases then pending, involving this property, it was never filed in such cases, but recorded in the county clerk's office of Lincoln county in a record book, commonly called a 'release docket'; that after the destruction of the courthouse of said county by fire, it was re-recorded and now is of record in a deed book of said county. It is this record which plaintiffs claim constitutes a 'cloud upon their title,' and which they seek to have set aside. In one of the above-styled suits, coercion is charged in connection with the signing of said so-called disclaimer, although this allegation is not substantiated by any supporting facts or allegations, and was not relied on in argument. The plaintiffs likewise embrace in their bill of complaint a naked allegation to the effect that the said paper was originally recorded in the release docket at the instance and by the direction of defendants.

"Defendants take the position that this paper is in reality and effect a quitclaim deed and divested W. C. Wiley of title to said property and vested title thereto in defendants, or their predecessors in title; furthermore, that this instrument duly signed, sealed and later recorded, estops Wiley or his successors in title from asserting title thereto."

In cases Nos. 1643 and 1644 there was a motion to remand, which motion was overruled, and the defendants filed written motions to dismiss the bills of complaint in each of the causes. A decree was entered dismissing them at the cost of plaintiffs, respectively, from which decree an appeal was taken to this court.

We will first dispose of what we conceive to be the first question involved in causes Nos. 1643 and 1644.

[1] It is contended by counsel for the appellant that they should have been remanded to the state court upon the ground that it appears from an inspection of the bills filed therein that the matter in dispute in each was of less value than $3,000. Among other things it is alleged in the defendants' petition that the value of the matter in dispute in this action "exceeds the sum or value of $3,000 exclusive of interest and cost." It has been repeatedly held that the removal of a case from a state court is based upon the petition for removal and that the averments of jurisdictional facts contained therein are to be taken as prima facie proof. In the case of Kessinger v. Hinkhouse (C. C.) 27 Fed. 883, the first sentence of the first syllabus is as follows:

"On a motion to remand a cause to the state court from which it was removed, the petition for removal is the basis of jurisdiction."

The following cases are very much in point: McDonald v. Flour Mills Co. (C. C.) 31 Fed. 577; Carlisle v. Sunset Telegraph & Telephone Co. (C. C.) 116 Fed. 896.

The plaintiff cannot base petition to remand upon an allegation made in a state court where, as in this instance, the petition for removal states in clear and concise language that the actual value of the property involved in this controversy is in excess of $3,000, exclusive of cost and interest.

In the case of Kessinger v. Hinkhouse, supra, the last sentence of the first syllabus says:

"* * * It is not in the province of the pleadings in the state court to state the grounds of jurisdiction in the United States Circuit Court. * * *"

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The court in that case also said, among other things:

"* * * The allegation of the jurisdictional facts is quite foreign to the pleadings in the state court, and any averment of the facts giving jurisdiction here would be quite irrelevant and impertinent in the pleadings of the state court. The cause is removed upon the allegations and averments of fact as to the jurisdiction contained in the petition for removal. We must therefore, upon a motion to remand, accept the statement of the jurisdictional facts in the petition for removal as prima facie true. If they are not true, the party against whose consent the order of removal was made may contest them by a plea in abatement to the jurisdiction. Clarkhuff v. Wisconsin, I. & N. R. Co. [C. C.] 26 Fed. 465."

As we have stated, the jurisdictional facts averred in the petition for removal constitute the basis of jurisdiction, in other words, the filing of the proper petition for removal eo instanti deprives the state court of jurisdiction and vests the United States court with jurisdiction. That court, to all intent and purposes, has absolute control over the matters in controversy and if the plaintiff desires to remand the same the burden is upon him to introduce proof sufficient to remove that burden in order to divest the federal court of its jurisdiction. Therefore, in this instance, plaintiff must challenge the averments contained in the petition for removal either by plea in abatement, answer, or denial in the nature of a plea to jurisdiction, and even the filing of the plea in abatement, answer, or denial in the nature of a plea to jurisdiction will not avail plaintiff, unless he supports the issue thus raised by evidence taken by the court.

In the case of Clarkhuff v. Wisconsin, I. & N. R. Co. (C. C.) 26 Fed. 465, the court, among other things, said:

"If the plaintiff in the state court desired to exclude the jurisdiction of the federal court, and if he could accomplish his purpose by mere pleading, he might in any imaginable case deprive his adversary of his constitutional and legal right of removal by alleging a fact to be true, having no foundation in truth. He might state the value of property involved to be less than $500, the contrary being the fact. He might allege untruly that his adversary is a citizen of the same state with himself. He might unite some mere nominal party as defendant with the real party in interest, falsely averring such nominal party to be a citizen of the same state with himself, and jointly concerned with the real party in the controversy. Thus might the plaintiff in the state court, by the simple process of pleading, without even the verification of his own affidavit, defeat the whole purpose of the removal act. It is manifest, therefore, that the party seeking the removal is at liberty to make averments against the facts as stated in the pleadings; and it is equally clear that the state court must receive the statement made in due form, and with proper verification by the petitioner for removal, as true prima facie, and proceed no further with the cause, but order the transfer of the case to the federal court. The cause comes here with the record thus made, and this court must primarily, by inspection of this record, determine whether or not the cause shall be remanded. Now, it is clear to my mind that, while the petition for removal must be received as true prima facie, and therefore as, upon the facts of the record, paramount to the pleadings filed in the state court, it cannot be taken in its turn as conclusive of the facts upon which the jurisdiction depends. If the petition for removal were taken as conclusive—if the party moving to remand were not at liberty to aver and show the jurisdictional facts to be contrary to the statement of them in the removal petition—he would be in his turn, in this court, completely at the mercy of his adversary."

The averments contained in the petition for removal being sufficient to vest the court below with jurisdiction, and the plaintiff hav-

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ing failed to put in issue the averments of the petition, and also failed to offer any evidence in support of the same, it necessarily follows that nothing occurred in the court below to deprive it of the jurisdiction which it acquired in a regular and orderly manner.

From what we have said it also necessarily follows that the refusal of the court below to remand these causes to the state court was eminently proper.

[2] The next question that arises is as to whether the court below erred in sustaining the motions to dismiss all three causes.

As we have stated, the object of these suits is to cancel and set aside disclaimers executed by William C. Wiley (in cases Nos. 1643 and 1644) and Frances Holton (in case No. 1645). These disclaimers are identical except as to parties and property involved.

It is first insisted that:

"(1) The claim of the complainants is barred by laches, lapse of time and neglect. The disclaimer mentioned in the bill of complaint was recorded in the clerk's office of the County Court of Lincoln county on the 12th day of July, 1887."

This squarely presents the question as to whether the complainant's cause of action is barred by laches, lapse of time and neglect of the complainants. In these causes the complainant is in possession of the land in question and comes into a court of equity for the purpose of having cloud upon his title removed, and in doing so to settle the question of title against one who holds adversely to him and is out of possession. It is well settled that under such circumstances, no matter how long the delay, complainant cannot be charged with laches. In the case of Gunnison Gas & Water Co. v. Whitaker et al. (C. C.) 91 Fed. 191, Adams, District Judge, in disposing of this phase of the question, said:

"Until the defendants asserted some right adverse to the complainant, the complainant could confidently repose upon its undisturbed possession, notwithstanding the illegal transactions complained of. There was, therefore, no occasion to resort to a court of equity for the relief prayed for in this case. Certainly not, so far as relates to the restraining order against defendants, until they began proceedings, or threatened proceedings, to assert some right under the void deed of trust. So far, therefore, as the injunctive relief is concerned there can be no complaint on the ground of laches. It is held, in the case of Ruckman v. Cory, 129 U. S. 387, 9 Sup. Ct. 316 [32 L. Ed. 728], that laches cannot be imputed to one in the peaceable possession of land under an equitable title for delay in resorting to a court of equity for protection against the legal title, since possession is notice of his equitable rights, and he need assert them only when he finds occasion to do so."

In the case of Smith v. Burrus, 139 Ga. 10, 76 S. E. 362, the court in the second syllabus said:

"An owner of land, in possession of it, who resorts to a court of equity to cancel a forged deed as a cloud on his title, is not chargeable with laches, though as much as 10 or 11 years may have intervened since his discovery of the forged deed."

The case of Coal Company v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063, is also very much in point, and in 8 A. & E. Enc.

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of Law (2d Ed.) p. 124, a number of cases are cited to sustain this point.

Section 33 of Pomeroy's Equity Jurisprudence is as follows:

"A party in possession of land, who resorts to a court of equity to settle a question of title is not chargeable with laches, no matter how long his delay. Such a party is at liberty to wait until his title is attacked before he is obliged to act. The most frequent illustrations of this principle are found in suits by parties in possession to remove a cloud on title or to quiet title. Where, however, statutes permit such suits by parties out of possession, the doctrine of laches does apply, if the plaintiff is not in possession."

This rule is in harmony with common sense and fair dealing. The possession by the plaintiff was sufficient and complete notice to the defendants, and we think it is too late for them now to avail themselves of the defense that claimant's cause of action is barred by lapse of time.

[3, 4] However, it is further contended by counsel for the defendants in support of motion to dismiss that the allegations of the bills are not sufficient in law to show that complainants have title to the minerals mentioned in the disclaimers by adverse possession. It appears from the allegation of the bill that at the time the disclaimers were executed, in each instance plaintiff had chain of title in fee to the respective pieces of real estate, derived from the commonwealth of Virginia; also, that there has been a continuous, actual, adverse, open, and notorious possession of these respective tracts, under and by virtue of such chain since 1867 and since the grant of the real estate involved herein by the commonwealth of Virginia. Further, that any and all taxes charged and chargeable upon said real estate had been regularly paid while claiming under said chain of title, and that these plaintiffs and their predecessors had such possession of said real estate under their such chains of title and payment of taxes since the time of the execution of said disclaimer and until the time of the institution of these suits and at the time of the filing of the bills in these causes.

It is also alleged by plaintiffs that:

Said "disclaimer is a cloud upon the title to his said real estate, and that the said certificate of recordation of the same made by W. C. Holstein, clerk county court, Lincoln county, is false, misleading, and untrue, and tends to further cloud plaintiff's title to said real estate, and that for the reason hereinbefore set forth plaintiff is entitled to have said paper writing or disclaimer, and the said certificate of recordation thereof, set aside, canceled, and held for naught as a cloud upon the title of plaintiff to his said real estate hereinbefore mentioned and described."

We think that these allegations are full and complete, and that any objection thereto is without merit.

The allegations of the bill must be taken as true on the motion to dismiss. In other words, the motion to dismiss is in the nature of a demurrer. This being so, the question arises as to whether, under the plaintiffs' statement they are entitled to the relief demanded, there being no denial either by answer or otherwise to the material allegations made by the plaintiffs.

[5] The court below held that the paper writing or disclaimer is sufficient to divest W. C. Wiley of title to mineral underlying the real

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estate in question and sufficient to vest title in defendant. In referring to this phase of the question the court said that the disclaimer "granted in no uncertain terms full mining rights and privileges." In other words, the court below held that the paper writing in question was equivalent to a deed and its provisions sufficient to transfer title from Wiley and to invest plaintiff with title to same, as we have said. This presents the question as to whether the disclaimer can be construed as a quitclaim deed, surrender, conveyance, release, or defeasance.

We are of the opinion that the instrument in question was in effect a quitclaim deed. In equity it was a contract by which the disclaimant said:

"'I relinquish all interest in the land. You take it and do what you please with it as far as I am concerned."

In equity the disclaimant would be required to do anything necessary to make the instrument effective. This construction we think is in harmony with the provisions of section 3, chapter 72, of the Code of West Virginia (sec. 3780), which is as follows:

"Whenever, in any deed, there shall be used the words, 'The said grantor (or the said ———) releases to the said grantee (or the said ———) all his claims upon the said lands,' such deed shall be construed as if it set forth that the grantor (or releasor) hath remised, released, and forever quitted claim, and by these presents doth remise, release and forever quit claim unto the grantee (or releasee) his heirs and assigns, all right, title, and interest whatsoever, both at law, and in equity, in or to the lands and premises granted (or released) or intended so to be so that neither he nor his personal representative, his heirs or assigns, shall, at any time thereafter have, claim, challenge, or demand the said lands and premises, or any part thereof, in any manner whatever."

[6, 7] It is insisted that the recordation of this instrument in a release docket was insufficient to give constructive notice. It appears that this paper was recorded in a release docket at the instance of the predecessors in title of the defendants, therefore such recordation is binding upon them, they having given explicit instructions as to how the paper should be recorded and were content to receive the same with full knowledge as to where it had been recorded. It should be remembered, in this connection, that instruments of this character are required to be recorded in a particular book. The statute of West Virginia as found in Code W. Va. (C. E. Hogg) 1913, c. 73, §§ 2, 7, provides:

"Sec. 3805. The clerk of the county court of any county in which any deed, contract, power of attorney, or other writing is to be or may be recorded, shall admit the same to record in his office as to any person whose name is signed thereto, when it shall have been acknowledged by him or proved by two witnesses as to him, before such clerk of the county court."

"Sec. 3810. Every such writing when admitted to record shall, with all certificates of acknowledgment, and all plats, schedules and other papers thereto annexed or thereon indorsed, be recorded by, or under the direction of the clerk of the county court, in a well-bound book, to be carefully preserved."

The latter section is plain and clearly intended to make provision for classification of documents required to be recorded, so that one

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engaged in abstracting titles to lands could, by inspecting the proper book, easily ascertain the complete history of the chain of title involved. If the statute had merely directed the recording, without specifying the particular book in which it should be recorded, then, under the authorities, the grantee could protect himself against subsequent purchasers for value by recording in any book; but when, as in this instance, the recording act requires the record to be made in a particular book, then the grantee cannot protect himself against subsequent purchasers for value, unless there is proper record in the book mentioned in the statute, and this is especially true when, in a case like the one now before this court, the grantee directs the wrong recording and receives the instrument back with a certificate of recordation in the wrong book.

It is also significant that chapter 76, § 5 (sec. 3862), which refers to release of liens, excludes all other papers from recordation therein. That section reads as follows:

"The clerk of the county court shall record and properly index all releases under this chapter and deeds of release admitted to record in his office, in a well-bound book *to be kept exclusively for the purpose*, and when any release or deed of release is recorded, he shall note the fact on the margin of the record or docket of the lien discharged thereby, with a reference to the book and page where the same is recorded." (Italics ours.)

Where the statute allows the record to be made in any book except one from which it is expressly excluded, recording in such excluded book is not notice to subsequent purchasers. This is precisely what occurred in the recordation of the instrument in question. To say that an improper recordation of this instrument was constructive notice would be in defiance of the rights of innocent purchasers and a complete disregard of any rule of construction of which we have knowledge. It would never occur to any lawyer or skilled abstractor to examine a release docket, after having found by an examination of the records wherein papers of this kind are required to be recorded that title was perfect. The provision which requires instruments of this character to be recorded is based upon the theory that the grantee, upon purchasing a tract of land, may be afforded an authentic record, showing the exact condition of the title to the property which he is about to purchase. Therefore, as we have said, papers of this kind are as a general rule required to be recorded in a certain book. Therefore, one having carefully examined that book and found perfect title, it would be absurd to say that grantee is bound by the recordation of the instrument in a book from which the recordation of instruments of this character are excluded.

For the reasons stated, we are of the opinion that the plaintiffs and those under whom they claim are innocent purchasers without notice and that the court below erred in dismissing these suits.

In view of what we have stated, we do not deem it necessary to enter into a discussion of the other assignments of error.

Therefore the decree of the lower court is reversed, with instructions for further proceedings in accordance with the views herein expressed.

Reversed.

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STUMP et al. v. STURM et al.

(Circuit Court of Appeals, Fourth Circuit. October 1, 1918.)

No. 1570.

1. DEEDS ⟸196(1)—PRESUMPTION—CAPACITY OF GRANTOR.
The presumption of law is that the grantor in a deed was sane and competent to execute it at the time of its execution.

2. DEEDS ⟸68(3)—CAPACITY OF GRANTOR—OLD AGE.
Old age is not of itself sufficient evidence of incapacity to make a deed, and if the grantor, though enfeebled, is capable of knowing the nature, character and effect of his act, that is sufficient to sustain it.

3. DEEDS ⟸211(1)—CAPACITY OF GRANTOR—EVIDENCE.
The evidence of an officer taking the acknowledgment of a deed or of a person present at its execution is entitled to peculiar weight in considering the grantor's capacity.

4. DEEDS ⟸206—CAPACITY OF GRANTOR—TIME OF EXECUTION.
The time of the execution of a deed is the material or critical point of time to be considered on the inquiry as to the grantor's capacity.

5. DEEDS ⟸72(1)—VALIDITY—"UNDUE INFLUENCE."
Influence gained by kindness and affection will not be regarded as undue, if no imposition or fraud be practiced, but "undue influence," to avoid a deed, must be such as to override the grantor's will.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

6. DEEDS ⟸211(4)—VALIDITY—UNDUE INFLUENCE—EVIDENCE.
Evidence *held* insufficient to show that an aged grantor, who conveyed the bulk of his property to missionary societies was unduly influenced.

7. DEEDS ⟸211(1)—VALIDITY—CAPACITY.
Evidence *held* insufficient to show that an aged man who conveyed the bulk of his estate to missionary societies lacked capacity.

8. RELIGIOUS SOCIETIES ⟸4—"CHURCH OR RELIGIOUS DENOMINATION."
The home missionary society of a religious denomination *held* not a "church or religious denomination," within Const. W. Va. art. 6, § 47, declaring that no charter of incorporation shall be granted to any church or religious denomination.

9. RELIGIOUS SOCIETIES ⟸16—HOLDING OF REAL ESTATE.
As Code W. Va. 1913, c. 54, § 30 (sec. 2929), allows any foreign corporation to hold property in the state, unless otherwise expressly provided, *held* that a mission society incorporated in foreign state might hold property in West Virginia despite the constitutional and statutory restrictions on churches and religious denominations.

10. CORPORATIONS ⟸631—GRANT OF CHARTER—PROHIBITION AGAINST FOREIGN CORPORATIONS.
That a state does not provide for the granting of a charter to domestic corporations of certain character is not in the nature of a prohibition against foreign corporations created for such purpose.

11. RELIGIOUS SOCIETIES ⟸16—GIFTS—RIGHT TO ATTACK.
Only the state can attack a gift to a foreign religious corporation as in violation of the public policy of the state as enunciated in Const. W. Va. art. 6, § 47.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Clarksburg; Alston G. Dayton, Judge.

Bill by Drusa Sturm and others against John S. Stump and others. From a decree for complainants (239 Fed. 749), defendants appeal. Reversed and remanded, with instructions.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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W. E. R. Byrne, of Charleston, W. Va., and O. E. Swartz, of Clarksburg, W. Va. (E. Bryan Templeman, of Clarksburg, W. Va., on the brief), for appellants.

R. F. Kidd, of Glenville, W. Va., and W. E. Haymond, of Sutton, W. Va. (Haymond & Fox and Alex. Dulin, all of Sutton, W. Va., and C. M. Bennett, of Glenville, W. Va., on the brief), for appellees.

Before PRITCHARD and WOODS, Circuit Judges, and McDOWELL, District Judge.

PRITCHARD, Circuit Judge. This is an appeal from the decree of the United States District Court for the Northern District of West Virginia, in a suit wherein Drusa Sturm et al. were complainants and John S. Stump et al. were defendants. The decree in question set aside a certain deed from Daniel Huffman to the American Baptist Home Mission Society, dated March 11, 1907, certain deed from Daniel Huffman to John S. Stump, dated September 20, 1909, and certain other deeds pertaining to the lands which are the subject-matter of the two conveyances in question. We will refer to the appellees as complainants hereinafter, and the appellants as defendants.

The complainants seek to set aside the conveyances in question on the ground that the grantor was mentally incapacitated to execute a valid deed for real estate, and insist that—

"At the time of the execution of the said two deeds, one to said society and the other to the said John S. Stump, the said John S. Stump particularly persuaded and unduly influenced the said Daniel Huffman to execute the same and each of them, and the said John S. Stump was present urging and procuring the said Daniel Huffman to execute said deeds, and because of the mental incapacity of the said Daniel Huffman and the influence aforesaid unduly exercised by the said John S. Stump upon him, the said supposed deeds were signed by the said Daniel Huffman," and because "the American Baptist Home Mission Society cannot accept conveyances of real estate in the state of West Virginia and could not at the date of said supposed deeds to it do so, or hold the same under the Constitution and laws of the state of West Virginia nor under the laws of the state of its creation."

It appears that Daniel Huffman died in Gilmer county in March, 1916, at the age of 94. He married prior to 1846, and his wife died in 1902. The children of his marriage were two daughters, one of whom, Drusa, married Charles Sturm, and is still living; the other married Cary Mollohan, and both she and her husband are dead, leaving children surviving them, Camden D. Mollohan, Josephone Mollohan, Losie Stump, and Darlie Bush. It further appears that Daniel Huffman was an industrious, frugal farmer and minister of the gospel of the Baptist Church, and accumulated a valuable estate, mostly realty, and worth approximately $50,000.

In November, 1910, the county court of Gilmer county adjudged him incompetent and appointed a committee to control his person and estate. It is insisted that on November 11, 1907, Huffman, "by deed, assumed to convey to the American Baptist Home Mission Society," a corporation of the state of New York, 384 acres, 532 acres, 100 acres, 100 acres, an undivided half in 10 acres, all the interest of the said Huffman in the oil and gas in 351 acres, all his interest in the

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coal, oil and gas in 92 acres and 48 acres in Gilmer county; all the interest of the said Huffman in the oil and gas in 147 acres and 55 poles and 135 acres in Calhoun county and 66½ acres in Braxton county, in West Virginia. By the terms of this deed he reserved the use, possession and control of these properties, to take and have all rentals for oil and gas accruing from existing leases, to make other leases therefor and receive all rentals and profits therefrom for and during his life; and it is set forth that "this deed shall not take effect until after the death of said Huffman." The consideration for this conveyance, set forth on its face, is one dollar in hand paid, but in its closing paragraphs it sets forth a purpose on the part of Huffman, by will, to make specific legacies to certain natural persons, and stipulates that if the other estate of which he died seized proved insufficient to pay such legacies, then the grantee society should make good all such specific bequests or legacies, to the extent of not exceeding a maximum sum of $4,500; and to secure the fulfillment of this obligation a vendor's lien is retained.

On September 20, 1909, deceased executed another deed reciting the execution of the former deed to the Mission Society and setting forth that "a doubt has arisen whether or not the grantee in the deed aforesaid can take and hold real estate in the manner contemplated by the said deed," Huffman conveys the same land and oil, gas and coal interests to John S. Stump (who, it appears, was and is the state agent of the Mission Society) in consideration of $1 in hand paid "and other valuable considerations," to be by Stump "held, used and disposed of by him according to his own will and discretion, without right on the part of any one to call him to account for the said lands or interests in said lands, or any part thereof, except so far as necessary to make good the charges hereby created." The charges thereby created are then set forth to be the reservation of a life estate in the lands and interests, to receive the rents, issues and profits thereof for life, and to have any specific legacies bequeathed by the grantor in his will made good to the extent that the other property of which he may die seized fails to accomplish that purpose, up to a maximum sum of $4,500, to be paid by grantor's personal representative as soon as the deficit should be ascertained, and to secure such provision, vendor's lien is retained. This deed then closes with the clause:

"It is expressly understood between the parties hereto that this deed is not intended as a repudiation of the deed so made to the American Baptist Home Mission Society, and is only intended to pass title to the grantee herein in the event the first-mentioned deed shall be held to be void and to pass no title."

It further appears that on June 25, 1912, the Mission Society by deed conveyed to said John S. Stump all its right, title and interest in and to these lands, coal, oil and gas interests, in consideration of $1 in hand paid and his note for $10,000, upon condition that the grantee, Stump, should assume all the obligations, stipulations and agreements contained in Huffman's deed to the society; that interest on the $10,000 note should not begin to run until Huffman's death, after which the vendor's lien retained to secure it, upon default in payment,

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might be enforced by sale of the lands but such proceeds of sale, whatever amounting to, should release and discharge the note in full. It is further stipulated in this deed that if the deed of November 11, 1907, to the society "shall, for any cause, be declared null and void by a court of the state of West Virginia, or of the United States, then and in that event" Stump shall "be released from any payment on account of the debt herein incurred, and said debt shall be deemed to be fully paid and discharged."

On April 11, 1916, immediately after Huffman's death, Stump and wife in consideration of the sum of $1 in hand paid, other valuable consideration acknowledged to have been received, and the assumption of payment of Stump's $10,000 note to the Missionary Society, conveyed all these lands and interests in coal, oil and gas to the Latin-American Improvement Association, Incorporated, a corporation formed under the provisions of the Business Corporation Law of New York by a certificate filed and recorded in the office of the secretary of state, in that state, on August 20, 1915.

Its certificate of incorporation sets forth the purpose of the corporation to be to acquire and improve real property, to sell and lease the same in any state in the United States, in Mexico or elsewhere. Its capital stock is limited to $1,000 of ten shares of the par value of $100, five of which are subscribed for by the five incorporators, one share each.

On the same day (11th April, 1916), it further appears that this Latin-American Improvement Association, Incorporated, executed to Stump a power of attorney, authorizing him to sell these lands and interests in lands, and collect the proceeds of sale, proceed at law and equity, employ counsel and do all things necessary to be done in the premises. For the purpose of assailing and having annulled the several conveyances and the power of attorney aforesaid, the surviving daughter and the children of Huffman's deceased daughter aforesaid, instituted this suit on May 13, 1916, in the circuit court of Gilmer county. The case was removed to the District Court upon the petitions of the American Baptist Home Mission Society and the Latin-American Improvement Association, Incorporated. The Mission Society and Improvement Company filed their joint and separate answer to the bill, and John S. Stump filed his answer thereto.

[1-7] First, we will consider the evidence upon which complainant relies to show that deeds in question should be set aside. Mr. W. E. Powell, the predecessor of John S. Stump as superintendent of the Home Mission Board in West Virginia, one of two individuals who, it is alleged, exercised undue influence upon the mind of the deceased, among other things wrote Huffman several letters. Such of the said letters as we deem material are as follows:

"Parkersburg, W. Va., Sept. 12, 1893.

"Rev. D. Huffman, Stumptown, W. Va.—My Dear Bro.: Your kind letter containing two checks, one for $102.93 for state and home missions, and the other for $2 for your J. & M. has come to hand. Please accept my sincere thanks for your promptness in this matter. I am sorry to see such a falling off. In 1891 your association gave $130.33; in 1892, $99.49; now only $89.38, a loss to our board of over $40 in two years. The indications now are that we are to have a debt of $800 to $1,000 as against $850 last year.

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"If it is possible for you and Mrs. Huffman to do so, I hope you will send me a good personal gift any time before Oct. 5th. A good Baptist made his will last week. Has about $15,000 worth of property and remembered the Home Mission Society. I should be glad if you would deed a good farm to the American Baptist Home Mission Society—you keep and manage it as long as you live and turn over the rents each year if you wished to do so—My dear Bro. I hope you will remember both State and Home Missions, but as you cannot convey property by will for State Missions, but can for Home Missions, allow me to urge that you will not put this matter off. It will be too late soon. Please do soon what you wish to do along this line and let me know about it. Will come up to see you about it if necessary. Hope to see you at Charleston Oct. 10-13. With kindest regards to Mrs. Huffman, as well as yourself,

"I am yours truly, W. E. Powell."

"Parkersburg, W. Va., Jany. 6, 1894.

"Rev. Daniel Huffman, Stumptown, W. Va.: In answer to my letter to you some months since your wife sent me $10 for State Missions, and in it she said 'I have thought this might be my last opportunity to help in this good work.' Believing that both yourself and Mrs. Huffman, after providing for your children, will want to do a liberal part for the work of our dear Saviour, by leaving money or property by will, I inclose you an exact form of bequest as prepared by the Home Mission Society. Since our State Mission Board cannot receive and hold legacies under our W. Va. laws, you can will all to the Mission Society with the request that say, one-half, be for State Mission work in W. Va. Since life is so uncertain and as making a will does not in any way interfere with the use and control of your property, allow me to urge upon your prayerful attention, that you and Mrs. Huffman ask the Lord to direct you in this matter and that you make your will at the earliest day you can, and that you remember liberally the American Baptist Home Mission Society that has done so much for our beloved country and also for West Virginia Baptists. As soon as you decide about this matter I shall be glad to hear from you both. I am just getting over a long and hard siege of 'la grippe.' Praying that the Lord will bless you and guide you both with many years of useful work yet.

"I am yours truly, W. E. Powell.

"P. S.—I inclose 3 copies. Keep one and hand the others to persons who will likely be interested in this work and speak to them about it."

"Parkersburg, W. Va., Dec. 6, 1895.

"Rev. D. Huffman, Stumptown, W. Va.—Dear Bro.: I have some hope of getting $1,000 about the 18th and if so will be glad to let you have it. Please let me know at once if you will take it if I get it. I have been greatly disappointed in not getting this money sooner for you. If I should come up to see you about the 20th, will you be ready to close up your will and arrange for the legacy? Would it suit you to deed to the American Baptist Home Mission Society a farm or two? This might be better than to have it in a will that might be contested.

"Please let me hear from you.

"Yours very truly, W. E. Powell."

It will be observed that the first of these letters relates to certain checks sent by the deceased and his wife to the Mission Board, and also contains a reference to the fact that the amount sent from the Association to which deceased belonged for the years 1891-1892 showed a loss to the Board of over $40 in 2 years. He then suggests that the deceased and his wife send a gift any time prior to October 5th, and refers to the fact that a "good Baptist made his will last week." In the next letter Powell says, among other things:

"* * * Believing that both yourself and Mrs. Huffman, after providing for your children, will want to do a liberal part for the work of our dear

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Saviour, by leaving money or property by will, I inclose you an exact form of bequest as prepared by the Home Mission Society."

Instead of showing that it was the purpose of Powell to influence the deceased to ignore the duty he owed to his children, he expressly says that "after providing for your children" he trusts he can see his way clear to do a liberal part for the mission work. He then refers to the good work that had been done in that section of the country, and further suggests that he would be glad to hear from him in regard to the matter.

Certainly these letters contain nothing that could be construed an attempt to exercise undue influence, but, on the other hand, indicate a purpose to cooperate with the deceased in doing what he might feel to be his duty as respects the mission cause.

The other letter relates to the same matter, and likewise contains no threat or inducement which could in any view of the case be construed as an attempt to have the deceased desist from that which he naturally desired to do, nor is there any suggestion contained therein, which, if adopted, would have been inconsistent with the desire and intention expressed by the deceased during his long and useful life.

We have also carefully considered the evidence which relates to the alleged improper conduct of John S. Stump, as respects this transaction. Stump, it appears, was also a minister of the Baptist Church and a nephew of the deceased.

The letters written by him were even more moderate than those written by Powell, and in the main relate to the condition of the mission work, its needs, etc. The first of these letters dated March 24, 1897, relates to a $500 note which according to a contract deceased had with a Mr. Thomas, would be due on April 15th. The writer, among other things, says he had arranged with Mr. Thomas to renew the old note and let it stand until they could secure the money to pay it.

In the letter of March 17, 1904, it is stated that the Home Mission Society would have a debt about the 31st of March of $48,000, then calls attention to the fact that the only way to prevent accumulation of this debt would be for the brethren to make extra contributions for the work during that month, but it contains no suggestion that it was even the duty of the deceased to contribute. The writer closes by saying:

"* * * During those three years the influx of foreigners has increased from about 500,000 to nearly 1,000,000 per year. In the face of this increasing need shall we lessen the mission force? It remains for the brethren to say. * * *"

These letters certainly contain no language calculated to unduly influence the deceased.

The letter of February 28, 1905, states that they were attempting to get up an endowment for four scholarships for high-grade men at Crozer Theological Seminary, the scholarships to be named in honor of four of the professors, and the only intimation as to what the deceased should or should not do is contained in the following statement:

"* * * I think that if you want to put some money into ministerial education this is as sure a place to have it used for only good men that I can

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think of. * * * I hope you will want to have part with us in this movement."

The next letter, dated December 28, 1906, begins by saying:

"I inclose herewith the will which you asked me to send you."

If this letter means anything, it is that the deceased had requested him to send copy of will and that he had complied with the request.

The next letter, dated March 5, 1908, relates to what the writer terms the "Marshall note," to secure which the deceased had taken a deed of trust. The writer offers his services in the collection of same.

On September 20, 1909, Stump again writes his uncle, inclosing check for $25 to be credited to the William T. and Docia Marshall note, stating that they proposed to pay same at an early date, but if they failed to do so he would advertise and sell on deed of trust.

On December 27, 1909, he again writes his uncle, inclosing check for $25 to be credited to the William T. and Docia Marshall note.

The next letter was written on January 1, 1913, and is in the following language:

"Parkersburg, W. Va., Jan. 1, 1913.

"Rev. Daniel Huffman, Stumptown, W. Va.—My Dear Uncle: By some mistake you have been summoned to appear at Glenville on the 6th day of January to give testimony in a proceeding which I have started to prove that you were mentally competent to make the deeds you have made in the past. I am writing now to tell you that if you got such a summons it was a mistake for them to send it to you, and you don't need to come to Glenville on account of it. I should be very glad to have you there, but it would be out of the question for you to make that trip in the middle of the winter. It might result in your death.

"I hope you are as well as usual and trust you may get through the winter all right.

"Yours truly, John S. Stump."

The above-quoted letter shows that Stump was confident that by fair trial he could show that deceased had been improperly adjudged insane, and was of the opinion three years thereafter that he was in every sense of the word mentally competent at the time of the execution of the deeds.

In the letter of June 7, 1902, Stump reminds deceased of the fact that his name had been dropped from the list of subscribers to the Home Mission Monthly, and, further, if the deceased so desired, he would place his name back on the list.

On the 26th of June, 1902, Stump again writes his uncle that he had renewed his subscription to the Monthly, paying for same to the fall of 1904. He concludes this letter by saying that he regrets to hear of the loneliness of his uncle.

On the 15th of September, 1905, he again writes Huffman a letter in regard to one that his uncle had written him on the 12th instant, in which the deceased had expressed a desire to see Stump and the corresponding secretary of the Home Mission Society about matters of business.

There is nothing contained in these letters which could be construed as an attempt on the part of Stump to unduly influence his uncle.

The letter of Oct. ( ) 1905, addressed to his uncle, relates to land

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situated in Faulkner county, Ark., stating that he had written the clerk of the court asking about liens, judgments, taxes, etc., that might be against the lands, and as to the advance in the price of real estate in that section, etc., telling him that he would report as soon as he received the desired information from the clerk. He expressed the opinion to Huffman that it would be a mistake to sell the lands at that time.

The letter of November 17, 1905, also relates to these lands, but contains nothing material to the question involved in this controversy.

On November 23, 1905, after obtaining information in regard to the Arkansas lands, Stump writes his uncle in regard to same, stating, among other things, that the tract contained 156.84 acres, instead of 160 acres, as called for in the deed, also that taxes for 1905 would be due January 1, 1906, and asks if he should find out what the taxes amounted to and pay them. Then he refers to a certain mortgage on the property, and further states that "there is no oil there, but there is supposed to be coal, and that there is talk of a railroad being built." He then asks his uncle if he desires him to close up this matter by having the mortgage canceled, and, among other things, says:

"* * * Inasmuch as you want this to go eventually to missions, I think if I were you I would deed this land to the Home Mission Society and let them close the matter out in any way they can, and relieve you of further worry or trouble about it. If you think you ought to do that, return the deed to me and I will have a deed made out and sent back to you to sign up. It seems to me that you could not afford to be worried about it for all there is involved."

There is nothing contained in any of the foregoing letters that evidences a purpose to unduly influence the deceased. Indeed the writer, among other things says:

"*Inasmuch as you want this to go eventually to missions* [italics ours], I think if I were you I would deed this land to the Home Mission Society and let them close out the matter," etc.

A number of other letters appear in the record, but in the main they relate to business transactions in which deceased was interested, and where John S. Stump, who had been given a power of attorney to act for him, was attempting to settle and adjust his business. The deceased received these letters from the date mentioned up to the 29th of August, 1910.

In a letter dated December 1, 1908, in referring to a debt said to have been due the deceased by a man by the name of Burns, Huffman is requested to release Burns from this debt; Stump stating in this letter that he thought it would be good policy to do so, and says further:

"* * * I don't want you to do it against your will, but I have given you the views of two of your friends and my own opinion for your consideration."

In referring to other matters further on in this letter the writer says:

"If you think I was not justifiable in making that proposition, please say so at once and I will withdraw it."

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This letter tends to refute the contention that Stump was endeavoring to unduly influence his uncle.

It appears that the deceased was dissatisfied with Stump's management of what was known as the Clarksburg suit, and in writing his uncle says:

"If you want me to do so, I will return your power of attorney as soon as you have settled with Mr. Linn and Mr. Bassel, and leave the whole management of your business in your hands."

It seems Messrs. Linn and Bassel were attorneys for the deceased. This letter, instead of indicating a purpose to unduly influence Huffman, shows that Stump was willing to relinquish any power or authority he might have had under the power of attorney.

The other letters are very much of the same tenor, and show nothing to support the contention of the complainant that the deceased was unduly influenced in executing the deeds.

Among other things, there is the deposition of Levi Huffman, brother of the deceased, which was offered in evidence by the defendants. Levi Huffman testified that he was 73 years of age, and that he was present when the deed was executed by Daniel Huffman to the American Baptist Home Mission Society dated November 11, 1907. He was asked:

"Q. Were you present when directions were given for the preparation of that deed? I will modify that question by asking you if any directions were given for the preparation of said deed in your presence, and, if so, by whom? A. I was; Daniel Huffman gave the directions."

He was also asked as to who were present when the deed was executed, and if any one retired at the time it was executed. In reply to the last part of the question he said: "John S. Stump." He was then asked to state the substance of the conversation with Daniel Huffman at that time, and he answered as follows:

"A. Daniel Huffman was asked if it was a volition of his own that he of his own will and accord had executed this deed, he said it was."

Levi Huffman was then asked if the deceased at that time gave any reason as to why he executed the deed. Deceased replied to the question by saying that—

"He had always had a deep interest in the mission cause, and that he desired his estate to go for that purpose, giving as a reason that he was a child of missions, and that he was converted and united with the church under the ministry of a missionary."

Deceased was then asked (according to Levi Huffman's testimony) as to whether John S. Stump had used any undue influence in securing the execution of the deed, and in testifying as to his brother's reply said: "My recollection is John S. had not." He was then asked as to the mental condition of the deceased at the time of the execution of the deed, as indicated by his action and demeanor, and in reply said: "So far as I was able to judge his mental condition was good." He was then asked how long prior to the execution of the deed his brother had contemplated devoting any part of his means to Home Mission work, and in response testified as follows:

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"A. In 1899 he expressed himself to me that it was his purpose and desire.

"Q. Where did he so express himself? A. First, at his own home; secondly, in journeying to the home of our brother-in-law, William Barr, likewise after our arrival at Barr's home.

"Q. What part of his property did he indicate that he intended to dispose of in such a manner? A. All of his real estate reserving the oil, gas, and coal.

"Q. What, if anything, was said by him at the time respecting a provision for his descendants? A. That he had given to them about as much as he intended them to have. I might be mistaken as to his reserving the oil, gas, and coal for all time, but possibly during his life; but he intended it all at his death to go into the hands of the Home Mission Society.

"Q. Did he ever afterwards tell you anything more on the same subject, if so, and where? A. In the year 1907 he also expressed a desire to turn his real estate over into the hands of the Home Mission Society. * * *

"Q. What influence was exerted to secure them? A. I am not aware that there was any.

"Q. Is it not a fact for the last ten years Daniel Huffman has insisted that his property belonged to the Lord and when he was through with it should go to Him without regard to his own children and heirs? A. You put the question too strong. He intended after he had given to his children what he intended them to have the remainder should go to the Lord or His cause, that was his statement to me. * * *

"Q. Who asked these questions of Daniel Huffman? A. It might have been Hines and Kelly.

Q. Why did Hines and Kelly ask these questions? A. How do I know? I want to make a statement. Mr. Hines and Kelly asked Daniel Huffman if any one had influenced him to make this deed, his answer to them was that if they knew as much about him as Brother Levi did that he couldn't be influenced to do a thing he did not want to do. * * *"

Rev. W. M. Hall, a Baptist minister, testified in regard to having seen the deceased at Petersburg, Va., in 1906. In regard to what occurred on this occasion he stated:

"After dinner he told me he had been in town seeing about his business, and then I don't know what brought the subject up, but he told me that he had decided to turn his property over to the missions; that he had been thinking for some time of writing to Mr. Stump about it, that he had decided to turn his property fully into the hands of the Mission Board and that they were to pay him interest or something to that effect. He said he wished to close it out in full, so that there would be no lawsuit after he was dead. I will change that a little—that he intended to give all that he expected his children to have to them while he lived and was going to deed the rest to the missions. I suppose the conversation lasted half an hour. * * *"

Rev. Hall also testified that he considered the deceased at that time an exceptionally strong man for his age and that he never saw any indication of mental weakness and never heard any one comment on it.

John S. Stout testified that he was a farmer, lived at Cedarville, Gilmer county, and was 57 years of age. He said, among other things, that on one occasion Daniel Huffman had told him that he had deeded property to the Home Mission Society and had heard some talk that his heirs were going to give him trouble in regard to the matter, but he stated that he—

"had given it to the Home Mission Society that the gospel might be carried to the world and that he had not done as much along that line as he would like to but the Lord had blessed him in giving him means and he had turned it over so that his brethren might carry on the work."

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This was in the spring of 1908, according to witness' recollection.

R. G. Linn, a practicing lawyer, testified that from time to time he was the legal adviser of the deceased and that he frequently consulted him about legal matters. In response to the question as to Huffman's mental condition he said: "I believe it to be good." When asked as to the deceased being able to understand papers of that character he testified:

"* * * He asked me—the paper was read over to him carefully and he asked me to read again the boundaries, or part of them, for the purpose of determining for himself whether or not it respected the reservation that he had made in some former deed."

Linn was then asked:

"Q. From that conversation you had with him upon that day would you say that he did or did not understand what property he had and what property was embraced in that deed? A. Why I believe that he understood, and I believed at the time that he did."

Sylvester Stump was also introduced and stated that he was 72 years old and that he was a notary public in 1909, that he knew the deceased and was present when they were considering the matter of the deed to John S. Stump. He testified that Mr. Linn read one copy and gave the other to him to read to see if it was correct. He testified:

"After they got the deed signed I asked Mr. Huffman if he knew the contents of it. He says, 'Yes, I do,' and I certified his acknowledgment. From what I saw I thought Daniel Huffman's mental condition was good that day. Good as common. He was not excited. He talked intelligently. They talked the business they were interested in."

D. N. Connoly, a Baptist minister was introduced and testified that he had been acquainted with the deceased since "about 1894," having often met him at church and other places. Among other things he said:

"I also saw him in 1911 on Kanawha river near the mouth of Mill Run. I was preaching around there. When I first spoke to him he says, 'I don't recognize you,' and then he stopped a moment and says, 'I believe I know the voice; I believe it is Brother Connoly.' I said, 'Yes, it is Brother Connoly.' And then he remarked to me that he couldn't see clearly."

He also testified that he detected nothing wrong with his mental condition at that time.

A number of other witnesses were introduced, practically all of whom testified that the deceased was a man of strong mentality, and the most of them stated that they had heard him express a desire and purpose to give his property, after providing for his children, to the mission cause.

The test by which the validity of the disposition of property depends is whether the donor or devisor, at the time of execution of the deed, or will, knew what he was doing, the property of which he was making disposition, its relation to his estate, its effect upon his relatives to whom the property for which he was making conveyances would, upon his death, descend, and the use to which it was to be put. If these

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conditions are found to exist the grantor is deemed to be competent and such deed, or will, should not be disturbed by the courts, in the absence of controlling evidence of undue or coercive influence over his mind and conduct at the time of the execution of the instrument.

In other words, if the deceased in this instance executed the deeds in question of his own volition and without being unduly influenced, so as to cause him to do that which he would not ordinarily have done under normal conditions, then and in that event this court, following a long line of decisions, would not be inclined to grant the relief sought by the complainants.

A careful consideration of the evidence discloses the fact that the deceased for the greater part of his life was considered a substantial farmer, possessing to an unusual degree those traits that give one success in life, to wit, energy, economy, good judgment, and uprightness in business dealings. It appears that he was a man of strong convictions, and this was especially true as to religious matters. The evidence further shows that he was not only a consistent member of the denomination to which he belonged, but that he spent much of his time in preaching the gospel and contributed to the cause in which he was so deeply interested; further, that for years prior to the execution of the deeds in question he contemplated making substantial contributions to the cause of missions before his death.

It is insisted that letters written by W. E. Powell and John S. Stump to the deceased were what might be termed "begging letters." An agent or agents of a Christian enterprise may properly appeal to those able and in sympathy with such enterprise for financial support. In this age of enlightenment the number of men of large means, as well as those of moderate means, who, from year to year, contribute to enterprises of this character, is rapidly increasing. Indeed, a majority of the educational institutions of this country, and certainly a majority of the religious institutions, are based upon endowments made by those who feel that it is their duty to dispose of their means by contributing to educational and religious institutions. These are laudable objects and it seems to us in a case like the one at bar, where one from his early manhood has spent his life in rendering Christian service, being imbued with a desire to not only preach the gospel to his own people, but to carry it to others, expressing at all times his purpose to make substantial contributions to the cause of missions, at a time when he was unquestionably in full possession of his mental and physical faculties and continued until his death to so express himself, tends strongly to show that what he did was not on account of undue influence, but was only the fulfillment of his long cherished and expressed desire.

It should be borne in mind that, in addition to what we have said as to the testimony offered, tending to establish the mental capacity of the deceased, that the court below found as a fact that the complainants had not established the mental incapacity of the deceased to execute the deeds in question. The court, in referring to this phase of the question, said:

"I think the evidence does rebut the contention of senile dementia or incapacity to convey. While he was 85 years old in 1907, and his memory was

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failing, I do not doubt his ability then to understand to the full degree required by the law, as enunciated in Buckey v. Buckey, 38 W. Va. 168 [18 S. E. 383], and similar cases, the nature and effect of a contract of sale."

There are a number of cases bearing upon this subject, and in the case of Buckey v. Buckey, 38 W. Va. 168, 18 S. E. 383, the court announced the following:

"The presumption of law is that the grantor in a deed was sane and competent to execute it at the time of its execution.

"Old age is not of itself sufficient evidence of incapacity to make a deed.

"The evidence of an officer taking the acknowledgment to a deed, or of a person present at its execution, is entitled to peculiar weight in considering the grantor's capacity.

"The time of the execution of a deed is the material or critical point of time to be considered upon the inquiry as to the grantor's capacity.

"A grantor in a deed may be extremely old, his understanding, memory, and mind enfeebled and weakened by age, and his action occasionally strange and eccentric, and he may not be able to transact many affairs of life; yet if age has not rendered him imbecile, so that he does not know the nature and effect of the deed, this does not invalidate the deed. If he be capable, at the time, to know the nature, character, and effect of the particular act, that is sufficient to sustain it."

The rule announced in the above case was reaffirmed in a number of cases in West Virginia, as follows: Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788; Farnsworth v. Noffsinger, 46 W. Va. 410, 33 S. E. 246; Teter v. Teter, 59 W. Va. 449, 53 S. E. 779; Bade v. Feay, 63 W. Va. 166, 61 S. E. 348; Woodville v. Woodville, 63 W. Va. 286, 60 S. E. 140; Black v. Post, 67 W. Va. 253, 67 S. E. 1072; Barnett v. Breathouse, 77 W. Va. 514, 88 S. E. 1013.

The case of Mackall v. Mackall, 135 U. S. 172, 10 Sup. Ct. 707, 34 L. Ed. 84, in referring to this phase of the question says:

"Influence gained by kindness and affection will not be regarded as 'undue,' if no imposition or fraud be practiced, even though it induce the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made. Matter of Gleespin's Will, 26 N. J. Eq. 523. * * * Confidential relations existing between the testator and beneficiary do not alone furnish any presumption of undue influence. Lee v. Lee, 71 N. C. 139. Nor does the fact that the testator on his death-bed was surrounded by beneficiaries in his will. Bundy v. McKnight, 48 Ind. 502. * * * Nor that the testator, an old and helpless man, made his will in favor of a son who had for years cared for him and attended to his business affairs, his other children having forsaken him. Elliott's Will, 2 J. J. Marsh. 340; s. c. Redf. Am. Cas. on Wills, 434. * * * It would be a great reproach to the law if, in its jealous watchfulness over the freedom of testamentary disposition, it should deprive age and infirmity of the kindly ministrations of affection, or of the power of rewarding those who bestow them.

"Undue influence must destroy free agency. It is well settled that in order to avoid a will on the ground of undue influence, it must appear that the testator's free agency was destroyed, and that his will was overborne by excessive importunity, imposition or fraud, so that the will does not, in fact, express his wishes as to the disposition of his property, but those of the person exercising the influence."

In the case of Du Bose v. Kell, 90 S. C. 196, 71 S. E. 371, the Supreme Court said:

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"To avoid a deed on the ground of undue influence, the evidence must show such an influence exerted on the grantor as to override his will and to make the act of executing the deed a mere mechanical performance by him of the design of the person exerting the influence, and undue influence may consist in any influence which is so far operative as to destroy free agency."

The whole subject of undue influence and mental competency is fully and elaborately discussed by Hawley, District Judge, in the authorities cited in President, etc., of Bowdoin College et al. v. Merritt et al. (C. C.) 75 Fed. 480. The discussion on this point is so full, and the citation of authorities so complete, that hardly anything can be added to it. The law on the subject is also admirably stated by Judge Sanborn in a Circuit Court of Appeals opinion. Sawyer v. White, 122 Fed. 223, 58 C. C. A. 587.

It is true that Daniel Huffman was forgetful in the latter part of his life, sometimes not knowing even those with whom he had acquaintance. There is also evidence that he was sometimes confused about the details of his business, such, for example, as whether notes had been paid—what he had done with some money which he had. But this confusion was always temporary, and he grasped and recognized the force of the evidence which was brought to him that he was mistaken as to his former views. Some of his neighbors testified that in their opinion, based on this confusion as to details of his business and the failure to recognize those whom he knew, that he was not of sound mind and incapable of making a valid deed. On the other hand, many who had intimate acquaintance with him, including two of his brothers, testified that he knew his property; that he had distinct purposes and ends in life, which were not irrational or fantastic, but, on the contrary, such as might well be entertained by an intelligent man. As we have stated those who were present at the time of the execution of the deed, including lawyers of the highest character, testified that he fully apprehended the nature of his property and the purport of the deed he was making, and aided in getting data for the preparation of the deed. The conclusion, therefore, of the District Judge that Huffman was not of unsound mind and had sufficient intelligence to fully realize what he was doing, is well sustained by the greater weight of the testimony.

There was no undue influence. It is true that several Baptist clergymen, deeply interested in the cause of missions, encouraged and solicited Huffman to carry out the purpose which he had formed, and not to delay it until it was too late. But there was not the slightest evidence that any pressure was brought to bear upon him. There is no evidence that he was told that the failure to make these deeds to carry out his design would affect his welfare in this world or the next. The only appeals made were that he should aid a good cause in pursuance of the design which he had expressed without any solicitation from anybody. When he went to make the deeds, Huffman himself requested his brothers to accompany him, and the papers were drawn by lawyers of high standing, after much discussion as to the form the transaction should take. Everything was done openly and above board. There was no necessity for effort to bring Huffman to a frame of mind which would conduce to the giving of his property to a missionary

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cause. He had been in that frame of mind for years, and we can discover no effort to control his will in this regard. The most that can be said as to the influence upon him was that he was requested and solicited to carry out the design without delay. But even this request was not unduly insistent, for as soon as it was made he agreed to the suggestion.

In view of all the facts in this case we are of the opinion that the case at bar is far removed from the standard of proof required to set aside conveyance, even for undue influence, or incompetency, or both.

[8, 9] However, it is insisted by counsel for the complainant that the deeds of 1907 and 1909 are invalid, in that they are contrary to the laws and policy of the state of West Virginia; in other words, after assuming the invalidity of the deeds in question upon this ground, they then arrive at the conclusion that no title passed to the grantor thereunder.

The court below in referring to this phase of the question, among other things, said:

"Personally, my views have been in accord with those of counsel in this line of reasoning, as shown by the two opinions filed in Miller v. Ahrens (C. C.) 150 Fed. 644, and [Id. (C. C.)] 163 Fed. 870; but I hesitate, in view of the opinion rendered in Pulp & Paper Co. v. Miller, supra [176 Fed. 284, 100 C. C. A. 176] by the Circuit Court of Appeals for this circuit, to rely upon them in the decision of this case. * * *

"The conclusions I reach are these: I think these conveyances are direct violation of the statute of West Virginia, limiting the amount and the purposes for which church organizations may take real estate. If, however, the ruling in West Va. Pulp & Paper Co. v. Miller, supra, is held decisive that only the state can complain of this, I am fully convinced that they should be set aside, at the instance of these heirs, because of the undue influence that caused their execution, and decree to that effect may be entered."

The Constitution of West Virginia (article 6, § 47) says:

"No charter of incorporation shall be granted to any church or religious denomination. Provisions may be made by general laws for securing the title to church property, and for the sale and transfer thereof, so that it shall be held, used, or transferred for the purposes of such church or religious denomination."

Counsel for the complainants say that—

"The provision made by general law, under the last clause of the above section of the Constitution, is chapter 57 of the Code of West Virginia; and it provides that the circuit court of the county shall appoint trustees to hold church property, and section 7 of that chapter [sec. 3299] provides that such trustees may take and hold for the purposes mentioned in the first section of said chapter, not exceeding four acres of lands in an incorporated city, town or village, and not exceeding 60 acres out of such city, town or village."

"This chapter makes provision in relation to the conveyances of land which shall be made for use or benefit of any church, religious sect, society, congregation or denomination as a place of public worship or a burial place or as a residence for a minister and provides that the land shall be held for such purpose and no other."

"Our [complainants'] contention is that this statute has no relation to the subject under discussion in this case. A church of any denomination has the right, under this statute, made in pursuance of the Constitution to take and hold real estate for church purposes locally to the extent "provided in section 7, but this by no means authorizes the incorporation of a company to take the land for any purposes connected with the church or religious denomination."

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The contention of the complainants is based upon the assumption that the American Baptist Home Mission Society is a "church or religious denomination," within the meaning of the section of the Constitution above quoted. We think there is a marked distinction between a "church or religious denomination" and a society or other organization acting as an auxiliary thereto.

In the case of Gilmer v. Stone, 120 U. S. 586, 7 Sup. Ct. 689, 30 L. Ed. 734, the Supreme Court passed upon the validity of a devise of several hundred acres of land situated in the state of Illinois, to be "equally divided between the Board of Foreign and the Board of Home Missions" of the Presbyterian church, both being New York corporations. The Illinois statute provides that "a congregation, formed for religious purposes," cannot purchase or hold land in excess of 10 acres. Among other things it appears that the corporate beneficiaries were formed—

"for the purpose of establishing and conducting Christian missions among the unevangelized of pagan nations and the general diffusion of Christianity, and to assist in sustaining the preaching of the gospel in feeble churches and congregations in connection with the Presbyterian Church in the United States, and generally to superintend the whole of the Home Missions in behalf of such church."

In that case the Supreme Court held that the Illinois statute was applicable to bodies formed for the purpose of religious worship and did not apply to these mission societies and the devise of land to them was allowed to stand. The Supreme Court in that case in referring to this point said:

"While these boards are important agencies in aid of the general religious work of the Presbyterian Church in the United States of America, neither of them is, in any proper sense, or in the meaning of the 35th section of the act of 1872, a church, congregation or society formed for the purpose of religious worship. The counsel for the plaintiff in error seem to lay stress upon the more general words, 'formed for religious purposes,' in the forty-second section of the act; but manifestly the other parts of the same section, and previous sections, show that the only corporations intended to be restricted in the ownership of land to ten acres, were those formed for the * * * commonly called benevolent or missionary societies. The reasons of public policy which restrict societies, formed for the purpose of religious worship, in their ownership of real estate, do not apply at all, or, if at all, only with diminished force, to corporations which have no ecclesiastical control of those engaged in religious worship, and cannot prescribe the forms of such worship, nor subject to ecclesiastical discipline those who fail to conform to the rules, usages, or orders of the religious society of which they are members."

In the case of Hamsher v. Hamsher, 132 Ill. 285, 23 N. E. 1125, 8 L. R. A. 558, there was a gift by will to the Young Men's Christian Association of Decatur, Ill., a corporation formed for the purpose of promoting, as shown by its charter, educational, humanitarian and charitable work, rather than religious worship. The Supreme Court of that state, in passing upon this question, among other things said:

"It does not appear that the Young Men's Christian Association of Decatur, Ill., exercises any ecclesiastical control over its members, or prescribes any form of worship for them, or subjects those who fail to conform to its rules to ecclesiastical discipline. Therefore a limitation upon the extent of

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its ownership of real estate is not so imperatively demanded by those considerations of public policy which apply to corporations formed for the purpose of public worship. We are of the opinion that said association is not subject to the restriction contained in section 42 of the Corporation Act, and that the devise to it of a greater quantity of land than ten acres is not invalid. It follows that the appellant takes nothing as heir, and that his cross-bill was properly dismissed."

It is undoubtedly true that the Constitution of West Virginia prohibits the incorporation of any church or religious denomination, but we are of the opinion that this provision applies only to church or religious denominations and cannot be properly construed as applying to organizations of the character involved in this controversy, nor does it contain any inhibition against a foreign corporation created, among other things, for the purpose of taking and holding real estate. Under the provisions of section 30 of chapter 54 of the Code of West Virginia (sec. 2929) any foreign corporation may hold property in that state unless otherwise expressly provided.

In the case of Fritts v. Palmer, 132 U. S. 283, 10 Sup. Ct. 93, 33 L. Ed. 317, the Supreme Court said:

"The Constitution and laws of Colorado, it should be observed, do not prohibit foreign corporations altogether from purchasing or holding real estate within its limits. They do not declare absolutely or wholly void, as to all persons, and for every purpose, a conveyance of real estate to a foreign corporation which has not previously done what is required before it can rightfully carry on business in the state. Nor do they declare that the title to such property shall remain in the grantor, despite his conveyance. * * *

"If the Legislature had intended to declare that no title should pass under a conveyance to a foreign corporation purchasing real estate before it acquires the right to engage in business in the state, and that such a conveyance should be an absolute nullity as between the grantor and grantee, leaving the grantor to deal with the property as if he had never sold it, that intention would have been clearly manifested. * * *

"To the above cases may be added those holding that an alien may take by deed or devise and hold against any one but the sovereign until office found. Cross v. De Valle, 1 Wall. 1, 13 [17 L. Ed. 515]; Governeur v. Robertson, 11 Wheat. 332 [6 L. Ed. 488]; National Bank v. Matthews, 98 U. S. 621, 628 [25 L. Ed. 188]; Phillips v. Moore, 100 U. S. 208 [25 L. Ed. 603]. Also, those holding that the question whether a corporation, having capacity to purchase and hold real estate for certain defined purposes, or in certain quantities, has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, concerns only the state within whose limits the property is situated. It cannot be raised collaterally by private persons unless there be something in the statute expressly or by necessary implication authorizing them to do so. Cowell v. Springs Company, 100 U. S. 55, 60 [25 L. Ed. 547]; Jones v. Habersham, 107 U. S. 174, 188 [2 Sup. Ct. 336, 27 L. Ed. 401]."

[10] We are further of the opinion that where a state does not provide for the granting of a charter to domestic corporations of certain character, such nonaction on its part is not in the nature of a prohibition against foreign corporations created for such purpose.

[11] We think the third proposition, that under the laws of West Virginia a foreign corporation will be deemed to have no corporate existence is untenable in the light of the cases decided by the Supreme Court of West Virginia, and those decided by the federal courts in cases arising upon gifts or grants made in West Virginia; also, this

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principle has been announced by the Supreme Court of the state of Virginia, whose laws in many respects are similar to the provisions of the Constitution of West Virginia. In the case of West Virginia Pulp & Paper Co. v. Miller, 176 Fed. 284, 100 C. C. A. 176, the court in referring to this point said: There was a devise in trust of lands in West Virginia to a church incorporated under the laws of Maryland. In that case the corporate existence of the Maryland church was recognized by the court; it holding, among other things, that in the case of devise of land to a foreign church, such devise could only be called in question by the state. In that case the court said in point:

"Even if this were a devise of land to a foreign church, the state alone could complain. In the case of Church v. Arkle, 49 W. Va. 93, 38 S. E. 456, the court said: 'Where one leases a lot from the trustees of a church in an action of unlawful detainer against him by such trustees for the recovery of possession, he cannot set up that the church holds the lot in violation of section 1, c. 57, of the Code, limiting the ownership of real estate by a church to such as may be necessary as a place of public worship or burial place, or the residence of a minister. None but the state can attack such ownership as violating that statute.' Banks v. Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706; Hanson v. Little Sisters of the Poor, 79 Md. 434, 32 Atl. 1052, 32 L. R. A. 293.

"Also in the case of Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401, the court, in referring to this question, said: 'But there are two conclusive answers to this argument: (1) Restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the state which created it. Runyan v. Coster, 14 Pet. 122, 131 [10 L. Ed. 382]; Smith v. Sheeley, 12 Wall. 358, 361 [20 L. Ed. 430]; Bogardus v. Trinity Church, 4 Sandf. Ch. (N. Y.) 633, 758; De Camp v. Dobbins, 29 N. J. Eq. 36; Davis v. Old Colony R. R. Co., 131 Mass. 258, 273 [41 Am. Rep. 221].'

"In the case of Julian v. Central Trust Co., 115 Fed. 956, 53 C. C. A. 438, it was insisted that the Southern Railway Company, being a corporation of the state of Virginia, could not hold railroad property in North Carolina, and, in referring to this phase of the question, the court, among other things, said: 'If the Southern Railway Company holds this property contrary to the will of the sovereign power of the state, it is for the state to interfere. No private individual can usurp its prerogative. Bank v. Matthews, 98 U. S. 628, 25 L. Ed. 188; Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313.'

"In the case of Hickory Farm Oil Co. v. Buffalo, N. Y. & P. R. Co. (C. C.) 32 Fed. 22, the court said: 'The leading case in Pennsylvania on the subject of the effect of a conveyance of real estate to a corporation forbidden by law to "purchase and hold" the same is that of Leazure v. Hillegas, 7 Serg. & R. [Pa.] 313, in which it was held that such corporation might purchase and take title to the real estate; its title, however, like that of an alien, being defeasible at the pleasure of the commonwealth. That case and the later case of Goundie v. Water Co., 7 Pa. 233, settle the principle that the commonwealth alone can object to a want of capacity in a corporation to hold land.'"

The case of Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 594, is to the same effect. Also, in the case of Ragan v. McElroy, 98 Mo. 349, 11 S. W. 735, the Supreme Court held that whether a corporation, in accepting deed to real estate, exceeded its powers, is a question which could only be raised by the state in direct attack.

In the case of Wilson v. Perry, 29 W. Va. 169, 1 S. E. 302, there was a bequest in trust to the Presbyterian Committee of Publication, a Virginia corporation, formed for "the dissemination of religious

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truths" and the Supreme Court of that state upheld the gift. In the case of Ross v. Kiger, 42 Va. 402, 26 S. E. 193, a bequest to the "Mission Society of the Methodist Episcopal Church," a New York corporation, was sustained.

The following cases are very much in point and sustain the contention of the defendant: Chambers v. City of St. Louis, 29 Mo. 543; American Mortgage Co. v. Tennille, 87 Ga. 28, 13 S. E. 158, 12 L. R. A. 529; Union National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188.

In the latter case, the Supreme Court, among other things said:

"Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose."

After carefully considering the provisions of the West Virginia Constitution, in the light of the foregoing authorities, we are of the opinion that (a) the American Baptist Home Mission Society and the Latin-American Improvement Association, Incorporated, are not religious denominations within the meaning of the act; (b) that there is no provision in the West Virginia Constitution that inhibits a foreign corporation from holding property within that state; (c) that this court in the case of the West Virginia Pulp & Paper Co. v. Miller (supra), established the rule, in this circuit at least, that in a case like the one at bar the state alone can attack the validity of an instrument alleged to be in violation of the public policy of the state as annunciated in the Constitution.

In view of what we have said we are of the opinion that the court below was in error in holding the deeds in question to be invalid, therefore, the decree of the court below is reversed and the case will be remanded, with instructions for further proceedings in accordance with the views herein expressed.

Reversed.

CHAPIN-SACKS MFG. CO. v. HENDLER CREAMERY CO. et al.

HENDLER CREAMERY CO. et al. v. CHAPIN-SACKS MFG. CO.

(Circuit Court of Appeals, Fourth Circuit. October 10, 1918.)

Nos. 1584, 1620.

1. TRADE-MARKS AND TRADE-NAMES ⟸3(5)—CHARACTER OF WORD—QUALITY.
No words which in their ordinary signification, or in their trade signification, merely describe the quality of the article to which they are applied, can be exclusively appropriated as a trade-mark.

2. TRADE-MARKS AND TRADE-NAMES ⟸3(5)—"VELVET."
"Velvet," in its primary meaning, signifies cloth, substantial, soft, and smooth to the touch, and is used in a secondary sense as designating the qualities of consistency, softness, and smoothness; and hence the words, "The Velvet Kind," cannot be appropriated by a manufacturer of ice cream as a trade-mark for his product.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Velvet.]

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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3. TRADE-MARKS AND TRADE-NAMES ⟸45—REGISTRATION—PRESUMPTION.
The allowance of a trade-mark by the Patent Office furnishes a strong presumption of its validity; but a trade-mark in the words "The Velvet Kind," as applied to ice cream, being invalid, cannot be sustained because of the presumption.

4. TRADE-MARKS AND TRADE-NAMES ⟸69—APPROPRIATION—INTENT TO DEFRAUD—INFERENCE.
Where defendants used words in which complainant had acquired a valid trade-mark, such use of itself evidenced an intention by defendants to defraud and palm off their product as that of complainant, although the inferences of fraud and unfair competition may be rebutted, in exemption of damages.

5. TRADE-MARKS AND TRADE-NAMES ⟸67—UNFAIR COMPETITION—PROTECTION.
Even where there is no technical trade-mark, a dealer may acquire property rights in words not the subject of a trade-mark, which the courts will protect upon proof of unfair competition.

6. TRADE-MARKS AND TRADE-NAMES ⟸78—UNFAIR COMPETITION—PROTECTION.
Where complainant built up an extensive trade in Washington, D. C., selling its ice cream under the descriptive words, "The Velvet Kind," that did not give complainant any right to exclude others from using such words in a place where it had not associated its ice cream with the designation, and defendant might adopt the words to describe its ice cream sold in Baltimore.

7. TRADE-MARKS AND TRADE-NAMES ⟸86—ACTION—LACHES.
While mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right to a trade-mark, yet where complainant, which did not have a technical trade-mark in the words "the Velvet Kind," under which it sold its ice cream, abandoned a suit against defendant, who had begun selling ice cream in another city under the same name, such abandonment estopped complainant from obtaining a decree from profits.

8. TRADE-MARKS AND TRADE-NAMES ⟸97—UNFAIR COMPETITION—RELIEF.
Where complainant had built up an extensive trade in ice cream under the name "The Velvet Kind" in one city, and defendant had appropriated that name for its ice cream, which it sold in another city, *held* that, on defendants beginning to sell ice cream in a third city in competition with complainant, it was bound to use the utmost good faith to distinguish its product from that of complainant, but should not be enjoined from entering territory in which the complainant had not established a market.

9. TRADE-MARKS AND TRADE-NAMES ⟸97—UNFAIR COMPETITION—RELIEF.
Where complainant had built up an extensive trade in ice cream under the name "The Velvet Kind," a decree enjoining defendant from advertising its ice cream under that name, without the distinct statement that it is "not 'The Velvet Kind' made by" complainant, *held* not to afford the latter sufficient protection, as such an advertisement, without a statement that defendant's ice cream was inferior, would indicate that defendant was claiming to sell ice cream superior to that of complainant.

10. APPEAL AND ERROR ⟸1171(3)—REVERSAL—COSTS.
While it is the general rule in equity that costs are in the discretion of the trial court, and that no appeal will lie upon a decree merely upon the ground of error in awarding costs, yet, where the decree is erroneous in any other respect, the appellate court may reverse or modify it with respect to cost.

Waddill, District Judge, dissenting in part.

Appeals from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

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Bill by the Chapin-Sacks Manufacturing Company against the Hendler Creamery Company and another. From the decree, which granted part of the relief sought (231 Fed. 550), both parties appeal. Modified.

Isaac Lobe Straus, of Chicago, Ill. (Walter A. Johnston, of Washington, D. C., on the brief), for plaintiff.

John Watson, Jr., of Baltimore, Md. (Vernon Cook, of Baltimore, Md., on the brief), for defendants.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

WOODS, Circuit Judge. In these appeals two mixed questions of law and fact are to be decided: Were the words, "The Velvet Kind," applied to ice cream in 1905, so descriptive of quality that they could not be appropriated as a trade-mark by complainant, Chapin-Sacks Manufacturing Company?

Assuming that they were, did the use by the defendant Hendler, and his successor in business, Hendler Creamery Company, of the words, "The Velvet Kind," and of containers and wagons similar to those used by complainant, nevertheless amount to unfair competition —the unfair appropriation of the good will of the complainant and the reputation of its ice cream?

[1] The first question is not free from difficulty, but it must be answered in the affirmative. No words which in their ordinary signification or in their accepted trade signification merely describe quality in the article to which they are applied can be excluded by one trader from use by others and appropriated as a trade-mark. Manufacturing Co. v. Trainer, 101 U. S. 51, 25 L. Ed. 993; Lawrence Manufacturing Co. v. Tennessee Manufacturing Co., 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997.

[2] "Velvet," in its primary meaning signifies cloth, substantial, soft, and smooth, without distinct particles causing roughness to the touch. With this signification, "velvet" and "velvety" are applied descriptively in common speech to other articles; and in this secondary sense the words are used almost as commonly as in their primary sense. Perhaps no other words applied to ice cream so well describe the qualities of consistency, softness, and smoothness—the absence of roughness to the sensitive touch of the tongue produced by distinct particles of ice. The word "velvet" was in this sense becoming more markedly descriptive in 1905, when complainant commenced its business; real cream having so largely ceased to be the chief constituent of ice cream, and the volume of the ice cream business having so vastly increased. It is not denied that at least two or three manufacturers and dealers in different parts of the country had before 1905 used the word "velvet" or "velvet kind" as descriptive of quality in ice cream. After December, 1905, when complainant registered the words, "The Velvet Kind," in the Patent Office as a trade-mark, the words "velvet" and "velvet kind" were very extensively so used all over the country, apparently without any knowledge of complainant's effort to appropriate the terms. This last fact is not important, as

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showing such prior appropriation by any dealer or dealers as to invalidate complainant's claim to a trade-mark by reason of prior appropriation. Its significance is that it shows a common conception and understanding of the words as distinctive of quality so general, and so valuable to the trade, that they could not be appropriated as a trade-mark by one dealer to the exclusion of all others. Indeed, we cannot help thinking complainant adopted the word "velvet" as a fit adjective to describe to the public the kind of cream it was making.

[3] The allowance of the trade-mark by the Patent Office, it is true, furnishes a strong presumption of its validity. In addition to this, the Patent Office registration of the words "velvet" and its derivatives, either alone or with other words, for such articles as candies, lotions, butter, oil, and cotton fabrics, also tends to support the claim of the complainant. No doubt, in registering these words as trade-marks, the Patent Office in these instances considered the words indirectly and remotely descriptive, without being actually so, thus applying the principle on which the word "Hygeia," conveying to those who happened to think of its derivation the idea of health or healthfulness, was held a good trade-mark for water in Consolidated Ice Co. v. Hygeia Distilled Water Co., 151 Fed. 10, 80 C. C. A. 506. But none of these registrations measures up to the case cited, and none of them, as we understand, has been subjected to judicial test. We think all presumptions from the action of the Patent Office are overcome by the great weight of the evidence and the common understanding that "velvet" and "velvet kind" describe, as hardly any other words could, the desirable qualities mentioned in ice cream.

[4] The second question must also be answered in the affirmative. If the complainant had acquired the right to the exclusive use of the words, "The Velvet Kind," as a trade-mark, their use by the defendants would be itself evidence of the intention to defraud and palm off their cream as that of the complainant. Lawrence M. Co. v. Tennessee M. Co., 138 U. S. 537, 549, 11 Sup. Ct. 396, 34 L. Ed. 997. In such case the inference of fraud and unfair competition might be rebutted in exemption of damages; but, in the absence of conduct by complainant amounting to estoppel, further violation of the right of property would nevertheless be restrained. Elgin W. Co. v. Illinois W. Co., 179 U. S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365.

[5] Even where there is no technical trade-mark, a dealer may acquire property rights which the courts will protect, upon proof of unfair competition by imitation of his distinctive words, marks, or other designations of his goods, or of his containers or other instrumentalities of trade. The principle is thus well expressed by Judge Lurton in Computing Scale Co. v. Standard Computing Scale Co., 118 Fed. 965, 55 C. C. A. 459:

"But when the word is incapable of becoming a valid trade-mark, because descriptive or geographical, yet has by use come to stand for a particular maker or vendor, its use by another in this secondary sense will be restrained as unfair and fraudulent competition, and its use in its primary or common sense confined in such a way as will prevent a probable deceit, by enabling one maker or vendor to sell his article as the product of another." Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118;

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Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365.

[6] Complainant began to make and sell ice cream in the city of Washington under the name of "The Velvet Kind" in May, 1905, and in December of that year registered the words under the federal law as a trade-mark. Doubtless believing it had a valid trade-mark, it placed the words on its containers and wagons, and by extensive advertisements in newspapers, by electric signs, and the distinctive marks on containers and wagons, the words, "The Velvet Kind," were made to signify to the trade in Washington, Richmond, and the immediate vicinity of those cities a cream of known quality made and sold in large quantities by the complainant under that name. There can be no doubt that, at least in Washington, the complainant had, by advertisement, marks, and the general conduct of its business, so associated its ice cream with the words, "The Velvet Kind," that the sale of ice cream in that city by others under that name, with nothing to distinguish their cream from complainant's, would have been a fraud.

But that did not give complainant any right to the exclusion of the use by others of the descriptive words in any place where it had not associated its cream with the designation. Hanover Star M. Co. v. Metcalf, 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713; Theodore Rectanus Co. v. United Drug Co., 226 Fed. 545, 141 C. C. A. 301. It is true that, in the cases cited, the markets in which the complainant had not established their trade in flour and drugs were much more remote geographically than is Baltimore from Washington. But ice cream is not usually transported from one large city to another, and its sale and distribution is usually within the area in proximity to the place of manufacture. Considered with respect to the usual area of sale and distribution, Baltimore is as distinct and separate market for ice cream as the Alabama market is from a city in Ohio for flour or patent medicines. Complainant had no plant in Baltimore, and has never attempted to compete for the Baltimore trade, and therefore it had no right to restrain any one from the use of the words, "The Velvet Kind," in that city.

The defendant Hendler, living in Washington, attracted by the words, "The Velvet Kind," used by complainant, some time in 1905 went into business in Baltimore, copying the words, "The Velvet Kind," and imitating in a general way the marks and colors on the containers and wagons which the complainant used. He, and the Hendler Creamery Company, his successor, built up a large business in Baltimore. Since the complainant had no appreciable trade in Baltimore, and had not made the words, "The Velvet Kind," to denote its cream, the adoption of the words there by the defendants, though an imitation, was not in itself proof of a fraud or unfair competition.

[7] Even if the words, "The Velvet Kind," had been a valid trade-mark under the federal statute, we should be inclined to hold that the abandonment by the complainant of its suit against the defendants in the state court in Baltimore, its full knowledge that defendants were going forward incurring expense and labor in the promotion of sales in Baltimore under the name of "The Velvet Kind," and the com-

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plainant's failure to make any effort for custom there, would be sufficient evidence of estoppel or waiver to prevent a decree for profits. But the complainant might nevertheless have been entitled to an injunction against the further invasion of its right; for the defendants' appropriation of the trade-mark in that case would have been piracy.

"The intentional use of another's trade-mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence, then, in the use is not innocent, and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself, * * * nor will the issue of an injunction against the infringement of a trade-mark be denied on the ground that mere procrastination in seeking redress for depradations had deprived the true proprietor of his legal right." Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526; Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60.

[8] This is important in determining the present standing of the defendants in a court of equity; for in justice and good conscience the principle has at least a qualified application to a case of unfair competition where there is no trade-mark. Hendler received the idea of "The Velvet Kind," as a trade-mark, from the complainant. He, in common with complainant, believed that the words could be made a trade-mark, for he registered them as his trade-mark under state law. While the complainant was developing its business in Washington, Hendler took the words to Baltimore, and effectually anticipated any extension of the use of the supposed trade-mark words to the Baltimore market, which the complainant might afterwards have desired to make. Under these circumstances, equity will exact of the defendants the utmost good faith and diligence to distinguish their product from that of the complainant in the city of Annapolis or any other field of competition.

Hendler began to sell ice cream as "The Velvet Kind" to an Annapolis dealer in 1906; but his orders were small, and he did not by their extent, or by advertisement, or in any way, make the words, "The Velvet Kind," significant or of special value in the Annapolis market. In 1908, the complainant entered the Annapolis market, and by advertisement and distinctive containers and wagons made the words, "The Velvet Kind," signify to dealers a particular kind of ice cream of excellent quality made by it. Thus it built up in that market a large trade. Analysis of the somewhat conflicting testimony would not be valuable, but it leaves no doubt of the correctness of the conclusion of the District Court that in Annapolis the defendants, by adopting the words, "The Velvet Kind," made popular by complainant's efforts, and by the use of imitative containers and wagons, brought about confusion of their cream with that of the complainant, and that they profited by the confusion to complainant's loss. Especially did they avail themselves of these methods, and make them unfairly profitable, when the opportunity was furnished by complainant's increase in the price of its cream.

We think the decree of the District Court went too far in enjoining the defendants from entering territory in which the complainant

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had not established a market for its cream under the designation of "The Velvet Kind."

[9] On the other hand, the decree of the District Court in another respect does not afford protection to the complainant. The defendants were enjoined from advertising and selling their cream in Annapolis and Laurel "without in immediate connection with said words 'The Velvet Kind' and in letters of the same character, style, and size, stating that their, the defendants', ice cream is not 'The Velvet Kind' made by the Chapin-Sacks Manufacturing Company of Washington, D. C." Advertisements and marks in this form, unless they contain a distinct statement of the fact that defendants' ice cream is inferior to that of the complainant, would indicate that the defendants were claiming to sell cream superior to that which the complainant was selling under the same designation.

[10] The general rule in equity is that costs are in the discretion of the trial court, and that no appeal will lie from a decree merely on the ground of error in awarding costs. But, where the decree is found to be erroneous in any other respect, the appellate court may reverse or modify the decree of the District Court with respect to costs in accordance with its own conclusions as to the equities of the case. This distinction is stated, and the numerous authorities supporting it are cited, in Gregg v. Metropolitan Trust Co., 124 Fed. 721, 732, 59 C. C. A. 637. We are so strongly impressed with the superior equities of the complainant in this case, and the necessity for the suit in order to protect its rights, that we think the entire costs should be paid by the defendants.

The decree will therefore embody these conclusions: (1) The words, "The Velvet Kind," applied to ice cream, being descriptive, are not valid as a trade-mark. (2) Advertisement and sale by the defendants of their ice cream in the city of Baltimore did not constitute unfair competition with the complainant. (3) The complainant has an established business for ice cream under the designation of "The Velvet Kind," indicated by its advertisements, its containers and wagons, in Washington, D. C., Richmond and Alexandria, Va., and Annapolis, Buckeyestown, Woodstock, and Frederick in the state of Maryland. (4) The defendants have been competing unfairly with the complainant in Annapolis and Laurel, in the state of Maryland. (5) The defendants should be enjoined from the advertisement and sale of ice cream under the designation, "The Velvet Kind," and from the use of containers, wagons, and other instrumentalities of the trade similar to those used by the complainant, in Washington, D. C., Richmond and Alexandria, Va., Annapolis, Laurel, Buckeyestown, Woodstock, and Frederick, in the state of Maryland, and all other places where the complainant has established the sale of its ice cream under the designation of "The Velvet Kind," until they shall submit to the District Court a plan of business which will satisfy the court that their cream will not be confused with that of the complainant, and will not in any wise unfairly affect complainant's business. (6) Complainant is entitled to an accounting as required by the District Court. (7) The un-

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fair course of conduct pursued by the defendants requires that they pay the entire cost in the District Court and in this court.

Modified.

WADDILL, District Judge. I concur in the conclusions of the majority of the court, as stated in paragraphs 3, 4, 5, 6, and 7, and dissent from the conclusions in paragraphs 1 and 2, though I am strongly inclined to the view that the complainant, as between itself and the defendants, is not entitled to the relief prayed for, respecting the sale of its ice cream in the city of Baltimore, because of laches in the prosecution of its suit, if, in fact, it was not estopped by the dismissal of the suit instituted in the state court at Baltimore against the defendants to prevent them from infringing the complainant's trademark, and unfairly competing with it in its ice cream business; said defendants having duly appeared in said cause.

BROWN v. DENVER OMNIBUS & CAB CO. et al.

(Circuit Court of Appeals, Eighth Circuit. November 18, 1918.)

No. 5019.

1. APPEAL AND ERROR ⊂⊃856(4)—REVIEW—DISMISSAL.
   Where a complaint was dismissed generally, without any reason being specified, the defendants are entitled to insist upon all the objections made below in order to sustain the judgment.
2. COURTS ⊂⊃310—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.
   Where there was requisite diversity of citizenship between plaintiff and the principal defendant, that another party defendant was a citizen of the same state as plaintiff will not deprive the federal court of jurisdiction, unless such person was an indispensable party.
3. MORTGAGES ⊂⊃10—TRUSTEES—RIGHTS.
   Since the enactment of the Colorado Public Trustee Act, there is no difference as to the interest conveyed by a trust deed to secure the payment of a debt as between real and personal property.
4. MORTGAGES ⊂⊃427(2)—TRUSTEES—TRUSTEE FOR BONDHOLDER.
   The rule that in general courts can deal with bondholders only through their trustees is a rule of convenience, to facilitate the conduct of the suit, and is inapplicable where the trustee occupies a position prejudicial to the interest of the bondholders.
5. COURTS ⊂⊃310—MORTGAGES ⊂⊃427(2)—FEDERAL COURTS—FORECLOSURE—PARTIES.
   Where the trustee named in a mortgage securing bonds refused to act, the trustee is not an indispensable party defendant to a suit by a holder of bonds to foreclose the mortgage; hence, though the trustee and the bondholder were citizens of the same state, yet, as there was diversity of citizenship between the mortgagor and the bondholder, suit to foreclose might be brought in the federal court.
6. COURTS ⊂⊃317—FEDERAL COURTS—JURISDICTION—REARRANGEMENT OF PARTIES.
   In determining whether the federal court has jurisdiction on the ground of diversity of citizenship, the court will align the parties according to their interest, so the trustee of a mortgage given to secure bonds will be treated as a plaintiff, if an indispensable party, and, though it was a citi-

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zen of the same state as the bondholder who began suit, the federal court has jurisdiction; the mortgagor being a citizen of a different state.

7. COURTS ⊂⊃317—FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—REARRANGEMENT OF PARTIES.
Where a bondholder, suing to foreclose a mortgage given to secure bonds, named the trustee, which had refused to act, a party defendant, *held*, that the omission of any prayer for judgment against the trustee warranted the federal court in treating the trustee as plaintiff, in determining whether there was requisite diversity of citizenship.

8. MORTGAGES ⊂⊃417—RIGHT TO FORECLOSE.
A complaint by a bondholder, seeking to foreclose a mortgage given to secure bonds, which alleged that the trustee had refused to act, that the mortgagor was in default, and that the holders of a majority in interest of the bonds had conspired to defraud other bondholders, and apply funds, properly applicable to payment of the bonds, to payment of unsecured indebtedness, *held* to state a cause of action for equitable relief, notwithstanding the mortgage provided for foreclosure only upon request of a majority of the bondholders.

9. MORTGAGES ⊂⊃414—PUBLIC POLICY—OUSTING COURTS OF JURISDICTION.
A provision, in a mortgage given to secure bonds, for foreclosure in event of default, upon request of a majority in interest of the bondholders, if precluding suit by a bondholder where a majority of the bondholders had conspired with the mortgagor to defraud, would be void as ousting the courts of jurisdiction.

10. MORTGAGES ⊂⊃401(2)—FORECLOSURE—STIPULATIONS.
A provision giving the majority in interest of the holders of bonds secured by a mortgage the option to declare the principal of the bonds due in event of default in interest does not prevent foreclosure for default in interest.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit by James H. Brown, for and on behalf of himself and all other holders of bonds who might come into the suit and contribute to the expenses, against the Denver Omnibus & Cab Company, a Wyoming corporation, and the Continental Trust Company. From a judgment dismissing the complaint, plaintiff appeals. Judgment as to the first-named defendant reversed, and case remanded, with instructions.

James H. Brown, of Denver, Colo., pro se.

William V. Hodges, of Denver, Colo. (D. Edgar Wilson, of Denver, Colo., on the brief), for appellee Denver Omnibus & Cab Co.

Thomas E. Watters, of Denver, Colo., for appellee Continental Trust Co.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. The complaint of the appellant alleged: That the Cab Company was a citizen of Wyoming and the Trust Company and appellant were citizens of Colorado. That appellant commenced the action in behalf of himself and all other holders of bonds secured by the mortgage hereafter mentioned who should come into the suit and contribute to the costs and expenses thereof. That July 31, 1909, the Cab Company in order to secure the payment of the principal and interest of 800 sinking fund first mortgage 6

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per cent. gold bonds to be issued by it, executed and delivered to the Trust Company as trustee a mortgage or deed of trust on the property described in the complaint, consisting of real and personal property. That said bonds were all certified and issued by the Trust Company in the aggregate sum of $250,000. That plaintiff was the owner of 52 of said bonds, of the par value of $500 each. That the bonds were to become due October 1, 1929, and draw interest at 6 per cent. per annum, payable quarterly. That the Cab Company failed to pay the interest on the bonds which became due and payable July 1, 1916, October 1, 1916, January 1, 1917, April 1, 1917, and July 1, 1917. That on divers and sundry occasions within six months prior to the commencement of the action, and more than six months subsequent to said default in the matter of interest, the appellant, on behalf of himself and all other bondholders of the same class similarly situated, had made repeated requests, verbally as well as in writing, that said Trust Company act under said mortgage for the collection of said interest and the protection and enforcement of the lien of said mortgage. That said Trust Company made no objection to the requests that were verbal on account of said requests not being in writing, but wholly refused to act in any manner for the purpose of collecting said interest or to protect the lien of the mortgage. That John M. Kuykendall was the president and general manager of the Cab Company and together with Anna his wife, owned a majority of its stock; that John W. Springer was a stockholder, director, and at different times had held the office of president and vice president of the Trust Company, and now was in the general control and management thereof. That said Trust Company did a banking business, and the Cab Company, commencing July 1, 1910, became and was a borrower of the Trust Company to the extent of $70,000. That the Trust Company, pretending to act under the trust deed, but in fact wholly in violation thereof, certified and issued for a nominal consideration $100,000 par value of bonds of the Cab Company purporting on their face to be secured by said trust deed, in excess of the $250,000 in bonds above mentioned. That said Trust Company retained of said spurious bonds $85,000 par value as collateral security for the indebtedness of the Cab Company to said trustee. That the trust deed provided that, if any bonds should be lawfully issued by said Cab Company in addition to the said $250,000 par value, the proceeds thereof, together with 15 per cent. upon the amount issued to be furnished and supplied by the Cab Company from its earnings, should be invested in improvements, betterments, or other property, which improvements, betterments, or other property should become as fully subject to the terms, conditions, and covenants of the mortgage or trust deed as though expressly incorporated therein. That said 15 per cent. was not furnished by the Cab Company, nor was any of the proceeds of said spurious bonds invested in improvements, betterments, or other property of said Cab Company. That in April, 1913, the Trust Company sold its banking business, including the indebtedness of the Cab Company, together with the collateral securing the same to the Interstate Trust Company, the appellee Trust Company guaranteeing the payment thereof. That pretending to

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act under a provision of the deed of trust on February 7, 1911, the Trust Company released from the lien of the trust deed property of the reasonable value of $55,000, and received therefor 25,000 shares of the common and 30,000 shares of the preferred stock of the Seeing Denver Company. That instead of holding said stock in trust for the benefit of the bondholders under the deed of trust, the Trust Company, in collusion with the Cab Company, permitted the latter to pledge said stock as collateral security for the unsecured indebtedness of the Cab Company. That by reason of this transaction $55,000 in value of the property covered by the trust deed was wholly lost to the bondholders. That the indebtedness of the Cab Company for the following years was about as follows:

Years.	Bills Payable.	Bonds.
1912	$132,074.00	$290,700.00
1913	124,799.00	290,700.00
1914	110,132.00	305,300.00
1915	104,203.00	305,300.00

That $250,000 of said bonded indebtedness represents the valid bonds issued under the trust deed. That, commencing about the year 1911, the Cab Company became indebted to the Denver National Bank in the sum of $15,000, which was subsequently increased to $23,850 and is a part of the bills payable above mentioned. That said bank was given of the bonds of said company, $19,200 par value, as collateral security for the indebtedness of the Cab Company. That one Harry C. James, a stockholder, director, and vice president of said bank, was also a creditor of the Cab Company, either personally or as an agent and representative of said bank, in an amount aggregating the sum of $12,500. That said James was also a stockholder of the Cab Company and also a bondholder in the sum of $5,200; that W. C. Bradbury claimed to be the owner of $7,000 par value of said spurious bond issue and also was a stockholder of the Cab Company and the owner of $10,300 par value of said valid bond issue. That one David G. Miller was a stockholder of the Cab Company and owned $10,000 par value of either the valid or spurious bond issue. That Frank L. Woodward was a large stockholder of the Cab Company and the owner of $35,700 par value of its bonds. That on or about the year 1912, John M. Kuykendall, in control of a majority of the stock of the Cab Company, caused and procured the said James, Bradbury, Miller, Springer, in control of the Trust Company, Woodward, and other holders of the valid and spurious issue of bonds of the Cab Company, to make a loan from and out of their said several personal holdings of the bonds, to be pledged as collateral to secure the different bills payable creditors of the said Cab Company, thereby making said bondholders general and unsecured creditors of the Cab Company for the face or other value of said bonds. That in the trust deed the Cab Company covenanted and agreed that it would in every year beginning with the 1st day of October, 1912, up to and including the 1st day of October, 1919, pay to the trustee not less than $10,000 in gold coin or its equivalent, to be applied by the trustee to the retirement of the bonds secured by said trust deed from and after

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October 1, 1919. That at no time whatsoever did the Cab Company perform said covenant and agreement or in any manner provide a sinking fund for the payment of said bonds. The complaint also contained the following allegations:

"That in total and in entire disregard of their said legal and equitable obligations, so to do, as aforesaid, the said the Denver National Bank, Harry C. James, W. C. Bradbury, David G. Miller, Frank L. Woodward, and a number of other persons comprising the said bond-loaning unsecured creditors of said Cab Company, whose names to this [plaintiff] are unknown, did conspire and co-operate and confederate themselves together to cause and procure, and did and have ever since on or about the month of October, A. D. 1912, caused and procured the said Cab Company to commit a breach of its covenants and agreements aforesaid, in the aforesaid mortgage, so that the said Cab Company has and did and ever since said last date is diverting and misapplying any and all surplus of its earnings over and above the amount of its regular running expenses to the payment of the principal and interest of the said bills payable, and of the indebtedness for which the bonds of the aforesaid bond-loaning creditors of said Cab Company were and are pledged, instead of applying such surplus from said earnings to the payment of said first and prior lien of the interest upon said lawful bond issue, and to the creation and maintenance of the aforesaid sinking fund, as required by said Cab Company's said bond and mortgage contract, and thereafter to the upbuilding of the equipment of said Cab Company, and also have and did, during all the times aforesaid, conspire, co-operate, and confederate themselves together as aforesaid to and did cause and procure the said Trust Company to commit breaches of its said duties and obligations to this plaintiff and all other lawful bondholders for whom he sues herein, by failing, neglecting, and refusing to act or to exercise any of the powers or authority aforesaid, conferred upon it under the said mortgage, for the security, protection, and benefit of plaintiff and other lawful bondholders, or any of them, notwithstanding the default of the said Cab Company, concerning the creation of the said sinking fund and the said defaults in the payment of interest and coupons upon the said lawful bond issue."

"That this plaintiff has not any personal knowledge of the amount of the said earnings of said Cab Company that have been so wrongfully, illegally, and fraudulently misapplied and diverted from application and creation of the said sinking fund and the payment of interest in default by said Cab Company, but is informed and believes, and charges the fact to be, that there has been upwards of about forty-five thousand ($45,000) dollars out of the said earnings of the said Cab Company, since the 1st day of October, A. D. 1912, misappropriated and diverted from said first mortgage lien, under and in execution of the conspiracy aforesaid, and through the wrongful, illegal, and fraudulent acts and doings of the said conspirators and confederates in the manipulation of defendant Cab Company and of its assets and earnings, and by the said Trust Company, and each of them, and by their presidents and chief managing officers, Messrs. Kuykendall and Springer, and each of them, all done to the great and irreparable wrong, injury, and loss of the plaintiff and other lawful bondholders of his class; that having in view the large amount of the said bills payable indebtedness and other indebtedness of said Cab Company, which as plaintiff is informed and believes, and so charges the fact to be, amounts outside of and in excess of the amount of its regular monthly running expenses to about $150,000, plaintiff verily believes and fears that unless this honorable court shall give him the aid of its equitable process by injunction and by restraining order, and the equitable remedy of a receiver, to collect, conserve, and apply the earnings of said defendant Cab Company to the payment of interest upon the said lawful bond issue, and the creation of said sinking fund, for the payment of the principal of the same; that his bonds and coupons and those of all other holders of lawful bonds and coupons of the said lawful bond issue will be irreparably damaged and injured, and the same rendered entirely valueless."

"That the said defendant Cab Company was and is insolvent and unable to keep or make good any of its covenants and agreements, to protect the said

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mortgaged estate from liens by attachment or garnishment, or judgment, or otherwise, at the suit of its creditors, whether secured or unsecured, and that all of the said earnings of the said mortgaged estate, and of the said mortgaged franchises of said Cab Company, were and are and will be until the appointment of a receiver herein, subject to be taken by attachment, or garnishment, or upon execution upon any judgment, at the suit of any creditor who sees fit to proceed by attachment against said defendant Cab Company."

"And plaintiff avers that, at all times in this complaint mentioned, the said Cab Company was and still is in the full, absolute, and undisputed possession of all that remains of said mortgaged estate, and is in the constant receipt of all the said earnings, and that the said defendant Trust Company is not in possession of the said mortgaged estate or earnings aforesaid; that by reason of the aforesaid wrongdoing and breaches of trust, so as aforesaid done and committed, by the said defendant Trust Company, and the part its said chief stockholder, president, and managing head is taking in the aforesaid conspiracy, it is unwilling and unable to take any action or steps whatsoever, as it ought, in equity and good conscience to do to protect each and every bondholder of the said valid bond issue, against the said spurious bond issue and the holders thereof, or to recover the said fifty-five thousand (55,000) shares of the Seeing Denver stock without subjecting itself to liability in heavy damages, to wit, to the amount of the par value of said bonds and the stock, namely, about one hundred fifty-five thousand ($155,000) dollars, and that by reason of the embarrassed condition of the said defendant Trust Company and its conflicting interests in the premises, and its part and the part of its said president in said conspiracy, and its aforesaid adverse interest to this plaintiff and all other bondholders of the said valid bond issue of said defendant Cab Company, for whom he sues, it has forfeited all right to any further trust and confidence in the premises and forfeited its right to longer act as a trustee in the said mortgage and that your plaintiff was and is entitled to proceed as for a performance of said mortgage contract in all respects, without the action or intervention in the premises of the said trustee, the said defendant Trust Company, on account of its involved and conflicting interests adverse to the interest of said plaintiff and all other bondholders of the said valid bond issue of said defendant Cab Company, for whom he sues."

"Plaintiff further alleges that he joins as a codefendant herein said the Continental Trust Company, as trustee, only because said Trust Company is named in said deed of trust as trustee, and that it has in no manner whatsoever, at any time, taken upon itself the execution of a or any of said trusts, provided for in the said trust deed, but, on the contrary, has at all times failed, neglected, and refused to do so. * * *

"That at no time whatsoever, in this complaint mentioned, has the said defendant Trust Company, as trustee, ever entered into or taken possession under said trust deed of any of the said mortgaged franchises, property, or estate of said defendant Cab Company or any part thereof, but, on the contrary, refuses so to do, and refuses to take any action to receive, collect, conserve, or in any manner protect or enforce the said mortgage lien of said mortgage contract, so given by said Cab Company upon its said franchises, property, and earnings, notwithstanding said defendant Cab Company has been for long over six (6) months in default, as hereinbefore alleged, both in the creation of said sinking fund, and in the payment of said interest and of the coupons representing the same.

"And said plaintiff, for and on behalf of himself and all other said bondholders, for whom he sues, hereby expressly reserves and excepts out of and from issue, trial, and determination in this action any and all actions, causes of actions, and suits, legal and equitable, by this plaintiff and others, as such bondholders, existing against said defendant Trust Company, either as trustee or personally, for and on account of any breach of duty or wrong done by said defendant Trust Company, as trustee, in the course of its said trusteeship, intending in this action only to bind said trustee so far as the court shall decree herein, in the recovery, restoration, conservation, protection, and collection of said mortgaged estate trust fund, and said past earnings, agreeable to the terms of said mortgage contract, and as might have otherwise been done by said defendant Trust Company but for its helpless

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condition, as aforesaid; but this reservation shall not be taken or construed as in any manner preventing the said receiver, or this plaintiff, if authorized by the court herein, as prayed, from maintaining separate and distinct action or actions against said Trust Company, for the recovery of said mortgage estate, trust fund, and past earnings, or redress of any wrongs committed by it, deemed proper and necessary to recovery and fully restore said mortgage trust fund and security."

[1] The complaint prayed for no judgment against the Trust Company, but did pray for an injunction and receiver to protect the rights of the bondholders, and for a foreclosure of the mortgage for interest and for general relief. The Cab Company and the Trust Company each filed a motion to dismiss the complaint, only two grounds of which are insisted upon here, namely, that the complaint did not state facts sufficient to constitute a valid cause of action in equity and that there was no diversity of citizenship; the Trust Company being a citizen of Colorado, of which state the plaintiff was also a citizen. The trial court dismissed the complaint generally, without specifying the reason therefor. The appellees, however, would be entitled here to insist upon the same objections that they made below in order to sustain the judgment. Dowd v. United Mine Workers of America, 235 Fed. 1, 148 C. C. A. 495.

[2] The question of the jurisdiction of the court below as a federal court will first be considered. In order to oust the court below of jurisdiction the Trust Company must have been an indispensable party, without whose presence before the court a final decree could not be made, without either affecting its interest, or leaving the controversy in such a condition that its final determination might be wholly inconsistent with equity and good conscience. Minnesota v. Northern Securities Co., 184 U. S. 236, 22 Sup. Ct. 308, 46 L. Ed. 499; Hawes v. First National Bank, 229 Fed. 51, 143 C. C. A. 645, and cases cited; United States v. Bean, County Treasurer, 253 Fed. 1, — C. C. A. —. The appellant, by the frame of his complaint and the nature of the relief asked for, could and did largely affect the question as to whether or not the Trust Company was an indispensable party. Storey's Equity Pleading (9th Ed.) §§ 127, 139, 214. The complaint not only specifically disclaimed any relief against the Trust Company, but the prayer asked relief only against the Cab Company. It thus appears that, so far as appellant could control the matter, the Trust Company was not an indispensable party. There remains the further question, however, as to whether, notwithstanding the wishes of appellant, could the court grant the relief prayed for against the Cab Company without affecting some interest of the Trust Company or leaving the controversy in such a condition that its final determination might be wholly inconsistent with equity and good conscience. The Trust Company has never taken possession of the mortgaged property and has no estate or interest therein except as trustee of the mortgage lien. Section 280, Colo. Code Ann. (Courtright); Session Laws Colo. 1894, p. 50, § 1.

[3-5] We do not understand that, since the enactment of the Public Trustee Act (1894), there is any difference as to the interest conveyed by a trust deed to secure the payment of a debt as between real

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and personal property. An injunction against the Cab Company could not affect the Trust Company, so as to make it an indispensable party. Injunctions within the sphere of their operation bind all persons having knowledge thereof, whether parties to the action or not. A receiver of the mortgaged property could not affect any interest of the Trust Company, except its right to take possession of the mortgaged property, and according to the complaint it has refused to act in any manner in that behalf. A foreclosure, if that shall be finally found necessary, would affect no interest of the trustee, but would simply be the performance of a duty which the trustee refused to perform. When everything is said, the only interest in the controversy which the Trust Company has is the right itself to enforce the provisions of the trust deed, and it has this right in this very action, if it shall choose to do so. We do not think it is an indispensable party. The rule that, in general, courts can deal with bondholders only through their trustee, is a rule of convenience, to facilitate the conduct of the suit, and must give way whenever the trustee occupies a position prejudicial to the interest of the bondholders. Lake St. E. R. Co. v. Ziegler, 99 Fed. 114, 39 C. C. A. 431; Lowenthal v. Georgia Coast & P. R. Co. (D. C.) 233 Fed. 1010; Farmers' Loan & Trust Co. v. N. P. R. R. (C. C.) 66 Fed. 174; Jones on Corporate Bonds, 338.

[6, 7] However, upon the question of jurisdiction, this court will align the parties according to their interest; therefore, if the Trust Company is an indispensable party and wishes to remain so, we must align it with the appellant as plaintiff, where its duty also places it. Georgia Coast & P. R. Co. v. Lowenthal, 238 Fed. 795, 151 C. C. A. 645; Lindauer v. Compania et al., 247 Fed. 428, 159 C. C. A. 482.

The fact that no relief is asked against the Trust Company in this suit brings the case within Hamer v. New York Railways Co., 244 U. S. 267, 37 Sup. Ct. 511, 61 L. Ed. 1125. The omission of any prayer for judgment against the Trust Company shows that properly it is to be treated as a plaintiff in the case. Steele v. Culver, 211 U. S. 26-29, 29 Sup. Ct. 9, 53 L. Ed. 74; Dawson v. Columbia Avenue Trust Co., 197 U. S. 178, 25 Sup. Ct. 420, 49 L. Ed. 713. We therefore are of the opinion that the District Court had jurisdiction.

[8-10] Coming to the objection that the complaint does not state facts sufficient for equitable relief, we may say generally that the case presented is one where a bondholder owning $26,000 par value of the bonds of the Cab Company secured by the trust deed set forth in the complaint, suing for himself and all other bondholders similarly situated, alleges that the Cab Company is insolvent, has defaulted in the payment of interest, has refused to provide for a sinking fund, as it agreed to do in the trust deed, is misapplying its net earnings to the payment of unsecured indebtedness, has sold a portion of the mortgaged property and misapplied the proceeds thereof, has entered into a conspiracy with general creditors to defraud the plaintiff and other bondholders, has conspired with the Trust Company to issue $100,000 par value of the bonds of the Cab Company without consideration other than nominal, said bonds purporting to be secured by said trust deed, and that said conspiracy has been carried out and

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the bonds delivered as collateral to general creditors. If this does not present a case for equitable relief, it would be hard to find one.

"It has been well said that whatever fraud creates equity will destroy. Its remedies and procedures for the circumvention of schemes and devices to cheat and defraud keep pace with the genius of the inventors of them." Monmouth Inv. Co. v. Means, 151 Fed. 159, 164, 80 C. C. A. 527, 532.

The mortgage covered "tolls, freight, incomes, rents, issues, and profits." It also provided that, if the Cab Company should default as to any of its covenants and legal proceedings were had, a receiver was a matter of right. We understand that the bondholders as a general proposition cannot control the disposition of the net earnings of the Cab Company until they have been impounded; but it is one of the objects of this suit to impound them, and the Cab Company covenanted to create a sinking fund from its earnings for the payment of its bonds.

As we understand the argument of counsel for appellee, it is this: There may be a cause of action stated, but such action must be brought by the Trust Company, and not even by it until the terms of the trust deed authorizing such a suit have been complied with. The general capacity of appellant to sue, the trustee having refused to do so, was in no wise challenged by the motion to dismiss, as a demurrer for want of equity, and that is what the motion to dismiss amounted to, so far as the ground now being considered is concerned, would not raise that question. As the right of appellant to sue under the restrictions of the trust deed, however, has been argued, under the point that the complaint is bad for want of equity, without objection, and as the question may arise hereafter, we will consider this point. The restriction is contained in paragraph 55 of the mortgage and reads as follows:

"It is further expressly agreed and made binding upon each and every holder of the bonds hereby secured that no proceeding of any nature or description, at law or in equity, shall be taken by any bondholder upon said bonds, or the coupons thereto attached, or either or any of them, or to foreclose the equity of redemption under this instrument, or to procure a sale of the property covered hereby, independently of the trustee or its successors or successors in trust, except after a request shall have been made to the trustee in the manner and form as herein provided, and after the trustee shall have been tendered adequate indemnity as herein provided, and also until after a refusal of the trustee to comply, or a failure of the trustee for a period of three months after such request to comply therewith according to the provisions of this instrument."

The trust deed provided that if default should be made in the payment of interest upon the bonds, and said default should continue for a period of six months, the principal of the bonds should become due and payable at the election of a majority in amount of the bondholders and that the trustee, when requested in writing by said bondholders, should declare the principal of the bonds due and payable. It also provided that in case default was made in payment of the interest on said bonds, or in case default should be made in the performance of any of the covenants of the Cab Company, and such defaults or either of them should continue for a period of six months

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thereafter, the trustee might, and if requested in writing so to do by a majority in interest of the bondholders, and upon receiving indemnity satisfactory to it, should personally, by its attorney or agent enter into and upon all and singular the mortgaged property and operate the business of the Cab Company, applying the net revenue to the payment of the interest due upon said bonds. The trust deed also provided that in case any default should be made by the Cab Company as above specified, which should continue for a period of six months thereafter, it should be lawful for the trustee, after entry as above stated, or without entry, to foreclose said trust deed by judicial intervention or legal proceedings. According, therefore, to the terms of the trust deed, in order that a bondholder should have the right to commence an action independent of the trustee, a request to the trustee to act must be given by a majority in interest of the bondholders, and this request must be in writing, if it was desired that the principal of the bonds should become due and payable, or if it was desired that the trustee take possession, and also, in the latter case, indemnity satisfactory to the trustee must be given, and the failure of the trustee to act after request must have existed for three months. The condition precedent that a majority in interest of the bondholders should request the trustee to act before a bondholder can sue cannot be insisted upon to prevent the appellant from bringing this action, as the law will not require a vain or impossible thing to be done. Under the allegations of the complaint, a majority in interest of the bondholders have conspired with the Cab Company to absorb all the net earnings in the payment of unsecured indebtedness due said bondholders and the Trust Company. In such a condition of affairs, when might we expect a majority of the bondholders to request the trustee to act? Mercantile Tr. Co. v. Lamoille Val. R. Co., 17 Fed. Cas. 25; Brooks v. Vermont Cent. R. Co., 4 Fed. Cas. 308, 310–312; Clay v. Selah Va. Irr. Co., 14 Wash. 543, 45 Pac. 141; Lowenthal v. Georgia Coast & P. R. Co. (D. C.) 233 Fed. 1010.

The restrictive clause hereinbefore quoted, if held to prevent the appellant to institute this action, in view of the allegations of the complaint is void as ousting the jurisdiction of the courts. Toler v. East Tenn. Va. Ga. Ry. Co. (C. C.) 67 Fed. 168; Guarantee, Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 143, 11 Sup. Ct. 512, 35 L. Ed. 116; Railway Co. v. Fosdick, 106 U. S. 47, 27 L. Ed. 47; Morgan L. & T. Ry. & Steamship Co. v. Tex. Cent. Ry. Co., 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625; Alexander v. Central R. Co., 3 Dill. 487, Fed. Cas. No. 166; Credit Co. v. Ark. Cent. R. Co. (C. C.) 15 Fed. 46; Farmers' Loan & Trust Co. v. Winona & S. W. R. Co. (C. C.) 59 Fed. 957; Mercantile Trust Co. v. M., K. & T. Ry. (C. C.) 36 Fed. 221, 1 L. R. A. 397.

The provision giving the majority in interest the option to declare the principal of the bonds due does not prevent a foreclosure for interest. Alexander v. Central R. R. of Iowa, supra; Beekman v. Hudson River West Shore Ry. Co. (C. C.) 35 Fed. 3–11; Farmers' L. & T. Co. v. Chicago & A. Ry. Co. (C. C.) 27 Fed. 146.

"The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies

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at the foundation of orderly government." Chambers v. Baltimore & Ohio R. R., 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143.

We have examined the cases cited by appellees' counsel on the binding force of these restrictive clauses in mortgages and deeds of trust, and find them either inapplicable or opposed to the settled law in the federal courts. The result is that we hold that the District Court had jurisdiction and that the complaint stated a cause of action against the Cab Company. The judgment below as to it is therefore reversed, and the case remanded, with instructions to overrule the Cab Company's motion to dismiss, and allow it to answer the complaint within a time to be fixed, if it shall be so advised; and it is so ordered. In regard to the Trust Company, as the appellant in his complaint disclaims any right to relief in this action against it, the judgment of dismissal is affirmed, on the ground that as to it the complaint does not state a cause of action in equity.

UNITED STATES v. BOARD OF COM'RS OF OSAGE COUNTY, OKL., et al.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1918.)

No. 5052.

1. APPEAL AND ERROR ⟸854(5)—REVIEW—AFFIRMANCE.
Where defendants moved to dismiss on several grounds, the judgment of dismissal may be sustained on any of the grounds made in the motion to dismiss.

2. INDIANS ⟸27(1)—SUIT BY UNITED STATES—ADEQUATE REMEDY AT LAW.
Act Okl. March 10, 1909 (Comp. Laws 1909, § 7616; Rev. Laws 1910. § 7367; Sess. Laws 1910–11, c. 152) and Act Okl. March 11, 1915 (Laws 1915, c. 107), afford a plain, speedy, and adequate remedy to property owners complaining of the erroneous assessment of taxes; so, no relief having been sought pursuant to the statutes, the United States, as guardian of Indian allottees, cannot maintain a suit in equity to enjoin sale of allotted lands for delinquent state and county taxes.

3. UNITED STATES ⟸124—SUITS BY —EQUITY JURISDICTION.
The United States have no more rights, so far as equitable jurisdiction is concerned, than private citizens.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit by the United States against the Board of Commissioners of Osage County, Okl., and others. From a decree dismissing the bill, complainant appeals. Affirmed.

John A. Fain, U. S. Atty., of Lawton, Okl. (Joseph W. Howell, of Washington, D. C., on the brief), for the United States.

Preston A. Shinn, of Pawhuska, Okl. (Corbett Cornett, of Pawhuska, Okl., on the brief), for appellees.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. The United States, as guardian of certain Osage Indian allottees, brought this suit against appellees to en-

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join them from selling certain lands described in the complaint for delinquent state and county taxes assessed and levied for the years 1910 to 1917. The taxes so levied were alleged to be illegal for the reason that the assessments upon which they were levied were arbitrary, grossly excessive, discriminatory, and unfair; also that the lands of the Osages were systematically overvalued, and the lands of other taxpayers systematically undervalued. The appellees filed a motion to dismiss on the following grounds:

"(1) There is no proper party plaintiff.
"(2) The said bill of complaint shows on its face that the court is without jurisdiction thereof.
"(3) There is no federal question involved, and therefore the court is without jurisdiction.
"(4) The said bill of complaint does not state a cause in equity.
"(5) The plaintiff, and each and all of the Indians upon whose behalf this suit is brought, have a plain, speedy, adequate, and complete remedy at law."

[1] The court sustained the motion and dismissed the complaint upon the ground that the lands involved were by Act of Congress approved June 28, 1906, c. 3572, 34 Stat. 539, declared subject to taxation, and the plaintiff had no interest in said lands or authority to contest the taxes thereon or the sale of said lands for unpaid taxes. In order to sustain the judgment of dismissal appellees may rely here upon any of the grounds made in their motion to dismiss. Dowd v. United Mine Workers of America et al., 235 Fed. 1, 148 C. C. A. 495.

[2] The fifth ground above stated is insisted upon here to sustain the judgment of dismissal. If this ground is well taken, we have no authority to consider the other points urged. It is our opinion that the United States, or the Indians whom they represent, had a plain, adequate, and complete remedy at law under the statutes of Oklahoma. A law of Oklahoma effective March 10, 1909 (Compiled Laws Okl. 1909, p. 1526), provided:

"Said board [of equalization] shall meet on the third Monday of April of said year to examine the assessment rolls of such township, cities or towns, and to hear all complaints of persons who shall feel aggrieved by their assessment, and to correct, equalize and adjust the assessments therein by increasing or decreasing individual assessments or the aggregate assessments of such city, town, village or township, and if necessary they may require a reassessment of any or all the property therein, such correction, equalization, adjustment or reassessment, shall be for the purpose of causing the same to be assessed at its fair cash value as herein defined and decision of said board shall be final as to individual assessment unless an appeal is taken to the board of county commissioners on or before the first Monday in June next following."

July 17, 1910, said law was amended so as to provide for appeals from the board of county commissioners to the county court of the county in which the land was located. Said law also provided that the board of equalization should hold a session on the first Monday of June each year—

"for the purpose of equalizing, correcting and adjusting the assessment rolls in their county between the different townships by increasing or decreasing the aggregate assessed value of the property or any class thereof, in any or all of them to conform to the fair cash value thereof as herein defined: Provided, that the county board of equalization may for the purpose of having the assess-

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ment of any city, town, village or township corrected, order a reassessment of any or all of the property therein." Compiled Laws of 1909, p. 1526; also Rev. Laws of 1910, § 7367.

Said law further provided as follows:

"The proceedings before the board of equalization and appeals therefrom shall be the sole method by which assessments or equalizations shall be corrected or taxes abated. Equitable remedies shall be resorted to only where the aggrieved party has no taxable property within the tax district of which complaint is made." Rev. Laws 1910, § 7370.

Thereafter a law effective June 10, 1911, provided as follows:

"The county equalization board shall meet at the county seat, and shall hold a session commencing on the first Monday in June of each year for the purpose of equalizing taxes over the county, notice of which shall be given at least ten days prior thereto in some newspaper of general circulation in the county. * * * Any person who may think himself aggrieved by the assessment of his property shall have the right to appear before the board for the purpose of having the assessment of his property adjusted. Complaints against the assessment shall be determined by the board in a summary manner, and the assessor's lists shall be corrected and adjusted accordingly: Provided, that an appeal may be taken from the final action of said board as provided by law. Said board shall have the authority to raise, lower and adjust individual assessments, fixing the same as the fair cash value of the property; to add omitted property and to cancel assessments of property not taxable. * * *" Session Laws of 1910–11, p. 334, § 11, effective June 10, 1911.

"The board of county commissioners of each county may hear and determine allegations of erroneous assessments or mistakes or differences in the description or value of land or other property, at any session of said board, before the taxes shall have been paid, on application of any person or persons who shall, by affidavit, show good cause for not having attended the meeting of the county board of equalization, for the purpose of correcting such error, difference or mistake, and wherein a lot of land or portion thereof, or any other property, has been assessed to any one person, firm or corporation who or which did not own the same, or property exempt from taxation has been assessed, or which has been doubly or erroneously assessed, the board of county commissioners shall have power, and it shall be their duty to correct all such assessments, and if any such taxes, so erroneously assessed shall have been paid, the same shall be a valid charge against the county and shall be refunded by the board of county commissioners. * * *" Section 14 of the Act next above mentioned.

A law effective March 11, 1915, provided as follows:

"Any taxpayer feeling aggrieved at the assessment as made by the assessor, or the equalization as made by the county board of equalization, may, during the session of said board, or, if the same is closed, within ten days after the first Monday in June, file with said assessor as secretary of said board, a written complaint specifying his grievances and the pertinent facts in relation thereto in ordinary and concise language and without repetition, in such manner as to enable a person of common understanding to know what is intended; and said board shall be authorized and empowered to take evidence pertinent to said complaint and for that purpose is authorized to compel the attendance of witnesses and the production of books and papers by subpœna and to correct or adjust the same, as may seem just. And the stenographer of the county court is directed, at the request of the board, or taxpayer, to take shorthand notes of such testimony and to transcribe such complaint and evidence, and a full transcript of the action of the board thereon and file the same with his certificate as to its accuracy in the district court, the filing of which transcript shall complete said appeal, which shall, in due course, be examined and reviewed by said court and affirmed, modified or annulled as justice shall demand," etc. Session Laws 1915, § 2, p. 176.

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"This act shall be construed to give remedies and rights in addition to those of appeal heretofore given by statute, but the remedies of resort to the boards and appeal therefrom shall be the sole remedies for the correction of assessments or equalization." Session Laws 1915, § 5, p. 177.

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes, showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days, and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein," etc. Session Laws 1915, § 7, p. 178.

The Supreme Court of the state of Oklahoma, in Board of Commissioners of Canadian County v. Tinklepaugh, 49 Okl. 440, 152 Pac. 1119, decided that the law of 1910 (section 7370) provided a speedy and adequate remedy for inequality or injustice in assessments or equalization and provided the sole method by which assessments or equalizations could be corrected. See, also, Board of Commissioners of Garfield County v. Field (Okl.) 162 Pac. 733.

We are clearly of the opinion that the United States and the individual Indians whose property was taxed had during the whole eight years that the taxes were imposed a plain, speedy, and adequate remedy at law. Section 267 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163), formerly section 723 of the Revised Statutes of the United States (Comp. St. 1916, § 1244), prohibits us from taking jurisdiction in equity where a plain, adequate, and complete remedy may be had at law. Such remedies as are provided by the statutes of Oklahoma above quoted have been held plain, adequate, and complete. Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651; Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288; Stanley v. Supervisors of Albany, 122 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000; McDougal v. Mudge et al., 233 Fed. 235, 147 C. C. A. 241; McLaughlin et al. v. St. Louis Southwestern Ry., 232 Fed. 579, 146 C. C. A. 537; Smith v. Douglas County et al., 242 Fed. 897, 155 C. C. A. 482.

[3] The United States have no more rights, so far as equitable jurisdiction is concerned, than private citizens. United States v. Stinson, 197 U. S. 200, 204, 205, 25 Sup. Ct. 426, 49 L. Ed. 724; United States v. Detroit Timber & Lumber Co., 131 Fed. 668, 677, 67 C. C. A. 1, 10; United States v. Debell, 227 Fed. 775, 779, 142 C. C. A. 284; United States v. Chandler-Dunbar Water Power Co., 152 Fed. 25, 81 C. C. A. 221; United States v. Midway Northern Oil Co. (D. C.) 232 Fed. 619, 631; State of Iowa v. Carr, 191 Fed. 257, 266, 112 C. C. A. 477, and authorities there cited.

The judgment of the court below is therefore affirmed, upon the ground that there was an adequate remedy at law during the years mentioned to correct the errors of which complaint is made.

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PUGET SOUND NAVIGATION CO. v. CANYON LUMBER CO. et al.

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3177.

COLLISION ⊂⊃61—STEAMER AND MEETING TOW—EXCESSIVE SPEED IN FOG.

A collision between a scow in tow and a meeting steamer, moving at a speed of 15 miles in a fog, *held* due to the fault of the steamer, because of her speed and her attempt to cross the scow's towline after having safely passed her tug.

Appeal from the District Court of the United States for the Western District of Washington, Northern Division; Jeremiah Neterer, Judge.

Suit in admiralty for collision by the Canyon Lumber Company and others against the Puget Sound Navigation Company, owner of the steamer Indianapolis. Decree for libelants, and respondent appeals. Affirmed.

Ira Bronson, J. S. Robinson, H. B. Jones, and Bronson, Robinson & Jones, all of Seattle, Wash., for appellant.

H. H. A. Hastings and Livingston B. Stedman, both of Seattle, Wash., for appellees Canyon Lumber Co. and Port Blakely Mill Co.

Roy L. Cadwallader, of Seattle, Wash., for appellees Smith.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. On the morning of October 20, 1916, the tug Klickitat, having in tow the scow Dorothy D, laden with lumber belonging to the Port Blakely Mill Company, was on her way from Port Blakely to Pier No. 2 at Seattle. While navigating in a fog, steaming out from Seattle, the Indianapolis, a steam vessel owned by the Puget Sound Navigation Company, plying between Seattle and Tacoma, collided with the scow, damaging it and throwing its cargo into the bay. Libel was instituted against the Puget Sound Navigation Company, and damages were awarded as prayed, from which decree this appeal is prosecuted.

But brief reference to the testimony need be made. The Klickitat left Port Blakely in the morning about 20 minutes to 5. It had the scow Dorothy D in tow, with a line 300 feet in length. Two floats, consisting of rafts of boom sticks, were also in tow behind the Dorothy D. These floats were probably 80 feet each in length, and arranged one just behind the other, the first held close to the scow. The weather was clear, and the Klickitat headed on a straight course to Pier 2, making allowance for the swing of the tide. The tug ran about halfway between the buoy and Duwamish Head, some distance out from Seattle. The course was taken, as it generally was, to keep out of the roadstead, as the steamers usually passed outside or to the north of the buoy. The master of the tug relates that, when he got abreast of the buoy, the weather began to get foggy, and he commenced to blow his signal, one long and two short whistles, at intervals of about 30 seconds; that, after passing the buoy some little time, he heard a boat

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whistling somewhere in the fog ahead, heard her blow several whistles, and suddenly the Indianapolis appeared in view, coming out of the fog, 300 or 400 feet distant, and in a few seconds she was directly abreast of the tug, going very fast, seemingly at full speed; that immediately on emerging from the fog the Indianapolis blew two whistles, signifying her intention to pass to the tug's starboard, and the tug answered with like signal, assenting thereto; that the boat passed within 30 feet of the tug, starboard to starboard, on across the tug's towline 200 feet or more in the rear, and struck the scow head on about 6 feet from its port forward corner, splitting off a section extending back about 72 feet; that the Klickitat was running a little less than 4 miles per hour, and did not stop its engines or slow down after hearing the fog signals from the Indianapolis, until it was seen that the latter vessel was going to collide with the scow. The master of the tug further says that, when he first saw the boat, she was bearing down on the tug from her starboard bow, exactly over the tug's port, and that the tug pulled over to port to get out of her way, and kept on going.

The master of the Indianapolis relates that he left the Colman dock, which is to the north of Pier 2, at 7 a. m.; that his boat steamed into the bay, coming down to about Pier 2 in making the turn, and got on her course at 7:04, the fog being "pretty thick"; that she had proceeded about a mile when she met the tug, and was at the time running 15 miles per hour, practically her full speed, and was blowing her small fog whistle; that the collision happened around 7:07 or 7:08 o'clock. The first intimation the master had that another boat was ahead was three short toots of a whistle, which he took for a towing whistle, whereupon he stopped his engines. He testifies that he then blew a fog signal, and got no response, but heard the exhaust from a gas boat (the tug) practically right ahead of him; that he saw the tug on his starboard bow, and blew a starboard passing whistle, which the tug did not answer; that, when his boat struck the scow, her engines had been reversed 6, 7, or 8 seconds. The mate of the Indianapolis, who was at the time on the starboard side of the upper deck, heard a gas boat somewhere ahead giving whistles, heard it once, and then heard the exhaust a little on the starboard bow, "mostly ahead, nearly right ahead." Then shortly afterwards, perhaps a minute, he saw the tug "right down on the starboard side" abreast of where he was standing. He reported to the captain that there was a scow in tow. According to the engineer, the vessel's engines were backing at the time of the collision, and had been for about half a minute, but she had not lost her headway. The stop signal was given him probably a minute before the signal to back.

Counsel for the Indianapolis frankly admit that she was in fault, in consideration of article 16 of the Rules of Navigation (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 326 [Comp. St. 1916, § 7854]), but ardently insist that the tug should share the damages, in view of the requirements of the same rule. While it may be true that the tug did not literally observe the latter clause of the rule, in not stopping her engines on hearing the fog signals of the Indianapolis, yet it is question-

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able whether she did not observe it so far as the circumstances of the case would admit. She was running at a very moderate speed, and the stopping of her engines would have allowed the tow to encroach upon her. We do not say, however, that the circumstances excused her from a strict observance of the rule.

But, laying this aside, the Indianapolis appears to have been grossly at fault in another particular, which occurred after the danger of collision from the approach of the vessels to each other through the fog had been obviated. The Indianapolis, observing the tug while some 300 or 400 feet away, gave the signal for passing to the starboard of the tug, which we believe was assented to, and the maneuver was made accordingly. The two vessels passed safely, but quite close to each other. It further appears that the Indianapolis then attempted to cross the towline of the tug. If it was practicable to clear the tug, it was also practicable to clear the scow to its starboard, and that course should have been adopted. The Indianapolis was running at full speed, a high rate of 15 miles per hour, through the fog, and the stopping of the engines when the tug's fog signal was heard checked her but slightly, for she was still running at a high rate when she passed the tug. If she had continued her course on a port swing, with the scow still 300 feet in the rear, there cannot be the least doubt that she would have cleared the tow also to the latter's starboard by a safe margin. The reversing of the engines of the Indianapolis when in near approach to the tow but added to the danger of collision, because the effect was to throw the ship to starboard, when its course should have continued to port to make the clearance. The Thielbek, 241 Fed. 209, 216, 154 C. C. A. 129.

We think the Indianapolis was grossly at fault in attempting, while running at a high rate of speed, to cross the towline of the tug, and in not continuing her course, to port, and thereby clearing the tow.

Decree affirmed, with costs to appellees.

THE WESTCHESTER.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 29.

1. TOWAGE ⇐11(1)—BREAKING OF PROPELLER SHAFT—NEGLIGENCE.
   The unexplained breaking of the propeller shaft of a tug in charge of a tow cannot be deemed an inevitable accident, merely because a piece was found broken out of the propeller, but the break must be deemed the result of the fault of the tug.
2. TOWAGE ⇐12(1)—TOWS—NEGLIGENCE.
   For a tow in charge of a tug to be without an anchor is a fault of the tow.
3. TOWAGE ⇐12(2)—ACCIDENT—DIVISION OF DAMAGES.
   Where a tow was at fault, because not equipped with an anchor, and the tug was at fault and liable for the breaking of the propeller shaft, and it could not be said with reasonable certainty that the stranding of the tow could have been avoided, had it been equipped with an anchor, *held*, that damages should be divided.

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4. TOWAGE ⟸13—SURVEY OF VESSEL—NOTICE.
Possible claimants, such as the owner of a tow, should be notified of a survey of a tug, whose propeller shaft broke and allowed the tow to be stranded.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by James Dwyer and others against the steam tug Westchester, her engines, etc., claimed by the Red Star Towing & Transportation Company. From a decree for claimant, respondents appeal. Reversed and remanded, with instructions to award libelant half damages.

Libelants' boat Sinclair, loaded, was in tow of the Westchester bound from the Harlem River to West Farms when the tug became disabled by the breaking of her propeller shaft in the bushing. This occurred between Mill Rock and Ward's Island shortly before 10 a. m. The stage of the tide does not appear. The disaster left the tow helpless and the Sinclair had no anchor. The Westchester dropped her anchor, but the hawser parted. The drifting barge grounded on the Hog's Back, receiving injuries to recover for which this action was brought. Investigation after accident showed a small piece broken out of the Westchester's propeller. The break in the shaft was clean and no flaw was discovered. In the normal operation of machinery no especially hard wear would have been put on the shaft at the place where it broke. The tug's engine was about 20 years old, the shaft was 4½ inches in diameter, which is heavier than ordinary for vessels of this class, and had been in use for a considerable number of years, but there is no evidence showing its exact age. The record shows that the Westchester was maintained in good condition, but it does not appear when the propeller shaft had last been overhauled or inspected. The tug broke down in a channel way about 800 feet wide, containing not over 30 feet of water. A survey was held on the tug, but no notice of the holding thereof was given to the libelant, although it was known that damage had occurred. The District Court dismissed the libel on the ground of inevitable accident, and libelant took this appeal.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellants.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] From the fact that a piece was found broken out of the tug's propeller it is argued that she must have struck a submerged log or other similar obstacle; but there is no evidence on that point, and we cannot infer such an obstruction from the mere chipping of the propeller blade. Nor is there any evidence to show that a shock insufficient to materially injure the propeller should have broken a good shaft. We cannot concur with the finding of the court below that this case is an instance of inevitable accident. It is enough to refer to our judgment in Re Reichert Towing Line, 251 Fed. 214, — C. C. A. —, decided since the decree appealed from was entered. The facts now before us are much less favorable to the tug than were those which we found insufficient in the decision just cited.

[2, 3] It was, however, a plain fault in the Sinclair to be without

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an anchor (The Sunnyside, 251 Fed. 271, — C. C. A. —), and we discover no excuse for its absence; but if an anchor had been on board, and had been used, it cannot be said with reasonable certainty that stranding would have been avoided.

The tide must have been of considerable strength, for the tug's cable parted; anchors are habitually carried at the bow, and the Sinclair was being towed stern first; instant action was necessary, the available time short, and whether under such circumstances the maneuver could have been successfully performed is doubtful.

To sustain the result, if not the reasoning, below, The M. E. Luckenbach (D. C.) 200 Fed. 630, affirmed 214 Fed. 571, 131 C. C. A. 177, is pressed upon us. It is true in one sense that here, as there, "concurrent faults"—i. e. negligent acts contemporaneously operating to produce injury—do not exist. But the word relied upon, "concurrent," must be taken as synonymous with "contributing," and in both The Luckenbach and The Sunnyside, supra, it was found as matter of fact that, despite a fault which put a tow adrift, there would have been no resulting injury, had it not been for a new and independent piece of negligence; therefore the wrongdoer first in point of time was held not responsible, although not innocent.

Here we infer negligence (i. e., unseaworthiness) in the tug from the unexplained breaking of her shaft, and find negligence admitted by the barge's admission of no anchor. When faults are thus shown, all the guilty, if their fault could have caused the injury, must, to escape liability, affirmatively show that they did not, in point of fact, cause the same. The Madison, 250 Fed. 852, — C. C. A. —. Neither party has borne that burden, in this case; therefore the damages and costs below should be divided.

[4] The procedure of claimants in giving no notice to libelant of the survey on the Westchester is objectionable and inexplicable, if it was expected to use that survey as a piece of evidence. The importance of surveys in maritime litigation has often been recognized. The Mason, 249 Fed. 721, — C. C. A. —. But, to say the least, it greatly diminishes the value of any survey considered as documentary evidence, and (even if the surveyors are called as witnesses) creates an air of unfairness about the whole proceeding, to exclude therefrom any known person who may claim against the injured res or have suit brought against him by reason of that injury. The matter is not important in this cause; it is mentioned because it is very important in proper admiralty practice.

For the foregoing reasons the decree is reversed, with the costs of this court, and the cause remanded, with instructions to award libelant half damages; the costs below to be divided.

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THE BOUKER NO. 2.

(Circuit Court of Appeals, Second Circuit. November 18, 1918.)

No. 51.

1. COLLISION ⟸107—SPECIAL CIRCUMSTANCES—RULES.
A steamer, backing out of her slip, preparatory to getting on her definite course, is governed by the special circumstance rule (article 27 of June 7, 1897 [Comp. St. § 7901]), and not the starboard hand rule.

2. COLLISION ⟸102, 144—FAULT—LIABILITY—DIVISION OF DAMAGES.
A tug, which backed from her slip without giving the usual warning signal, *held* at fault for a collision with another tug, while the second tug was also at fault for coming down too close to the line of piers, and hence damages for the resulting collision should be divided; it appearing that the failure of the vessels to maintain lookouts was immaterial, as neither could have seen the other in time to have avoided the collision.

Appeal from the District Court of the United States for the Eastern District of New York.

Libel by Thomas Flannery against the steam tug Bouker No. 2, her engines, etc., claimed by the Bouker Contracting Company. From a decree for libelant, claimant appeals. Reversed and remanded, with directions to enter decree for half damages.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for appellant.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. July 28, 1915, a little after 3 p. m., the tide running flood and the weather clear, the tug Bouker No. 2, backing out of the slip between Piers 22 and 23 on the Brooklyn side of the East River came into collision with the tug Thomas A. Quigley, bound down the river to the slip between Piers 23 and 24; the fantail of the Bouker striking the port side of the Quigley. The District Judge for the Eastern District of New York found the Bouker solely at fault, and this is an appeal from his decision.

[1] He fell into one plain error in supposing that the starboard hand rule applied to the Bouker, saying:

"The ordinary rule requiring boats to pass port to port, the starboard hand rule as to boats upon crossing courses, and the rules as to indication of intended navigation by whistle signals, all make it apparent that if the Bouker backed out at high speed, so as to come in collision while the Quigley was passing down the river and still maintaining about that same distance from the piers, responsibility would rest upon the Bouker. * * * The starboard hand rule would control the movements of the Bouker, if she was intending to back out into the river a sufficient distance to place her upon a crossing course, and that intention should be indicated by a whistle signal, for the protection of any boat which might properly be approaching. But if the Bouker was intending to turn up the East River, and thus to observe the port to port passing rule with any boat coming down, the burden was upon the Bouker to approach the corner at such a rate of speed as not to come in collision with any boat which might be

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properly along the Brooklyn shore at that point. The Bouker must therefore be held responsible primarily in this case."

The rule does not apply to a steamer backing preparatory to getting on her definite course, whether it be up or down the river. The situation of steamers maneuvering to get on their definite courses is covered by the special circumstance rule. Article 27, Act June 7, 1897, c. 4, § 1, 30 Stat. 102 (Comp. St. § 7901). This was flatly decided by the Supreme Court in the case of The Servia and The Noordland, 149 U. S. 144, 156, 13 Sup. Ct. 877, 37 L. Ed. 681, which we have consistently followed. See our own cases: The John Rugge, 234 Fed. 861, 148 C. C. A. 459; The William A. Jamison, 241 Fed. 950, 154 C. C. A. 586.

[2] Pier 22 is covered within a short distance of the end, so that a tug backing out would not be seen until nearly out of the slip by one coming down the river, nor would she any sooner see the tug coming down. It is quite evident to us that the collision was unavoidable when the tugs did see each other. Although the Bouker was backing out slowly, and immediately put her engines full speed ahead, and the Quigley blew a signal of one blast of her whistle, an alarm, and hard-aported, the tugs came together. The judge found that the Bouker did not blow the usual slip whistle, and we accept his finding on this point, which puts her at fault; but we think the Quigley was also at fault for coming down too close to the line of the piers, in violation of the maritime requirements of ordinary prudence. It is not necessary to decide whether the East River statute (chapter 410, § 757, Laws 1882) applies to the locality. If the Quigley had been out, as her witnesses say, from 200 to 300 feet from the line of the piers, she could easily have avoided the Bouker by porting, so easily that she could hardly have escaped sole liability. The District Judge also found the Bouker at fault for want of a lookout at the stern. The absence of a lookout forward on the Quigley is admitted. However, we think the absence of lookouts, or of vigilant lookouts, had nothing whatever to do with the collision. The vessels were first visible to each other when too near to go clear. The Bouker is at fault for not advising the Quigley of her movements by the usual slip whistle, and the Quigley for coming down at full speed too close to the line of the piers.

The decree is reversed, with costs, and the cause remanded to the District Court, with instructions to enter the usual decree for half damages.

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ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. SMITH.

(Circuit Court of Appeals, Fifth Circuit. December 20, 1918.)

No. 3239.

1. COMMERCE ⟸27(2)—SAFETY APPLIANCE ACT—RAILROADS SUBJECT TO ACT.
A railroad company, having its line wholly in Texas and incorporated therein as required by the state law, but which, with its connections, constitutes part of the interstate system of railroads, is subject to the provisions of the Safety Appliance Act March 2, 1893 (Comp. St. §§ 8605–8612).

2. COMMERCE ⟸27(3)—RAILROADS—SAFETY APPLIANCE ACT.
A railroad company subject to the provisions of Safety Appliance Act March 2, 1893 (Comp. St. §§ 8605–8612) is liable for an injury to an employé resulting from violation of that act, regardless of whether the particular car not properly equipped was at the time employed in interstate commerce.

In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge.

Action by Frank Smith against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant brings error. Affirmed.

S. P. Ross and Sam R. Scott, both of Waco, Tex., for plaintiff in error.

A. L. Curtis, of Belton, Tex., and Winbourn Pearce, of Temple, Tex., for defendant in error.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. [1] Defendant in error, plaintiff below, alleged injuries resulting from a failure of defendant railway company to comply with the Safety Appliance Act of Congress (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. §§ 8605–8612]). Issue is made as to the applicability of the act. If the company's line was an interstate highway, and as such used in interstate commerce, the company is liable for injuries resulting from a failure to furnish the character of equipment required by the act. It was agreed by the parties:

That at all times mentioned in plaintiff's petition, and for many years previous thereto, the St. Louis Southwestern Railway Company was a Texas corporation, with its line extending from Texarkana, Tex., to Waco, Tex., so far as this suit is concerned. That as such railroad, in the operation of its business as a common carrier, it handled and hauled over its line interstate commerce when tendered to it for that purpose. It is not agreed, however, that the particular car in question, or any car in connection with the train in which it was moving, was carrying interstate commerce at the time of the plaintiff's injury; and it is not agreed that plaintiff was employed by the defendant in interstate commerce at that time.

[2] The plaintiff in error, as all railroad companies in Texas (with exceptions), is a Texas corporation, with authority to connect at the

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state line with other railroads. These railroads within the state are connected up with the other railroads of the country, and constitute with them the interstate system of railroads, upon which the bulk of the interstate transportation is conducted. Possibly the stipulation quoted above is not as broad as the facts judicially known, but enough appears from the agreement to establish the interstate character of the defendant company's line. That the particular cars, not properly equipped, may not have been at the time engaged in interstate commerce, is immaterial. Southern Ry. Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72; T. & P. Ry. Co. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874.

The charge of the court, together with special charges given at the request of defendant, fully and correctly gives the applicable law.

The judgment is affirmed.

S. STERNAU & CO., Inc., v. GEORGE BORGFELDT & CO.

(District Court, S. D. New York. December 18, 1918.)

1. PATENTS ⇐35—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.
Where commercial success may be accounted for on other grounds, and the patent in suit plays either no part or an inferior part in attaining such success, a court must be cautious in giving it weight in aid of the patent, or a broad construction of its claims.

2. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—ALCOHOL LAMP.
The Ball patents, No. 1,222,571, for a container, and No. 1,237,453, for a combined lamp and stand, both relating to lamps for burning solid alcohol *held* void for lack of invention; also *held* not infringed, if conceded validity.

In Equity. Suit by S. Sternau & Co., Incorporated, against George Borgfeldt & Co., for infringement of the Ball patents, Nos. 1,222,571 and 1,237,453. Decree for defendant.

J. Edgar Bull and John Robert Taylor, both of New York City, for plaintiff.

Briesen & Schrenk, of New York City (Hans v. Briesen and Fred A. Klein, both of New York City, of counsel), for defendant.

MAYER, District Judge. The importance of the controversy, in respect of the patents in suit, lies in the remarkable commercial progress in the sale of containers and stands for solid alcohol. The patent features of the case are simple enough, and, but for an attractive commercial field, would probably invoke little attention. This commercial progress, however, properly requires a careful consideration of the subject-matter so that it may be understood that the result in this case is not arrived at merely because, on first glance, the patents are simple.

Plaintiff and defendant sell solidified alcohol to the public in convenient containers, which are fitted into or engaged with stands. These cans or containers are extensively used by the public for cooking or heating purposes, and thus furnish a small, compact, and

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inexpensive means for those of the public who, for one purpose or another, wish to avoid the employment of more expensive or elaborate heating devices.

Prior to the time plaintiff embarked on this line of business, solid alcohol was well known as a fuel, certainly as far back as 1898. About 1901–1903, one Rossmann imported from abroad solid alcohol and a stove therefor, and attempted to exploit these articles commercially, but was not successful. The information as to his efforts is not sufficiently full to determine why he failed. His failure may have been due to lack of capital, or to an imperfect device, or to the fact that the public had not as yet become educated to the use of solid alcohol.

In April, 1913, a concern known as the Lava Heater Manufacturing Company placed upon the market a patent heater together with a solid alcohol. A substantial sum of money was spent for advertising this product, and in the fall of 1913 the business was taken over by the Ellenem Company upon a royalty basis. This last-named company manufactured and sold the heater and fuel, and conducted a substantial advertising and publicity campaign. The heater remained on the market from the spring of 1913 until the summer of 1915. Shortly after the Lava heater was introduced commercially, a device, with accompanying outfit, known as the "Home and Camp Cooker," was placed on the market in 1913 or 1914 by a concern which originally acted as sales agent for the Lava heater. Plaintiff entered the field in 1914, and soon captured the market as against the Lava heater and the "Home and Camp Cooker" device. Plaintiff first put out a single outfit, comprising a collapsible wire stand, a plain round can of solid alcohol, and a small tin boiler. This outfit sold for 50 cents. From this starting point plaintiff has developed its business to an extraordinary extent.

In examining, however, the history of plaintiff's efforts, it must be noted that while the plaintiff was still using plain cans—that is to say, cans without grooves—it sold well over a million of such cans. For a new venture, the plaintiff's solid alcohol business was a success practically from the start, and while the business of plaintiff has grown substantially as time has gone on and progress has been contemporaneous with changes in the form in which its solid alcohol was marketed, yet the case is not one where it can be said that plaintiff's commercial success has necessarily been due to the later device or form in which this solid alcohol has been placed before the public.

[1] From the evidence it is apparent that Mr. Sternau and Mr. Strassburger, of plaintiff company, were men of marked business ability. They appreciated the possibilities of solid alcohol, and, through competent manufacturing methods and able salesmanship, have made their goods known practically throughout the country. The rule that commercial success will be resorted to as an aid in resolving doubt as to patentability, and also will be considered in connection with a liberal or narrow construction of claims, has been constantly growing in favor. When availed of in cases of simple invention, the rule often proves of value; but in every case it is vital that

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the court must be satisfied that the commercial success can be directly traced to the employment of the device of the patent. It may very well be that extensive and good advertising and good salesmanship may contribute to the result, and yet not prevent the conclusion that the commercial success is due to the exploitation of articles made under the patent in suit. Where, however, the commercial success may be well accounted for on other grounds, and the patent in suit plays either no part or an inferior part in attaining such success, then the court must be cautious not to be misled by what might seem prima facie to be commercial utility.

If, for the purpose of illustration, plaintiff's ability in marketing the goods and the education of the public to the use of solid alcohol were laid aside, yet in this case the large previous success in marketing a comparatively new article with the plain or ungrooved containers negatives the idea that commercial success can be resorted to either in aid of the patent or of a broad interpretation of the claims.

We come, thus, to a consideration of the patents for what they set forth in the grant, tested, in addition, by the disclosures of the prior art.

The groove patent:

"This invention," the patentee stated, "relates to improvements in containers or stoves for containing and burning solid fuel and has for its objects:

"First. To combine a stove and container, said container being adapted to be used in different situations with stands or supports.

"Second. To reduce the expense of manufacture.

"Third. To prevent leakage due to expansion or contraction of the contents of the lamp."

And he claimed:

"As a new article of manufacture, a container adapted to carry a fuel and to be detachably secured to a suitable holder to constitute therewith a lamp, said container being formed of a material and constructed to resist damage thereof by heat, and a cover for normally inclosing the contents of the container, adapted to be opened to expose a flame opening, the body of the container being contoured to present approximately longitudinally disposed internal and external relatively raised and depressed portions, adapted to allow for expansion and contraction and constituting in part holder engaging means."

The testimony excludes the argument that there is any merit in the provision in reference to the adaptation "to allow for expansion and contraction." Simply stated, then, what the patent is for is a series of grooves whose purpose is to engage in safe and locking manner with a stand.

It may very well be that to make such grooves in suitable manner requires the skill of a capable mechanic or artisan in the course of actual manufacture; but, obviously, patentability is not concerned with skill of that character. It seems to me hardly necessary to resort to the prior art to hold that the depression in a container taking the form of a groove, does not involve inventive thought. Once the desire is presented to fit an article to another, it is, in my opinion, a very natural and easy step for a man to conclude to make grooves so positioned that they will fit with the device sought to be engaged.

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Indeed, I gather from the testimony of Mr. Ball, the alleged inventor, who is skilled in arts having to do with small appliances, that he found no great difficulty in solving what is called a problem. It is sufficient to refer to Eichelkraut, No. 1,050,113, and Hamm, No. 1,079,124, to demonstrate how little possibility there was of invention, if, indeed, it can be said that invention may be predicated upon a patent of this character. In any event, the very most to which plaintiff would be entitled would be the precise groove found in its container, and that precise groove is not infringed. I think, however, it is desirable not to be doubtful on the point, and therefore I hold the patent void for lack of invention.

The combination patent:

"My invention," the patentee stated, "relates to a collapsible stand and a lamp supported thereby, and has for its objects to produce a device whereby—
"First. The lamp will be prevented from turning in the stand.
"Second. The stand will be prevented from being collapsed when the lamp is in position; and
"Third. The lamp will always be properly seated in the stand."

And he claimed:

"1. A lamp comprising a body with contracted parts perpendicular to its base in several places, in combination with a stand having a plurality of pivoted legs engaging with such contracted parts, whereby said stand is prevented from collapsing by the engagement of the legs with such contracted parts. * * *
"3. A lamp of cylindrical shape having a plurality of vertical grooves in its exterior surface, in combination with a stand having members extending above the lamp and provided with inwardly projecting portions so separated that there is a separating space less than the greatest diameter of the lamp and of greater diameter than the diameter of the lamp at the bases of the grooves, whereby when the lamp and stand are assembled said portion will engage with the bottom of the lamp and prevent proper positioning of the lamp until the grooves and inwardly projecting portions are brought into alinement."

Before considering the question of patentability, it may be pointed out that defendant's grooved can, in combination with defendant's stand, admittedly does not infringe, nor can infringement be charged against defendant's grooved can, when used with the so-called Nelson stand, which plaintiff formerly used.

Prior to the applications for the patents in suit, plaintiff was manufacturing and successfully selling stands of the type shown in the Nelson patent, No. 1,096,185, granted May 12, 1914, which consisted of the identical stand shown in the combination patent here under consideration. Nelson provided, inter alia:

"When in place, the lamp will rest upon the base *1* and will be encompassed by three legs, the curved middle portions of the legs engaging with the body of the lamp."

The alleged inventor, Ball, therefore, must be presumed to have had before him the Nelson stand, with the information as to the location of the engaging point to be utilized when a container would be placed in the stand.

The patent to Eichelkraut, No. 1,050,113, granted January 14, 1913, was for a portable and collapsible stand for spirit stoves. Ei-

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chelkraut had pointed out that the can should be provided with grooves adapted to fit over the edges of the stand members *a* and *b*. (See lines 65 et seq. of Eichelkraut patent.)

The appropriate relation of a groove container with a stand such as Nelson disclosed, could, in my opinion, be worked out by a man skilled in the art, even though the Eichelkraut patent had never existed. Plaintiff insists that Ball—

"was the first to make a collapsible stand and container in which the container is the sole means of locking the legs of the stand against collapsing and in which it is absolutely impossible to use the container for heating purposes without locking the legs against collapsing."

While it may be said that the present so-called Sternau can and stands accomplished this result in an admirable way, yet the thought was practically and fully exemplified in the combination of the Nelson stand with a plain ungrooved can.

The fact that the Ball combination patent may work out so as to produce a better device does not impart to the Ball patent the high character of invention. Other patents, perhaps, might be referred to; but I think enough of the prior art has been mentioned to satisfy the requirements of the case.

I have passed by the question of double patenting, because unnecessary to consider, in view of the conclusion as to the question of patentability.

It is of some materiality in the case that, as the Sternau stands are now constructed, it would be impossible for the public to utilize, in Sternau stands, plain cans containing solid alcohol bought from other manufacturers. The effect is really to delimit the use by the public of solid alcohol put up in the ordinary and well-known way.

Before invention can be accorded to this combination patent in such circumstances, it must be entirely clear that the inventive thought is present, and expressed and duly claimed. It is immaterial that, as one of the results, the defendant may enter more fully into competition with plaintiff, especially in respect of what are known in the trade as the refills, viz. the cans containing the solid alcohol.

The case really belongs, not in the domain of the patent law, but in the broad field of competitive business. So far as the devices here employed are concerned, the battle for supremacy must be won, not with the powerful aid of patent control, but by superiority of product and business ability in competitive effort for the favor and patronage of the public.

As thus the combination patent is held void for want of invention, the bill is dismissed, with costs.

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LUTEN v. ALLEN et al.

(District Court, D. Kansas, First Division. February 27, 1918.)

No. 196-N.

1. PATENTS ⟸313—SUITS FOR INFRINGEMENT—DISMISSAL OF BILL.
When, from facts of which a court must take judicial notice, a claimed invention is not patentable, or when want of invention is apparent on the face of the patent, a bill for infringement based thereon must be dismissed.

2. EVIDENCE ⟸5(1), 9—SUITS FOR INFRINGEMENT—JUDICIAL NOTICE.
In an infringement suit, the court will take judicial notice of (1) all matters of general scientific knowledge; (2) all matters in common use, and all matters of common knowledge; (3) such mechanical devices as are of common knowledge among all; and (4) the nature of a patented invention.

3. PATENTS ⟸328—INVENTION—METHOD OF REINFORCING CONCRETE BRIDGES.
The Luten patent, No. 818,386, for method of reinforcing concrete arches in bridges, *held* void for lack of invention, as disclosing merely a change of place of old elements in combination, producing perhaps a better, but not a new, result, and involving only the ordinary skill of the mechanic.

In Equity. Suit by Daniel B. Luten against Arthur E. Allen, William S. Fulton, and Arthur E. Allen and William S. Fulton, partners doing business as Allen & Fulton. On motion to dismiss bill. Motion granted.

Vermilion, Evans, Carey & Lilliston, of Wichita, Kan., for complainant.

S. M. Brewster, Atty. Gen., S. N. Hawkes, Asst. Atty. Gen., and Robert Garver, Co. Atty., of Topeka, Kan., for respondent.

POLLOCK, District Judge. This is a suit by Daniel B. Luten to restrain the infringement of one of his many letters patent procured on the method of reinforcing concrete work employed in the construction of bridges, culverts, etc., and for an accounting. The letters patent involved in this suit are numbered 818,386, issued April 17, 1906. While the patent contains seven claims in all, but two of said claims, numbered 1 and 7, are involved in this controversy. These claims read as follows:

"1. An arch having imbedded therein a plurality of tension members passing alternately across the rib, said members being low at the crown and high at the haunches, and each of said members passing across the rib at different longitudinal points from the others, substantially as described."

"7. An arch having imbedded therein rods, bars, or other tension members in two or more series, following one face of the arch rib, thence across and following the other face of the rib; the points of crossing for the different series being angularly or laterally displaced with respect to each other, substantially as described."

The structure alleged to be an infringement of these claims was a bridge erected by defendants for Shawnee county, this state, known as "Joss Bridge," over Vassar creek, in said county.

Defendants have appeared, and move to dismiss the bill for want

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of equity appearing on the face of the record, arising out of the averments of the bill itself, together with the exhibits attached thereto or filed therewith, coupled with the information gained from that common knowledge of which courts will take judicial notice.

As this is but one of the many suits instituted in this court by plaintiff on patents involving like or similar matters, I am aided by voluminous printed briefs covering the entire range of the subject-matter. The sole controversy here presented is: Does the bill show the claims of the patent invalid for want of invention at the times the patent was applied for and issued?

It is to be noted from a reading, both claims of the patent involved pertain to the manner of reinforcing a concrete arch employed in the structure. The employment of arches of all kinds and natures for the purpose of thereby strengthening suspended portions of structures in compression was well known by all men and successfully used by the ancients, and at all times since. This is not disputed. Hence, nothing whatever new or novel in the employment of materials in construction or formation of an arch for the purpose of carrying weight in suspension is or can be claimed by plaintiff.

Again, the use of concrete as a building material was well known in the art of building ages before the adoption or use by plaintiff in his work of building done under his patents. Hence, nothing can be claimed by plaintiff as new or original in the quality of concrete, the ease with which it separates on low tension, or its ability to withstand extreme compression.

Again, the practice of employing in all forms steel or other metal rods, bars, strands, ropes, strips, woven mats, etc., in the reinforcement of concrete used in buildings of all kinds and character, for the purpose of preventing its separation when subjected to a pulling or tension force, was also well known to the trade and in the art of building long before the same was conceived or employed by plaintiff.

The only question here presented is this: Was the idea of the plaintiff in the employment of the form of a well-known figure (an arch) in the work of bridge construction, in the doing of which work a well-known and well-understood combination of materials, concrete in conjunction with reinforcing steel rods, an original and patentable method of construction arising solely from the fact the manner of the use made of the materials in combination produced a stronger structure, hence the better adapted to the purpose of carrying a load, including its own weight, than was the manner of combination of said materials by others long before employed in the work?

Now, I take it all matters of general scientific knowledge, such as arise out of the science of mathematics, the operation of natural laws, and other such matters, are comprehended within that class of facts of which courts will take judicial cognizance, when attention is thereto directed. From which it follows, if it may be said the claims in the patent here in controversy are invalid for want of invention, the court should sustain the motion to dismiss the bill, and obviate the necessity of incurring the expense and performing the labor of taking

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proofs. Brown et al. v. Piper, 91 U. S. 37, 23 L. Ed. 200; Slawson v. Grand Street R. R. Co., 107 U. S. 649, 2 Sup. Ct. 663, 27 L. Ed. 576.

Hence, the decision of the motion presented involves two questions: (1) Of what do courts take judicial knowledge? (2) What constitutes invention, in such sense as to uphold a claim of patent?

[1] When these questions are answered, and the answers are applied to the claims of the patent in controversy, such application must determine the question raised by the motion; for it is quite well settled, when from the facts of which a court must take judicial notice a claimed invention is not patentable, a bill based on such patent must be dismissed, or, when want of invention is apparent on the face of the letters patent granted, the patent must be declared void and nonenforceable, notwithstanding the fact of its having been granted. Slawson v. Grand Street R. R. Co., supra; Torrent Co. v. Rodgers, 112 U. S. 659, 5 Sup. Ct. 501, 28 L. Ed. 872; Kaolatype Engraving Co. v. Hoke (C. C.) 30 Fed. 444; West v. Rae (C. C.) 33 Fed. 45.

[2] Now, it seems from authority courts will take judicial notice of the following, among other matters: (1) All matters of general scientific knowledge (Brown et al. v. Piper, supra; Slawson v. Grand Street R. R. Co., supra); (2) of all matters in common use and all matters of common knowledge (King v. Gallun, 109 U. S. 99, 3 Sup. Ct. 85, 27 L. Ed. 870; Terhune v. Phillips, 99 U. S. 592, 25 L. Ed. 293); (3) of such mechanical devices as are of common knowledge among all (Aron v. Manhattan Ry. Co. [C. C.] 26 Fed. 314; Knapp v. Benedict [C. C.] 26 Fed. 627); (4) of the nature of a patented invention (Kaolatype Engraving Co. v. Hoke, supra; Slawson v. Grand Street R. R. Co., supra).

Mr. Robinson in his work on Patents (section 77), says:

"Every invention contains two elements: (1) An idea conceived by the inventor; (2) an application of that idea to the production of a practical result. Neither of these elements is alone sufficient. An unapplied idea is not an invention. The application of an idea, not original with the person who applied it, is not an invention. The inventive act in reality consists of two acts—one mental, the conception of an idea; the other manual, the reduction of that idea to practice."

In Fuller v. Yentzer, 94 U. S. 288, 24 L. Ed. 103, Mr. Justice Clifford, delivering the opinion of the court, says:

"Valid letters patent undoubtedly may be granted for an invention which consists entirely in a new combination of old elements or ingredients, provided it appears that the new combination of the ingredients produces a new and useful result."

In Smith v. Nichols, 88 U. S. (21 Wall.) 112, 22 L. Ed. 566, it is said:

"A mere carrying forward, or new or more extended application, of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way, by substantially the same means, with better results, is not such invention as will sustain a patent."

In Penn. Railroad v. Locomotive Truck Co., 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222, it is said:

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"The application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated."

In Phillips v. Detroit, 111 U. S. 604, 4 Sup. Ct. 580, 28 L. Ed. 532, it is said:

"No invention was required for the construction of the pavement described in the patent, and that it demanded only ordinary mechanical skill and judgment, and but a small degree of either."

In Reckendorfer v. Faber, 92 U. S. 347, 23 L. Ed. 719, it is said:

"The law requires more than a change of form, or juxtaposition of parts, or of the external arrangement of things, or of the order in which they are used, to give patentability."

In Hollister v. Benedict Manufacturing Co., 113 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901, it is said:

"All that remains to constitute the invention seems to us not to spring from that intuitive faculty of the mind, put forth in the search for new results, or new methods, creating what had not before existed, or bringing to light what lay hidden from vision, but, on the other hand, to be the suggestion of that common experience, which arose spontaneously and by a necessity of human reasoning, in the minds of those who had become acquainted with the circumstances with which they had to deal."

In Wollensak v. Sargent, 151 U. S. 221, 14 Sup. Ct. 291, 38 L. Ed. 137, it is said:

"The novelty must be a novelty in the means or mechanical device, and not in the use to which the combination is put."

In Spirella Co. v. Nubone Corset Co., 216 Fed. 898, 133 C. C. A. 102, it is said:

"The simple carrying forward of the old idea, and doing what has been done before in substantially the same way, but with possible better results, is a change not involving invention." Richards v. Chase Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991; Neureuther v. Mineral Point Zinc Co., 179 Fed. 850, 103 C. C. A. 336.

In Siemund v. Enderlin (D. C.) 206 Fed. 283, it is said:

"Nor can it be held that an arrangement of the parts of a device (described in prior patents and used for a purpose and in a way shown in those patents, but, coupled with the skill of the operator, made to be effective only under certain conditions, which will produce results desirable under certain circumstances) can be patentable as a new invention, when the earlier patents show both an understanding of the possibility of these results, the existence of such an arrangement of parts and of the conditions produced, together with an understanding of what is necessary for a skilled operator to get these results, even though the reason assigned, or the explanation of the cause of the results themselves, be mistakenly stated and attributed to incorrect factors or parts in doing the work. * * * Nor is mere adjustment patentable."

In American Laundry M. Mfg. Co. v. Troy Laundry M. Co. (C. C.) 171 Fed. 870:

"If ordinary mechanical skill is adequate to make the selection and union, or combination, and no new idea is involved in the process, there is no patentable invention, however great the improvement."

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[3] Now, is the question presented as to the best method or manner of placing steel bars or rods in reinforcing concrete arch, to give it strength to support weight, one capable of being definitely and certainly solved by the application thereto of well-known scientific principles, or must such question be worked out from experimental tests, involving many changes in manner and form of employment, until a happy (the best) form is chanced upon or discovered by the creative power of the mind, as contradistinguished from its ability to understand well-known and settled scientific principles?

From a study of the authorities I am of the opinion all the claims of the patent involved in this case disclose is a mere change of place of old elements in combination, producing perhaps a better, but in no sense a new, result; further, that any mechanic of ordinary skill in the doing of the work would have developed the method employed from out his understanding of such matters and in dealing with them. If this be true, as has been seen from the authorities above cited, the claims to the patent in dispute are invalid, and confer no monopoly of right in use upon the plaintiff, and the motion to dismiss must be sustained.

It is so ordered.

LUTEN v. YOUNG et al.

(District Court, D. Kansas, First Division. February 27, 1918.)

No. 197-N.

PATENTS ⊂=328—INVENTION—METHOD OF REINFORCING CONCRETE BRIDGES. The Luten patent, No. 853,203, for method of reinforcing concrete arches in bridges, *held* void for lack of invention.

In Equity. Suit by Daniel B. Luten against Joseph W. Young and others. On motion to dismiss bill. Motion granted.

Vermilion, Evans, Carey & Lilliston, of Wichita, Kan., for complainant.

S. M. Brewster, Atty. Gen., S. N. Hawkes, Asst. Atty. Gen., and Robert Garver, Co. Atty., of Topeka, Kan., for respondents.

POLLOCK, District Judge. This is a suit brought for the infringement of patent and accounting. The letters patent involved in this suit are No. 853,203, applied for May 17, 1902, issued May 7, 1907.

The claims involved in this patent are Nos. 1 and 12. The alleged infringement consists in the erection by defendants, doing business as the Leavenworth Bridge Company, for Shawnee county, this state, of a concrete bridge known as the "Poor Farm bridge," and another bridge, known as "East Fourth Street bridge," in said county. Defendants have moved to dismiss the bill for want of equity.

I have examined the briefs and arguments filed in this case, and find there is involved precisely the same principles considered and determined in case No. 196-N on the records of this court, wherein the

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present plaintiff is plaintiff and Arthur E. Allen et al. are defendants. 254 Fed. 587.

For the reasons expressed in the memorandum opinion filed in that case, the motion in the present case is likewise sustained.

It is so ordered.

FROMONT v. ÆOLIAN CO.

(District Court, S. D. New York. November 27, 1918.)

No. 14–349.

COPYRIGHTS ⇐77—INFRINGEMENT—OWNER OF PREMISES WHEREIN INFRINGEMENT OCCURS.

Where defendant leased or agreed to permit another to use a concert hall in its possession, *held* that, though defendant a few days before the performance was advised not to permit, without the consent of plaintiff or his agent, the rendition of certain copyrighted music, defendant is not liable as an infringer because its lessee's artist performed the copyrighted music, etc.; defendant having no interest in the concert other than the hire of the hall.

In Equity. Bill by Eugene Fromont against the Æolian Company. Bill dismissed.

Melville H. Cane, of New York City, for plaintiff.

George D. Beattys, of New York City, for defendant.

MAYER, District Judge. The suit is the usual infringement suit, brought by the plaintiff, a French publisher of music and a resident and citizen of the republic of France, against the defendant, the Æolian Company, a Connecticut corporation. There were two other defendants, but plaintiff and those defendants arranged the controversy prior to the trial of this suit, and the suit was discontinued as to them.

Briefly stated, it appears that the Æolian Company on May 10, 1917, entered into a written agreement or lease with Antonia Sawyer, Incorporated, by the terms of which the Æolian Company, as lessor, let, and Antonia Sawyer, Incorporated, as lessee, hired, the use of the Æolian concert hall, which is leased and controlled by the Æolian Company; this hall being located in the borough of Manhattan. The lease was for 3½ hours commencing at 1:30 o'clock and terminating at 5 o'clock on October 13, 1917, and provided that the premises were to be used by Antonia Sawyer, Incorporated, for the sole purpose of giving a public piano recital by Rosita Renard at a rental specified in the lease or agreement, which rental was paid by Antonia Sawyer, Incorporated, to the Æolian Company. After May 10, 1917, and shortly prior to October 13, 1917, plaintiff by his agent notified the Æolian Company in writing of the copyright of two musical compositions known as "Prelude" and "Claire de la Lune," and advised the Æolian Company not to allow the performances thereof on October 13, 1917, at Æolian Hall, and by Rosita

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Renard, presumably acting on behalf of Antonia Sawyer, Incorporated, without the permission or consent of the plaintiff or his representative.

It is stipulated that the Æolian Company, at the time when the lease was executed, had no knowledge that Rosita Renard was to perform any copyrighted works of the plaintiff, and, briefly stated, had no business relations of any kind or description with and control over the pianist, Rosita Renard, or any other person engaged or employed in the contemplated concert; and it is further stipulated that the Æolian Company did not derive any profit whatever from the performance, except the amount agreed upon, as above stated, as rental of the concert hall. When October 13, 1917, came, a public concert for profit was given at Æolian Hall by Antonia Sawyer, Incorporated, at which Rosita Renard, the pianist, played and performed the two copyrighted works above referred to, namely "Prelude" and "Claire De Lune," without authority or consent of plaintiff or his agent or representative. Prior to the concert tickets were put on public sale by Antonia Sawyer, Incorporated, at the concert hall and elsewhere, and were sold to the public, who attended the concert in considerable numbers.

From the foregoing it appears that the defendant, the Æolian Company, had no relation whatever to the performance, except that prior to any knowledge as to a claim in respect of a copyright the Æolian Company had entered into a lease of the premises for part of the afternoon of October 13th with Antonia Sawyer, Incorporated. At the time that the notice was given to the Æolian Company, that company was under a binding contract with Antonia Sawyer, Incorporated, to let the premises in question at the date and for the period above set forth. The theory of the suit is that the Æolian Company became a coinfringer. It is perfectly plain that the Æolian Company was not an infringer in the original sense. The infringers, if such they are, were Antonia Sawyer, Incorporated, and possibly the pianist, Rosita Renard.

Plaintiff asks this court to hold, under such circumstances, that the owner of a building, or a room, who has had no connection whatever with the performance of a copyrighted work, other than to let the said premises without any notice or knowledge, shall be held as an infringer. Of course, if, as in at least one English case, the owner of the premises had arranged for the infringing production, and was to receive profit therefrom, the situation would be quite different. If this court were to sustain the view advanced by the plaintiff, it might well result in the owners of buildings, such as the defendant owns, or buildings such as are occupied by hotels and restaurants and department stores, in being held as co-infringers merely because, either by permission or contract arrangement, performances are had where some performer, without any prior agreement with the owner of the building, publicly performed some copyrighted work. It is matter of common knowledge that entertainments of all kinds are given, not merely in theaters or other regular places of amusement, but in hotels, and assembly rooms, department stores,

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and open grounds, such as the stadium and the Polo Grounds, and other large fields adapted for the giving of concerts or pageants.

It is significant, although, of course, not controlling, that there is not to be found in the reports of American cases any case which has dealt with a cause of action similar to that here urged. To hold the defendant liable would, in my view, be to stretch both the purpose and the provisions of the Copyright Law (Act March 4, 1909, c. 320, 35 Stat. 1075 [Comp. St. § 9517 et seq.]) far beyond even the imagination of the Legislature. While unquestionably this exceedingly useful statute was passed primarily to protect authors, composers, and artists of various kinds, and to secure for them the reward of their labors, yet the act is constructed in such a manner as to safeguard the public against financial loss and damage unexpectedly and unwittingly incurred. Thus all of the preliminary provisions as to copyrighting are surrounded with great care. The notice of copyright must be given in a particular way, as the statute points out. The provisions as to damages and penalties are carefully set forth and guarded.

Viewing the act and its purpose, it seems to me that a defendant cannot be called a coinfringer who is in no sense an inducing party to the infringement, who derives no profit from the infringement, excepting in the very remote way in which it is urged that this defendant landlord derived profit here; and where, as here, a defendant enters into an ordinary everyday business contract, without any knowledge whatever of a threatened infringement, and thus becomes bound under the contract, it seems to me that the construction contended for by plaintiff would result in visiting upon innocent landlords a penalty which the statute never contemplated.

I think I have already stated that plaintiff notified the defendant of the threatened infringement, said notice having been given to the defendant a few days before October 13, 1917; but it will be remembered that at that time the outstanding agreement to let the premises had been long in existence, for, as above pointed out, this agreement was made between the Æolian Company and Antonia Sawyer, Incorporated, in May, 1917.

For the reasons thus outlined, and more, which can be amplified, if necessary, the bill is dismissed, with costs.

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PITKIN-HOLDSWORTH WORSTED CO. v. MEISLIN.

(District Court, E. D. New York. December 12, 1918.)

SALES ⇐89—CONTRACT—MODIFICATION.

Defendant *held* on the evidence not to have agreed to a modification as to price of a contract for yarn to be manufactured for him by plaintiff.

At Law. Action by the Pitkin-Holdsworth Worsted Company against Aaron Meislin, doing business under the trade-name of the Chester Knitting Works. Trial by court, and judgment for plaintiff.

Frederick S. Duncan, of New York City, for plaintiff.

Maurice Kaufman, of Brooklyn (Jacob L. Holtzmann, of New York City, of counsel), for defendant.

GARVIN, District Judge. The action has been tried by the court without a jury, by consent. Plaintiff and defendant made two contracts, which will be known as the contract of February 19, 1915, and the contract of February 20, 1915, respectively. The contract of February 19th provided for the sale by plaintiff to defendant of 5,000 pounds of yarn at 93½ cents per pound. The contract of February 20th was for 5,000 pounds of yarn of a different weight at 97½ cents per pound.

On March 16, 1916, plaintiff wrote defendant the following letter:

"The Pitkin-Holdsworth Worsted Co.,

"Manufacturers of Worsted Yarns.

"Passaic, N. J., Mar. 16, 1916.

"Chester Knitting Works, Brooklyn, N. Y.—Dear Sir: After having talked with you on the telephone this morning, we went very carefully into the matters connected with your contract with us, and at the present writing we have little to say that is different from what we have already said in our numerous letters to you. We refer you first to the letters written under dates of Sept. 17 and 23, 1915; particularly do we call your attention to our letter of Sept. 23d. Your contract was placed with us Feb. 19, 1915, for 5,000 pounds of yarn. As far back as Aug. 10 and 19, 1915, we advised you to specify against this contract, which you did not do until dyeing conditions got worse. Since the date your contract was entered, Feb. 19, 1915, the price of dyeing Navy has advanced to 22 cents. We saw these conditions coming and for that reason urged instructions from you. Inasmuch as the war has caused these rapid advances and has placed us in a most unusual position, we are not now disposed to supply your yarn at a time when there would be so great a loss to us, as we are absolutely not to blame.

"The proposition we now make to you is to some extent stated in our letter of Sept. 17th, the difference being that to-day you will have to pay 17 cents per pound additional; in other words, if you will pay us $1.10 per pound for 2/18's dyed yarn we will ship you the balance of this contract of Feb. 19, 1915, as quickly as possible. The yarn is actually worth $1.25 per pound dyed, and you are therefore saving 15¢ on every pound. In writing you this way we wish you to understand we are not making any unusual requests, as other customers of ours have volunteered willingly to pay the advanced charge for dyeing.

"Upon carefully considering this subject we feel sure that you will instruct us to make delivery to you on this basis.

"Very truly yours, The Pitkin-Holdsworth Worsted Co.,

"P/D. [Signed] H. L. Pitkin, Treasurer."

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To which on March 17, 1916, defendant made the following reply:

"Chester Knitting Works,

"Manufacturers of a Complete Line of Sweater Coats,

"88–92 Junius Street.

"All orders accepted subject to our ability to get yarns dyed, and also to advance in price if cost of dyeing increases.

"Brooklyn, N. Y., Mar. 17. '16.

"Pitkin-Holdsworth Worsted Co., Passaic, New Jersey—Gentlemen: We are in receipt of your letter of the 16th inst., the contents of which surprises us very much, for you are entirely unjustified in your statements. The fact is that we have some yarn specified as far back as April, which has not been delivered to date. Furthermore, upon looking up our specifications given to the end of August, we find there is quite some yarn undelivered. So you can readily see that we were justified in not sending in additional specifications, when we did not receive that which we had specified.

"You will also recall that it was not the fault of the dye conditions that we did not receive our yarn, for the yarn had not even been sent to the dyers. We called up your dyers several times and they never had any order for us from you. So the fact is that you did not have the yarn to be dyed. However, we will not argue over this now, as we have decided to compromise with you, not because you are right, but because we realize the position you are in and are willing to meet you part way.

"We have four thousand pounds still on order with you and would agree to take this in at $1.05, half in 2/30 and half in 2/20, as per the following specifications:

1000 lb. 2/30 Maroon
1000 " " Cardinal
1600 " 2/20 Maroon
400 " " Cardinal

"We believe this proposition will meet with your entire satisfaction and would ask you to confirm same by return mail.

"We would at the same time inquire whether you would accept an additional order from us for five thousand pounds of worsted 2/30 in maroon and cardinal at $1.25 per pound, also a few thousand pounds in either light or dark Oxford.

"We would appreciate the courtesy of a prompt response, as we would like to know whether or not you are in a position to accept this additional order.

"Thanking you in advance for the courtesy, we beg to remain very respectfully yours,

"AM/RP Chester Knitting Works.

"P. S.—We trust that upon receipt of this letter you will make a prompt shipment to the dyers against our old order, which we assure you will be appreciated."

On March 18, 1916, plaintiff wrote defendant the following letter:

"The Pitkin-Holdsworth Worsted Co.,

"Manufacturers of Worsted Yarns.

"Passaic, N. J., March 18, 1916.

"Chester Knitting Works, Brooklyn, N. Y.—Dear Sirs: In reply to yours of the 17th: We are sorry you did not appreciate the offer we made you was very much to your advantage to accept, and we do not now change our ideas. In fact, even since writing you the price of dyeing has advanced 2¢ pr lb. If you care for us to proceed making yarns for you on basis of $1.10 pr lb., for 2/18's and 2/20's, and 4¢ pr lb. additional for 2/28's, 5¢ pr lb. additional for 2/30's, although we would state that it will be impossible for us to make any 2/28's or 2/30's yarn for a long while, we upon hearing from you will proceed to make the yarn. All yarns to be billed at dyer's weights, and accepted by you at said weights.

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"Regarding a new order: We are not at the present moment accepting orders from any one, as we have all the business we can take care of for the next five months.

"Yours truly, The Pitkin-Holdsworth Worsted Co.,
"HLP/C [Signed] H. L. Pitkin, Treasurer."

These letters refer only to the contract of February 19th, and do not indicate an intention on the part of defendant to modify the terms of the contract of February 20th. His conduct throughout, on the contrary, shows that he at all times insisted that plaintiff must carry out the latter contract according to its terms, for on March 21, 1918, plaintiff sent him a printed form of contract, which he was asked to sign and return, and which contained: "Above specifications completes all the orders for your account." If defendant had signed as requested, this might have been construed as a cancellation of the second order. He refused, and distinctly stated that it was not at all satisfactory.

It is true that some time later he made a payment on account of shipments under the second contract at the increased price; but it is claimed that this was by inadvertence, and there is not sufficient proof to indicate that he thereby intended to modify the terms of the contract in question.

It has been stipulated that, if the court finds that the second contract was modified, there is due plaintiff $3,249.93. If there was no modification, there is due $2,441.44. The latter sum was tendered before suit was begun.

Judgment will therefore be entered against defendant for $2,441.44, without interest, and without costs.

HENRY L. DOHERTY & CO. v. TOLEDO RYS. & LIGHT CO. et al.

(District Court, N. D. Ohio, W. D. August 2, 1918.)

No. 86.

1. COURTS ⟸37(3)—JURISDICTION—PERSONS ENTITLED TO QUESTION.
Where a city voluntarily intervened in a suit against a street railway, and a quasi receivership was undertaken upon the city's demand for relief, *held*, that the city was not in a position to question the jurisdiction of the court to restrain alleged illegal action by the city with respect to fares charged.

2. STREET RAILROADS ⟸24(10)—FRANCHISE—USE OF STREETS WITHOUT.
A street railroad, operating without a franchise, is not a trespasser, and it has the right to make reasonable use of the streets in the proper conduct of its business, until it is forbidden to continue by the city authorities, who may impose as an alternative to ejection reasonable conditions.

3. STREET RAILROADS ⟸24(10)—FRANCHISE—USE OF STREETS.
The power of a city to require a street railroad company, which was operating without a franchise, to remove from the streets, cannot be questioned in the courts.

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4. STREET RAILROADS ⚖24(10)—USE OF STREETS—JUDICIAL INQUIRY.
Whether conditions as to the use of streets, imposed by a city upon a street railroad company operating without a franchise, are fair and reasonable, is a subject of judicial inquiry.

5. COURTS ⚖282(3)—FEDERAL COURTS—JURISDICTION.
The federal court has jurisdiction of a suit wherein it was asserted the conditions as to use of streets by franchiseless street railroad company were so unreasonable as to work a deprivation of property without due process, in violation of Const. U. S. Amend. 14.

6. STREET RAILROADS ⚖24(10)—OPERATING WITHOUT FRANCHISE—FARES—RIGHT TO CHARGE.
Where a street railroad company is operating without a franchise and not bound by any contract stipulation, it has a right to demand for its service from time to time a rate of fare which will secure to it reimbursement for its expenditures properly incurred, plus a fair return on the property employed in performing the service.

7. CONSTITUTIONAL LAW ⚖298(2)—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY.
While it is for the public authorities in the first instance to regulate the rates to be charged by a quasi public service corporation, such as a street railroad, yet if the rates do not secure, in addition to a reimbursement of operating expenses, a reasonable or fair return on the actual value of the plant, enforcement will be a violation of the constitutional inhibition against the taking of property withoue due process of law.

8. CONSTITUTIONAL LAW ⚖298(2)—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY—"FAIR RETURN."
The fair return to which a street railroad company is entitled upon the value of its property is that rate per cent. actually received, in the absence of special contract, in the community where the service is rendered.

9. CONSTITUTIONAL LAW ⚖298(2)—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY—"FAIR RETURN."
Where the corporation performs a service obviously necessary and indispensable to the well-being of the community, the capital of the company upon which the fair return is to be computed should be the fair and reasonable value of the property used in such service, valued as the equipment of a going concern.

10. CARRIERS ⚖18(1)—RATES—JUDICIAL REVIEW.
The primary duty of regulating and fixing the rates to be charged by a quasi public service corporation, as a street railway, is upon the city authorities, and the jurisdiction of the courts is limited to a determination whether the rates are reasonable.

11. CARRIERS ⚖18(6)—RELIEF—ENJOINING OF FUTURE ACTION.
The proof of the inadequacy of a street car fare rate proposed by a city may be so clear and convincing that the courts are warranted in enjoining its imposition in advance of putting it in operation.

12. STREET RAILROADS ⚖24(10)—DUTY TO RENDER SERVICE—CORPORATION WITHOUT FRANCHISE.
A street railroad company, operating without a franchise from the city, has the right to cease at once its service and take up its tracks.

13. STREET RAILROADS ⚖24(10)—FRANCHISES—CONDITIONS.
Where a street railroad company was operating without a franchise, the act of the council in imposing conditions which the company refused to accept does not ipso facto require the company to leave the streets.

14. CARRIERS ⚖18(6)—FARE CHARGED—INJUNCTION.
Where the authorities of the city of Toledo proposed to take action to compel the Toledo Railways & Light Company, which was operating

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without a franchise, to sell 11 tickets for 50 cents, *held*, that such action, under the circumstances, would work a confiscation of the company's property, and so would be enjoined in advance; the company being entitled to charge for its service a sum which would give a fair return.

In Equity. Bill by Henry L. Doherty & Co. against the Toledo Railways & Light Company and others, in which the City of Toledo became a party by its voluntary intervention. On petition by the Toledo Railways & Light Company for an injunction. Temporary injunction issued.

The Toledo Railways & Light Company, operating all the street railways of the city of Toledo, is a consolidation of several independent companies. The lines were governed by a number of separate franchises expiring at different dates. Some of the lines were permitted by their franchises to charge 25 cents for six tickets and others 50 cents for eleven tickets; 5 cents being the cash fare with free transfers. Franchises for some of the most important lines expired in 1910, and those of others, practically disintegrating the system, ran out March 27, 1914. Since this date street railway operations have been without a franchise, nor has the city attempted to prescribe conditions for the use of the streets, except as hereafter noted. For several years there had been intense agitation in the city over the franchise question, and a strong public sentiment had been created against the company. A temporary settlement of controversies was effected in 1911 or 1912 by the company conceding a fare of five tickets for 15 cents during two specified hours in the morning and two hours in the evening, with 5 cents in cash at all times, and six tickets for 25 cents for other hours, with free transfers. This arrangement, which was the fruit of an informal agreement, was operative until April, 1916. In 1913 the council passed an ordinance imposing a street rental of $250 per day on the lines on which the franchises had expired. A suit testing this matter was early brought in the state court, where it has remained without progress for five or six years. In 1913 a New York partnership, H. L. Doherty & Co., took over the management of the company. The municipal election of 1913 resulted in a defeat for the entire city administration, not, however, upon the street car issue, as all of the candidates for executive and legislative offices in the city were known to be unfriendly to a franchise for the street car company which provided a greater rate of fare than three cents. At the time of the election, Cornell Schreiber was city solicitor, and was defeated as a candidate for mayor on a platform hostile to the street car company. Immediately after the election, although the entire council and every city officer was to leave office within two months, and although the company had important franchises which were operative for nearly three months after new city officials came in, an ordinance passed the council at one sitting under suspension of the rules and was immediately signed by the mayor, providing that, in addition to the $250 per day street rental, the company should carry passengers for three cents after March 27th, with a condition that the operation of the cars after that date should be deemed an acceptance by the company of the terms of the ordinance. There was no alternative provision in this ordinance that, in default of compliance with its provisions, the company should cease running its cars, but the city solicitor was directed to go into an appropriate court to obtain an order enforcing it. This ordinance is generally known as the Schreiber ordinance, after its author. In January following, Doherty & Co., having obtained a judgment against the street railway company which was unsatisfied on execution because of prior liens, filed a creditors' bill in this court. This bill, among other allegations, raised the question of the confiscatory character of the Schreiber ordinance, alleging that an attempt to meet it would be to destroy the equity of redemption in the company. The new city administration indicated that it would enforce the ordinance, although no attempt had been made to get an order of enforcement as the ordinance provided. This situation led to an application in March, 1914, for a temporary injunction against the city of Toledo, upon the

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hearing of which it was shown that the city had secured an exhaustive examination of the railway company's affairs by a well-known auditing company of its own selection, and that shortly prior to the passage of the so-called Schreiber ordinance the auditor had filed with the city an illuminating report plainly showing that a three-cent fare was impossible, and that, in addition, the head of the auditing company had written a personal letter to the mayor advising him in the most emphatic terms that a three-cent ordinance would be clearly confiscatory; all this information being in the hands of the city officers, including the then city solicitor, Schreiber, author of the ordinance, before the ordinance was drafted. The evidence on the hearing of the application for a temporary injunction showed that the city officers were proposing to enforce the ordinance by placing policemen on the cars to compel the acceptance of three-cent fares. Pending the court proceedings, the company at a great loss to itself instructed its conductors to permit every passenger to ride free who insisted on riding for three cents, and before the court had a fair opportunity to act 9,000,000 passengers availed themselves of this free transportation. A temporary injunction was thereupon issued in that case, which is, in fact, the same case now before the court; this present issue being between cross-complainants. The case still pending, in April, 1916, the company's platform operatives struck for higher wages, leaving the city without street car service for about two weeks. At this juncture the city of Toledo filed an amended cross-complaint to support an application concurrently made for the appointment of a receiver for the street railway company and to compel the company to resume and maintain its service. Issues thus arising were heard. The application for a receiver was not finally passed upon, nor was it withdrawn; but, as a modus vivendi, the company was ordered to suspend the three-cent hours and was permitted to charge its ordinary fare at such times, one half of the increased receipts to go towards defraying the expense of an increase in wages for its platform men and the other half to be delivered to a custodian appointed by the court to be disbursed in the purchase of additional equipment in the shape of new cars to improve the service; the city acquiescing in this as a temporary arrangement to terminate the strike, but not withdrawing its application for a receivership. At the municipal election of 1917, no further progress having been had in the pending case, and nothing having been accomplished by way of placing the street railway company under franchise, Mr. Schreiber, the city solicitor who prepared the so-called Schreiber ordinance in 1914, was elected mayor, not, however, on any issue involving the street railway matters. In the spring of 1918 the company was threatened with a walkout of its employés, having the effect of a strike, because of its inability to again increase wages on its current income. Prolonged negotiations were had between the company and representatives of the men and Mayor Schreiber. Again the city employed an accountant of its own selection to determine the relation of the company's income at its present rates of fare, 5 cents cash, six tickets for 25 cents, with free transfers, and a raise of wages, equivalent to 6 cents per hour, which all parties conceded the men should have. On the company's insistence that the facts and the accountant's report showed that it should be permitted to charge at least 5 cents straight for adult fares, with 1 cent additional for transfers, thus abolishing six tickets for a quarter and free transfers, the mayor issued what the company construed to be an ultimatum that, so far as he could influence the situation, a greater raise of fare than eleven tickets for 50 cents, with free transfers, would not be permitted, and that, if the company should suffer a strike or be unable to maintain its lines on that basis, he, the mayor, would see that the cars would run nevertheless. At this juncture the street railway company filed in the pending case an amended answer and cross-complaint, setting up the new facts and the mayor's position, and asking that the city be enjoined from interfering with its proposed raise of rates to 5 cents straight, with 1 cent for transfer. The application came on for hearing, the city's objection to the jurisdiction of the court was overruled, testimony was heard; the company producing, not only its own books, but the report of the city's special accountant, to sustain its claim that it must have the additional income indicated in order to raise wages, and thus avoid a walkout, to the disruption of its service. The court found that under

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present conditions the company, to maintain its service, was under the necessity of increasing wages by at least 6 cents per hour, and that to meet such increased expense there was a present necessity of increasing fares as the company demanded, and that the mayor's ultimate rate was inadequate. It was also found that the company was justified in its construction of the mayor's attitude as a threat to use extraordinary measures to maintain street car service at his maximum rate of eleven tickets for 50 cents, with free transfers, and that he would interpose a veto to any legislation by the council more favorable to the company. By the charter of the city eleven votes are required from the sixteen councilmen to override a veto. A temporary injunction restraining the city from interfering with the rate of 5 cents straight and 1 cent for transfers was issued; the injunction, however, by its terms providing that it should not be construed to interfere in the slightest degree with the city's power to legislate respecting the conditions of street railway operation, including fare regulation.

Chas. A. Frueauff, of New York City, and Tracy, Chapman & Welles, of Toledo, Ohio, for plaintiff.

Rathbun Fuller, of Toledo, Ohio, for defendant Toledo Rys. & Light Co.

Ralph Emery and Cornell Schreiber, both of Toledo, Ohio, for defendant city of Toledo.

KILLITS, District Judge (after stating the facts as above). [1] The city of Toledo has been a party to this cause for more than two years. The issue raised when the case began has long since disappeared. The original complainant, for want of prosecution, long ago lost its right to the relief demanded in the complaint. The present controversy is between cross-complaining defendants, each of which has been in the case for some time; the city by its voluntary intervention. For more than two years certain interests of the defendant street railway company have been under the control of the court through a quasi receivership, which was undertaken upon the city's demand for relief. In addition, the city has pending in this court in this case a demand against the company to recover certain money damages. Therefore the city is in no position to question this court's jurisdiction to determine in this case the varying issues arising from time to time between it and the company. This record, however, leaves the court a sphere of action insufficient to relieve the company in the present situation without the formulation of a new issue, which has been attempted in the street railway's second amendment and second supplement to its amended cross-complaint. We have no doubt of the right of the street railway company to present this live question in this case, although to one accustomed to the reformed practice in the state courts it might seem that a new action had better have been instituted.

[2] Although the Toledo Railways & Light Company has been operating in Toledo for more than four years without a franchise, it nevertheless has the right to make reasonable use of the streets in the proper conduct of its business, until it is forbidden to continue by positive action of the city authorities, who may impose, as an alternative to ejection, reasonable conditions of use. City of Detroit v. Detroit United Railway, 172 Mich. 136, 137 N. W. 645. It is therefore no trespasser,

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for the city authorities have not hitherto acted, either to eject it or to impose reasonable conditions of use.

[3] Because there is no contractual relation between it and the city of Toledo (that is, it has no franchise), the power of the city over it is limited to the pursuit of one of the two alternatives above suggested, namely, to order the company off the streets, or to prescribe terms of use which meet the law. The right of the city to eject the company from the streets cannot be questioned in any court. That would be the exercise of a public policy, the decision of which is delegated exclusively to the council.

[4, 5] Whether or not conditions of use imposed by the city authorities upon this franchiseless and privately operated public utility are fair and reasonable, provided they are not accepted by the company, is a subject of judicial inquiry (Reagan v. Farmers' Loan & Trust Company, 154 U. S. 362, 397, 14 Sup. Ct. 1047, 38 L. Ed. 1014), and within the jurisdiction of this court, because of the provisions of the Fourteenth Amendment of the Constitution of the United States (City of Cincinnati v. Cincinnati & Hamilton Traction Co., 245 U. S. 446, 38 Sup. Ct. 153, 62 L. Ed. 389, decided January 7, 1918; City and County of Denver v. Denver Union Water Co., 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649, decided March 4, 1918).

[6] When a public utility corporation is operating without a franchise, and, consequently, is not bound by any contract stipulation therefor, which is the case here, it has the right to demand for its service from time to time a rate of fare which will secure to it reimbursement for its expenditures properly incurred in rendering the service, plus a fair return upon the valuation of the plant actually employed in performing the service. Minnesota Rate Cases, 230 U. S. 352, 433, 434, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, and cases therein cited, and the recent decisions of the Supreme Court of the United States above referred to.

[7-9] It is for the public authorities, in the first instance, to regulate the rates to be charged for the service of such a corporation (Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Spring Valley Water Works v. Shottler, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 397, 14 Sup. Ct. 1047, 38 L. Ed. 1014); but if such rates do not secure, in addition to a reimbursement of operating expenses, a reasonable or fair return on the actual value of the plant, to enforce them by the public authorities would be to violate the constitutional prohibition against taking property without due process of law (Brymer v. Butler Water Company, 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260). To the same effect are the decisions of the Supreme Court just referred to and many earlier decisions. The "fair return" to which the company is entitled upon the value of its plant is that rate per cent. actually received in the absence of special contract in the community where the service is rendered (Denver Case, above); and where the corporation performs a service obviously necessary and indispensable to the well-being of the community, the capital of the company upon which the "fair return" is to be computed should be the fair and reasonable value of the plant of the corporation engaged

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in such service valued as the equipment of a going concern (Denver Case). In the Denver Case the Supreme Court found that 6 per cent. was the proper percentage, because of the same conditions respecting use of money prevailing in Denver which exist also in Toledo, wherefore we should take that rate per cent. as equally the one appropriate here.

It follows from the foregoing that there is no obscurity as to the rights of the company, or as to the limitations of the city's power of action, or as to the duty of the court when its authority is invoked by either party. The law is definitely and finally settled. The court can do nothing more than to refuse any relief to the street railroad company if the council tells it to get off the streets. It can do nothing less than to tell the city that it must allow to be collected a compensation for service which meets the conditions above established, so long as it permits the railroad to operate at all. There is no third course which the court can take, unless the parties agree.

[10] Primarily the duty of fixing regulations (including rates of fare) for street occupancy is upon the city authorities; it is only when the city in that behalf acts unreasonably, or fails to act at all, that the court has any function. The court cannot fix rates of fare to which the city is bound against its consent. Its power is nothing more than to say whether or not a particular condition of street occupancy, such as the fare to be charged, is reasonable, and if it finds such condition to be unreasonable, and a substantial interference with the constitutional rights of the company, the court may set such condition aside. If the city does not act, or until the city acts, the company, of its own motion and without the city's approval, may establish rates to which the public must conform, and to protect which it may appeal to a court. It has the same right to fix the price at which it will sell its service as the merchant has to put a price on his goods, and until the company's price is revised, legally, by the city or in judicial proceedings, it must be met by the car rider, if he would ride at all.

This is the bald situation in Toledo, a situation which is the logical and necessary result of a failure to agree upon a franchise contract. The city has narrowed its range of control by permitting the franchise to expire. What it might do in enforcing a franchise contract, it cannot do itself now, and has no right to ask the same of a court. Now, the city is hampered by economic conditions which it absolutely must regard in order to act lawfully. If the city council should now undertake its privilege and duty to fix rates and regulations for street car service, it must make such conditions conform to the economic burdens now borne by the company; otherwise, its action would be subject to overthrow by the courts on constitutional grounds. This is the compelling force of all judicial action on the subject. This power of the court has for a corollary the authority to say, when its jurisdiction is involved, whether a rate demanded by the company shall stand until the city acts. Lawful action thereon thereafter taken by the city would supersede the court's decree, which, obviously, would have but a temporary office. It is unreasonable to say that the city, by neglecting its obvious duty, could compel the company to leave so embarrassing a

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question open, to be subject of contention at the pleasure of any car rider.

[11-14] It ought to be clear to every understanding mind that it is the present burden of expense upon the franchiseless corporation which persons receiving the benefit of its service should be compelled to bear at any one period. The inconvenient consequence of this principle is that a fluctuation of rates of fare is theoretically possible according as the expense of furnishing the service rises or falls with the fluctuation in the cost of labor and materials, for the operating company must bear the burdens as well as the advantages of its franchiseless condition, and has as clear a duty to reduce the fare when expenses fall as it has a right to increase when expenses rise. Public convenience and every demand of plain common sense, therefore, suggests that in times such as these, when prices and expenses are so extraordinarily liquid, when materials indispensable for operation, maintenance, and repair are extraordinarily high, and when high living expenses of the laboring man compel him to ask for higher wages, some principle of accommodation should be agreed upon, with reasonable conditions and concessions, propounded and accepted in a reasonable spirit on both sides, in negotiations between the city and the company.

On the motion for temporary injunction, two queries are before the court for answer: First, is the rate of fare which the company asserts it must now charge the rate which, in all probability, it has the right to ask, for the time being, in order to secure the return to which the authorities above cited say it is entitled? and, second, do the facts indicate a probable cause for asking this court to protect it in its demand? We are hearing a motion for a temporary injunction, decision of which involves the exercise of a discretion as the probabilities appear. We take up the questions in this apparently illogical order because, if the company shows a compelling probability that it should have what it demands, the fact that the city, charged by law with the duty of first passing upon those demands, deliberately ignored the plain force of the facts upon which the company relies, has some influence in determining whether or not the court should act. Official arbitrariness is not an infrequent cause of official oppression, and its presence is frequently an augury that rights which should be officially protected may be officially neglected, or even invaded.

The court is very strongly impressed by the testimony heard that the rate of fare which the company demands is necessary, at present, at least, if the company is to receive what the law says it should have. This is not the occasion when it should be determined what the fair valuation of the company's investment in its street car service is. We have no full data on which a judgment on that question can be definitely predicated. This much is entirely clear, however: That the valuation upon which what the Supreme Court calls a *fair* return should be calculated is probably very much more than $8,000,000. Taking it at this figure, however, which the testimony indicates to be an estimate much below the minimum even, the company is lawfully entitled to a rate of fare which will meet its current expenses and provide for it a return above mere operating expenses of at least

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$480,000 annually. It seems certain that the very best that can be said for the city, under any circumstances, is to say this; and it is the clear indication of the evidence before us that a fare of five cents, with a one-cent charge for transfer, will, under present circumstances, not pay the company's operating expenses enhanced by an increase of wages, and even this surplus. Indeed, the city, if we may judge from the character of its argument to the court, is not seriously combating this proposition. It does not argue anywhere in its brief that this rate is exorbitant. All the city now contends for is to try some lower rate of fare by way of experiment, and see what the result will be, although all the evidence before this court indicates most clearly that the mayor's proposition of eleven tickets for fifty cents, with free transfers, will not meet what is due the company.

We are unable to see any right in the mayor to ask the company to submit to an experiment which present conditions show will be a losing one. From his testimony, and the arguments submitted in behalf of the city, it does not appear that he had any confidence that this rate was adequate; for he says that, in fixing upon it, he was moved by the theory that the car rider, the car men and the car company each must sacrifice something in the present emergency. But the mayor of Toledo has no right to demand of this franchiseless company that it render service to the city at a sacrifice, nor has he the right to say to the employés of the company that they must work for less wages than their services are fairly worth. He ignores the fact that it is no sacrifice for the car riders of the city to pay any rate of fare which is what the service to them actually costs, and the economic truths that they should pay what the service to them costs, that the car men are entitled to a reasonable wage, and that the car company is entitled to a compensation which will allow it to live. No one has the right, whether an official or not, to ask either the car men or the car company to make "sacrifices" that the car riders may get service at less than cost, and, of course, the court can listen to no such proposition as that to support an insistence that an inadequate rate should be imposed.

The Supreme Court of the United States in one of the cases cited by the city (Wilcox v. Consolidated Gas Company, 212 U. S. 19–41, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. [N. S.] 1134, 15 Ann. Cas. 1034), as well as in another case in the same volume (Knoxville v. Water Company, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371), recognizes that the proof of the inadequacy of a rate proposed by the city may be so clear and convincing that a federal court is warranted in enjoining its imposition in advance of putting it in operation. That is the state of the evidence here on the question of the necessity of the company's rate. The evidence comes from reliable sources, the most important being the city's own out-of-town expert. For the purpose of the motion, then, for a temporary injunction, we find no difficulty in holding that it is probably necessary for the company to charge the rate demanded.

Is the second support of the motion made in the evidence? Does the evidence suggest a probable cause for the intervention of this court to restrain oppressive action on part of the city or its officers? To an-

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swer this question the court is justified from the evidence in definitely concluding that the company was in a serious predicament when its application for a temporary restraining order was made. While it was not threatened with a technical strike, which, under the rules of the labor organization to which most of these trainmen belonged, seems to have been impossible, yet it was confronted with a situation the probable outcome of which seemed to be so serious a retirement of its operatives from its service that the combined effect would be that of a disastrous strike. The company quickly recognized that its men were justified as individuals in leaving its service because of the inadequacy of compensation which they received, and it is very clear to this court that it was not only the moral duty of the company to materially increase compensation to its trainmen, but it was as strongly the moral duty of the community to indorse the company's action in that behalf; it was plain that, unless the company did in fact increase its expense of operation very materially through an increase in wages, its service would be crippled, not only to its own loss, but to the very serious loss of the community itself.

But, to meet the morally just demands of its men, concededly the company must enhance its revenue. The mayor recognized that fact, for he proposed to indorse an increase of fares, and, upon the question of how to meet the serious emergency confronting the company, the only disagreement between it and the city authorities was as to the extent the increase should go. The company, not being controlled by franchise limitations, was not obliged to consult the city in fixing fare. As a matter of courtesy, or expediency, or both, it did invoke the city's co-operation, only to meet an ultimatum from the mayor which amounted to a threat. Of course, the mayor did not formulate his threat in definitely concise and unmistakable language; but that his attitude was one of hostility to the company, conveying a definite impression that he would go to any length possible to compel the company to meet his ultimatum, however embarrassing that would be, no moderately acute mind can fail to conclude from the testimony and evidence in this record. He plainly intimated that he would stand irrevocably upon the proposition of a maximum fare of eleven tickets for fifty cents, to the end of vetoing any legislation more favorable to the company than that. The mayor, through his veto power, is able to nullify five-sixteenths of the legislative authority of the city.

With the history of this controversy as it is in this record, to which we shall hereafter allude briefly, it would be a credulous person indeed who would assume it to be possible to get 11 councilmen to override the mayor's veto of an ordinance fixing fares at more than the mayor's figure, if, indeed, the council could be induced to pass any ordinance at all. In addition to the threat of a veto, if the counsel should act beyond the mayor's limit, the company was given to know that if it got into deep trouble with its employés, and gave thereby the mayor any excuse to appeal to some other authority to secure unembarrassed street car service, such excuse would be promptly accepted. Substantially, as the evidence shows, the mayor of the city, upon whom, with the council, rested just as great a responsibility for the settlement

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of the difficulties in which this public utility was involved as upon the latter's managers, was in the attitude of saying to this company:

"Act against our arbitrary will at the peril of some proceeding instituted in the name of the city, which will result in taking from you the management of your company."

It is difficult to understand just what Mayor Schreiber meant when he said with vehemence to the representatives of the men and to the company, in effect, that, whatever might be the outcome of the controversy between the company and its employés, the street cars would run. It is inconceivable that he intended to use the power of the city to compel the dissatisfied employés to remain on the cars, and it is equally inconceivable that he intended any other action of a character friendly to the company. To assume that he would do anything more than he was most obviously compelled to do by way of helping the company would be to ignore the official record he has made in the past of hostility to it, of which the testimony concerning his present attitude as mayor gives no indication of repentance. Of course, it is not to be assumed that he had in mind anything that would be void of the color of legal justification. There is nothing, however, is this case to assure this court that he would have approached the executive problems confronting him in a spirit other than hostile toward the company, had the company's troubles resulted in its inability to maintain service. Of course, whatever he proposed to do was under color of his office, which fact meets the contention that the company's complaint is against individuals, and not against the city.

Some significance, as indicating the character of the mayor's appreciation of his responsibilities, may be attached to this paragraph in the city's answer, which is subscribed by Mr. Schreiber himself as one of the counsel for the city:

"This defendant [the city of Toledo] denies that the same [the operation of city street car system] is a vital necessity to the citizens and residents of said city, and denies that any interruption in the operation of the street car system of said company would work great and irreparable harm to said company, or to the citizens and residents of the city of Toledo as a whole, or to the interest of the United States."

We must assume that the mayor means here what he says, and therefore it is justifiable to think that this formal expression of his idea, deliberately placed in the city's defense to the present issue, indicates the degree of serious consideration he would give to a matter affecting the street car company and its public service. This averment in the answer suggests either a judgment on the part of the chief executive concerning the relationship to the city of its only organized means of intercommunication with which there must be an almost unanimous disagreement on the part of those who are alive to the city's welfare, or a hostility to the street car company so contemptuous and besetting as to render impossible to him a fair consideration of its problems. Whatever may be the reason for this remarkable statement, it serves to interpret the mayor's attitude toward the company's problems, and justifies an impression that a full measure of proper appreciation of them, and of the importance of a solution of them, with equal regard

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to the company's rights and the city's service, is not now to be expected in the executive office.

We prefer to believe that, if once the question were put up to the mayor, he would do something to keep transportation going at all hazards, and that the remarkable statement above quoted justifies a feeling, only, that in so doing he might be substantially inconsiderate of the plain rights of the company. Whatever may have been in his mind when he said emphatically that under any circumstances the street cars would run, it seems that it must have been one or both of two ideas of extraordinary procedure, rather than that which the law, as well as common sense, plainly indicates to be the proper method, namely, a harmonious co-operation between the company and the city, through official action in which the uppermost thought would be the securing of justice both to the car riders and the company, and whereby the latter might maintain its system under reasonable and fair regulations, and the former would pay for the service what its rendition reasonably costs. He may have thought, in the event of the failure of the company to maintain full service, to invoke the assistance of a state court. In fact, many things in evidence suggest that that was in his mind. Probably, with the record here as the city itself has allowed it to be made and to remain, such a course would have resulted in a conflict of courts, in which the advantage would be with the federal court; but even a futile attempt of this sort is capable of involving the company in embarrassment, to prevent which a court of equity might interfere.

Although the company has the right to cease at once its service and take up its tracks (Cleveland Street Railway Company v. City of Cleveland, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399), it is probable that the national emergency would impel presidential seizing of the street car system for operation, to protect war industries, and the mayor might have had this course in mind also, and to apply to the federal executive to that end. This action, which the company could not well oppose, would obviously be detrimental to its interests, provided that it wanted to maintain its system itself, and assuming that, if a fair treatment under the law were accorded to it by the city, it could carry on its service. An attempt in this way, by the city's action under these circumstances, to take the management of the system away from the company, might call for the intervention of a court of equity.

Neither of these courses could be invoked by the mayor without contravening the constitutional rights of the company, unless the company, because of its own deficiency of resource, was in default of its duty to the public. The city officials cannot be permitted to maneuver and jockey questions affecting the company with which they should deal fairly and impartially and fully, and then, because their official neglect, or worse, brings the company into unmerited embarrassment, seize upon that situation as an excuse to take away from it the control of its affairs. Courts are not so impotent as to be incapable of furnishing relief against such a situation. Whether or not the mayor's attitude was seriously threatening can only be cor-

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rectly estimated by recourse to the history of the prolonged street car controversy, to Mr. Schreiber's previous relationship to that controversy here, and with reference to the sensitive condition of public sentiment on the part of a great portion of the citizenship using the street car service.

Four years have not yet passed since the company found itself compelled to carry millions of passengers free, because the present mayor of Toledo had been one city official to assure the car-riding public that three cents was a rate so entirely adequate as to be almost sacred, and that to demand more was to attempt extortion, and because the then city officials were indicating official protection to the dupes of the three-cent propaganda should the latter "stand on their rights" to ride for a rate which the city, later, confessed to be palpably confiscatory. The court cannot be obtuse to the impression that there remains yet enough of this unreasonable sentiment to add almost an intolerable burden to the company, if it should attempt to exercise its plain rights, unsupported, even if not definitely antagonized, by the mayor. With the author of the Schreiber three-cent ordinance and the measure demanding $250 per day street rental in the mayor's chair, fulminating an ultimatum that a rate must be adhered to as impracticable now as three-cent fare was in 1913, it is not to be wondered that the company feared that its rights were to be disregarded by the city, and that it was at the peril of some action under color of office which, at the least, would appeal to the imagination of that portion of the public which may yet feel, as it has been wrongly educated to feel, that antagonizing the street railway company is the highest form of official service, and which would, consequently, embarrass the company precisely as it was unfairly dealt with by the city four years ago.

This court is prepared to say that there is power in a court of equity to enjoin acts, lawful even, by the mayor of Toledo, the results of which would work inequity to the street railway company; that it can by its decree confine the parties to this case to that orderly procedure in the determination of their relations to each other which the law clearly points out. The city of Toledo is in this case, and has been for more than two years, with an application to the court for the security of an unembarrassed street car service in the city of Toledo, and with that application still pending, and the city here in that attitude, we do not propose to let its representatives in this emergency be free to take any extraordinary steps which will surely and necessarily embarrass the company in the performance of its plain duty to serve the public. However the mayor might act, whatever was in his mind when he said that the street cars would run in any event, no action he could take but would be within the condemnation of a court of equity, as a plain invasion of the equities of the company, unless it was either the securing by legislation from the council that which would permit the company to serve the public and at the same time to live as a business proposition or a direction to get off the streets.

We do not propose to permit an order to run out of this court which will restrain the city authorities of Toledo from the perform-

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ance of any legitimate function in connection with this company. No order which we can issue can have any vitality which interferes with the city's prerogatives in that respect, but the city is limited to but one of the two courses of action hitherto indicated. Failing to get from the city any reasonable proposition of adjustment in this emergency, the company exercised its plain right to fix the figure at which it could for the time being meet the cost of its service, enhanced by the just demands of its men for increased compensation. All that the court can do is to preserve the status which the company has created, if upon investigation it appears that that is reasonable, leaving the city free to exercise all the wisdom, judgment, and moral courage which abides in its officiary in the settlement of terms which the company can accept.

It is not the law, although so stated in the brief of the city, that the council may prescribe conditions which, if unacceptable to the company, involve, ipso facto, a duty upon the company to abandon its service and leave the streets. The responsibility of determining whether the public of Toledo shall be served with a street car system or not cannot be so sidestepped by the city's officiary. In the hearing four years ago, this court decided, respecting the so-called Schreiber ordinance, that the company could reject unreasonable terms, and at the same time continue its service with the expectation of getting proper compensation, notwithstanding the hostile attitude of the city, until the city affirmatively directed the company to leave the streets as an alternative to the acceptance of unreasonable terms, and that holding finds itself amply justified by the recent decisions of the Supreme Court elsewhere referred to, particularly the case of Cincinnati v. Cincinnati & Hamilton Traction Company. So the temporary injunction which the court proposes to grant here will leave the city absolutely unhampered to legislate upon the subject which has been neglected for so many years. It will likewise, of course, leave the company free to apply to the court for relief against unreasonable legislation, unless the city authorities are brave enough to couple with unreasonable provisions of its legislation a specific alternative that the company must accept them or quit the streets.

It is not conceded, notwithstanding the brief of the city, "that the court cannot enjoin legislative action, and it is equally clear that the court cannot judge in advance that certain legislative action, if taken, would be void." While we are not attempting here to enjoin legislative action—just the contrary, we are trying to encourage it—yet it has been adjudicated that in extreme cases, and this is surely one, that may be done. Clearly foreshadowed legislative action of the city of Kalamazoo was enjoined by Judge Denison in Knickerbocker Trust Company v. City of Kalamazoo (C. C.) 182 Fed. 865, and much of the reasoning of that court applies here.

Much as the court regrets it, we expect this contention to remain with us until the sensible people of Toledo insist that the problem be approached from a different standpoint than that hitherto occupied generally by the city's official representatives. No injunction will issue from this court, temporary or otherwise, which will re-

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strain the city from lawfully employing its full powers in any particular; but we may and will enjoin the city, and any one who assumes to act in the city's name, from taking any extraordinary action which has a tendency to embarrass the street railroad company in the performance of its service to the city, so long as the company is capable of and willing to serve the city with street car transportation.

A temporary injunction is to issue on the lines of the amended restraining order.

UNITED STATES v. WHEELER et al.

(District Court, D. Arizona. December 2, 1918.)

No. C-692.

1. ARMY AND NAVY ⟸20—SELECTIVE SERVICE ACT—DUTY OF REGISTRANTS TO REMAIN AT RESIDENCE.

Neither the Selective Service Act nor the regulations prescribed by the President required registrants to remain in their permanent homes and actual places of legal residence until drafted into military service, etc.

2. CRIMINAL LAW ⟸5—WHAT LAW GOVERNS.

The offense of forcibly taking a person in the state and carrying into another denounced by Pen. Code Ariz. 1901, § 186, as well as the offense of false imprisonment denounced by section 205, are within the police power reserved to the states by Const. Amend. 10.

3. CRIMINAL LAW ⟸5—WHAT LAW GOVERNS.

As the congressional legislation against kidnapping found in Criminal Code, §§ 268–271 (Comp. St. 1916, §§ 10441–10444), is expressly limited to the constitutional authority of Congress to legislate against slavery, etc., under Const. Amends. 13, 14, this amounts to a legislative declaration that kidnapping not so limited was left to be dealt with by the states under their police power; the expression of one thing excluding others.

4. CONSPIRACY ⟸29—OFFENSES—FEDERAL LAW.

It was not a violation of Criminal Code, § 19 (Comp. St. 1916, § 10183), denouncing conspiracy to injure, etc., any citizen in the exercise of any right secured by the Constitution or laws of the United States for defendants to conspire to deport from Arizona citizens of the United States some of whom had registered under the Selective Service Act; the conspiracy not depriving those conspired against of rights secured by Const. art. 4, § 2, or Amendment 14, the federal statutes against kidnapping, etc., being inapplicable, and the Selective Service Act not requiring registrants to remain at their legal residences.

5. CONSPIRACY ⟸29—CONSTRUCTION OF STATUTE.

Section 19 of the Criminal Code of the United States (Comp. St. 1916, § 10183) has the same meaning as when it was enacted as section 6, Act May 31, 1870. As there enacted it was intended to protect the political rights of citizens of the United States in the several states, and not their civil rights as mere persons, residents or inhabitants. Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656, 763, 30 L. Ed. 766.

6. CRIMINAL LAW ⟸95—JURISDICTION—FEDERAL COURTS.

That it might be impossible to enforce the state law against kidnapping, etc., against defendants who conspired, etc., to deport citizens of the United States from Arizona, does not give the federal court jurisdiction of the prosecution; no federal law being violated.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Harry C. Wheeler and others were indicted for conspiracy in violation of Criminal Code, § 19. On demurrer. Demurrer sustained, and indictment quashed.

William C. Fitts, Sp. Asst. Atty. Gen., and Thomas A. Flynn, U. S. Atty., of Phœnix, Ariz.

E. E. Ellinwood, John Mason Ross, and Clifton Mathews, all of Bisbee, Ariz., for defendants Wilcox, Douglas, Rae, Merrill, Sherman, Cunningham, Allison, Watkins, Shattuck, Brophy, Tovrea, Hunt, Gannon, Johnson, Bledsoe, Hodgson, Howe, Sims, Snodgrass, Dowell, and Stout.

MORROW, Circuit Judge. This is a demurrer to an indictment charging the defendants with a conspiracy in violation of section 19 of the Criminal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1092 [Comp. St. 1916, § 10183]).

The objection is that the facts stated in the indictment do not charge an offense within the constitutional provisions of that section. The section provides as follows:

"Sec. 19. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

The section was originally contained in section 6 of "An act to enforce the right of citizens of the United States to vote in the several states of the Union and for other purposes," approved May 31, 1870 (16 Stat. 140, 141, c. 114). It was afterwards contained in the Revised Statutes of the United States, enacted June 22, 1874, as section 5508, in chapter 7, entitled "Crimes against the Elective Franchise and Civil Rights of Citizens." The section is now contained in chapter 3 of the Criminal Code, bearing the same title as chapter 7, containing section 5508 in the Revised Statutes, did prior to the enactment of the Criminal Code.

This case is known to the public as the "Bisbee Deportation Case." It involves an alleged conspiracy on the part of the defendants, continuing from the 1st to and including the 12th day of July, 1917, to deport from Bisbee, in the state of Arizona, 221 persons to the state of New Mexico. The conspiracy was plainly a single act on the part of the defendants against all the persons to be deported; but for the purpose of classifying such persons with respect to their citizenship, and liability to the selective draft, the indictment has been split up into four counts, so as to charge the offense as a conspiracy directed against different classes of persons. This may be done, subject to certain limitations. United States v. Howell (D. C.) 65 Fed. 402; Orth v. United States, 252 Fed. 568, — C. C. A. —. These four counts

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classify the persons against whom the conspiracy was directed as follows:

In the first count the whole number of 221 persons are described as citizens of the United States.

In the second count 25 of this number of persons are described as citizens of the United States residing in, but not citizens of, the state of Arizona.

In the third count, 196 of the persons mentioned in the first count are described as citizens of the United States and of the state of Arizona, residing in Arizona. There is also in this count a name not mentioned in the first count, making the number in this class 197. No objection is made to the indictment on this account.

In the fourth count 60 persons mentioned in the first count are described as citizens of the United States and of the state of Arizona, residing in said state, who were male persons between the ages of 21 and 30, required by the proclamation of the President of the United States, dated May 18, 1917, to present themselves on June 5, 1917, and who did present themselves, for and submit to registration under the provisions of the act of Congress approved May 18, 1917 (40 Stat. 76, c. 15).

It is alleged in the first count that the 221 persons against whom the conspiracy of the defendants was directed—

"were citizens of the United States, residing in the county of Cochise, in the state and in said district of Arizona, in the peace of said county, state, and district, and then and there as such citizens of the United States were exercising the right and privilege pertaining to citizens of said state peaceably there to reside and remain and to enjoy the blessings of liberty rather than in another state of the United States, and the right and privilege pertaining to citizens of said state to be immune from unlawful deportation from that state to another state, and then and there were not persons charged in any state with treason, felony, or other crime, who had fled from justice of said state, and had been found in said state of Arizona, or persons then in said state of Arizona, who had committed crimes or offenses against the United States in another state, or in other states, or persons not sentenced or imprisoned in a prison or prisons located in another state, or any other states, or persons subject to extradition to a foreign country or foreign countries."

It is charged that the defendants conspired and confederated together—

"to injure, oppress, threaten, and intimidate said citizens of the United States in the free exercise and enjoyment by them, respectively, of certain rights and privileges secured to them as such citizens by the Constitution and laws of the United States; that is to say, the rights and privileges aforesaid."

The rights and privileges "aforesaid" were the—

"right and privilege pertaining to citizens of the said state peaceably there to reside and remain and to enjoy the blessings of liberty rather than in another state of the United States, and the right and privilege pertaining to citizens of said state to be immune from unlawful deportation from that state to another state."

It is further charged that—

"Said unlawful and felonious conspiracy, combination, confederation, and agreement then and there was one for injuring, oppressing, threatening, and

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intimidating said citizens of the United States in the free exercise and enjoyment of said rights and privileges, by unlawfully and with force and arms driving and conveying said citizens in a body from their said places of residence in said state of Arizona to and into another state, to wit, New Mexico, and threatening said citizens with great bodily harm and death if they should return or endeavor to return to said state of Arizona."

It is further charged that certain of the defendants in and for executing such conspiracy did certain overt acts set forth in the count.

The second count is the same as the first count, except that it is alleged that the 25 persons against whom the conspiracy was directed are described as citizens of the United States residing in, but not citizens of, the state of Arizona, who—

"were exercising the right and privilege pertaining to citizens of other states of the United States, other than said state of Arizona, peaceably there to reside and remain and to enjoy the blessings of liberty and the right and privilege of being immune from unlawful deportation from that state to another state."

The charge in this count is that the defendants conspired and confederated together—

"to injure, oppress, threaten, and intimidate the citizens in this count named in the free exercise and enjoyment by them, respectively, of certain rights and privileges, secured to them as such citizens by the Constitution and laws of the United States; that is to say, the rights and privileges in this count aforesaid."

The rights and privileges "in this count aforesaid" are the rights and privileges—

"pertaining to citizens of other states of the United States, other than said state of Arizona, peaceably there to reside and remain and enjoy the blessings of liberty and the right and privilege of being immune from unlawful deportation from that state to another state."

The third count is the same as the first count, except that it is alleged that the 197 persons therein named, against whom the conspiracy of the defendants was directed, were citizens of the United States and of the state of Arizona.

The fourth count is substantially the same as the first count, except that it is alleged that the 60 persons against whom the conspiracy was directed are described as—

"citizens of the United States and of the state of Arizona, residing in the county of Cochise, in said state, and in said district of Arizona, and were respectively male persons between the ages of 21 and 30, * * * who were then and there required by the proclamation of the President of the United States, dated May 18, 1917, to present themselves, and did present themselves, for and submit to registration under the provisions of the act of Congress approved May 18, 1917, * * * at divers registration places in divers precincts, * * * these precincts being the precincts where the citizens mentioned in this count of this indictment had their permanent homes and actual places of legal residence."

Against these persons so subject to the selective draft, it is charged that the defendants conspired—

"to injure, oppress, threaten, and intimidate in the free exercise and enjoyment by them, respectively, of the certain right and privilege secured to

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them as such citizens by the Constitution and laws of the United States; that is to say, the right and privilege in the count aforesaid."

The right and privilege in the count aforesaid was—

"the right and privilege pertaining to citizens who had presented themselves for, and who had submitted to, registration as aforesaid, of remaining unmolested in their said permanent homes and actual places of legal residence, subject to draft and until drafted under the provisions of said act of May 18, 1917, into the military service of the United States."

[1] The act did not require registrants under the act to remain in their permanent homes and actual places of legal residence until drafted into the military service of the United States, nor did the selective service regulations prescribed by the President of the United States make such a requirement; but, on the contrary, the location of the registrant elsewhere than at his permanent home and actual place of legal residence at the time of his call into the military service was provided for in such regulations, and the absence from home of the registrant in no way prejudiced his rights under the act or under the regulations of the President.

Stripped of the verbiage required to state the various elements of the alleged conspiracy, we find that the injury charged in the four counts of the indictment may for the purpose of the present inquiry be reduced to the single charge of a conspiracy to injure, oppress, threaten, and intimidate certain citizens of the United States in the free exercise and enjoyment of the right and privilege, pertaining to citizens of the state of Arizona, peaceably there to reside and remain and to enjoy the blessings of liberty rather than in another state of the United States, and the right and privilege pertaining to citizens of said state to be immune from unlawful deportation from that state to another state.

[2] The offense which the defendants are charged to have conspired to commit is, then, an offense against the right and privilege of the persons conspired against, secured to them as citizens of the state of Arizona, and upon examining the law of that state we find that the charge in the indictment is correct in both form and substance, and that protection has been provided for such persons under the police power of the state. Section 186 of the Penal Code of 1901 of the state of Arizona provides:

"Every person who forcibly * * * takes * * * any person in this state, and carries him into another * * * state * * * is guilty of kidnapping"

—for which a punishment has been provided. Another aspect of the case is provided for in section 205 of the Penal Code, where it is enacted:

"False imprisonment is the unlawful violation of the personal liberty of another"

—for which a punishment has been provided.

The right of protection furnished by this police power of the state is a right reserved to the state under the Tenth Amendment of the Constitution of the United States, providing that:

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"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Whether this state protection is exclusive or not in a particular instance depends upon the question of whether the power has also been granted by the Constitution to the general government expressly or by necessary implication.

[3] Congress has provided a statute against kidnapping, to be found in sections 268–271 of the Criminal Code (R. S. §§ 5525–5527, and Act June 23, 1874 [Comp. St. 1916, §§ 10441–10444]); but this legislation is expressly limited to the constitutional authority of Congress to legislate against slavery, involuntary servitude, and peonage under the Thirteenth and Fourteenth Amendments to the Constitution. The Peonage Cases (D. C.) 123 Fed. 671; Clyatt v. U. S., 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726. This amounts to a legislative declaration that kidnapping, not so limited, was left to be dealt with by the states under their police power. "Expressio unius est exclusio alterius."

[4, 5] The question is broadly stated in the brief of the Assistant Attorney General in support of the indictment in this case as follows:

"We admit that the fundamental rights of a person as such, or of a citizen as such, are not secured to him by the Constitution of the United States. The rights to life, liberty, and the pursuit of happiness, for instance, existed before the Constitution, were not created by it, and hence are not secured by it, but by the Constitution and laws of the several states. If, however, these fundamental rights are brought into connection with the federal government, the situation is changed, and the right then becomes one secured by the Constitution of the United States."

He then proceeds to explain what he means by "fundamental rights" being "brought into connection with the federal government."

"For example," he says, "ordinarily the right to remain in any one place, or to move freely from place to place, is not secured by the Constitution of the United States; but if state boundaries are brought into the question, if the right claimed be to remain in one of the several states of the federal Union, as distinguished from another, or to move freely from one of the several states into another state of the federal Union, it then becomes a right secured by the Constitution of the United States"—citing Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 745; U. S. v. Patrick (C. C.) 54 Fed. 338–347.

In the case of Crandall v. Nevada, the question related to a capitation tax of $1 imposed by the statute of the state of Nevada—

"upon every person leaving the state by any railroad, stagecoach or other vehicle engaged or employed in the business of transporting passengers for hire."

The Supreme Court of the state held that this tax was not an impost on exports, nor an interference with the power of Congress to "regulate commerce among the several states," and upheld the statute. The case was taken to the Supreme Court of the United States, where the question whether the tax was an impost on exports, or was an interference with the powers of Congress to regulate commerce among the several states, was passed over, and the tax held to be the exercise of an authority by the state, affecting the functions of the

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federal government and inconsistent with its constitutional operations. In support of this doctrine, the court refers to the extensive operations of the federal government, conducted through its various departments, with the citizens of the several states, and the necessity that such communications should be free and open, without any obstruction on the part of any of the states, and the court finds that the right of the state to impede or embarrass the constitutional operations of that government, or the rights which the citizens hold under it, has been uniformly denied. The court quotes from the opinion of Chief Justice Marshall in the case of McCullough v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, finding:

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very means, is declared to be supreme over that which exerts the control—are propositions not to be denied. If the states may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax the patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of the government. This was not intended by the American people. They did not design to make their government dependent on the states."

Manifestly this finding of the Supreme Court, that the state has no power to obstruct or burden the operations of the federal government, has no application to the facts alleged in the present indictment. The facts here stated do not relate to any act of the state, and do not charge any intent or purpose on the part of the defendants to obstruct or burden the operations of the federal government, or to obstruct or burden the transportation of passengers from one state to another. There is a recital in the indictment relating to the crossing of the state boundary by the persons against whom the conspiracy was directed. Treating this recital as a charge, it does not state any fact from which an inference may be drawn that it was the intent or purpose of the defendants to burden or in any way obstruct or interfere with the operations of the government, to obstruct, burden, or impede the transportation of passengers from one state to another, or to prevent or obstruct the persons against whom the conspiracy is alleged to have been directed in moving freely from Arizona into any other state.

We do not see how the decision of the Supreme Court in Crandall v. Nevada can be held as decisive of the present case.

In the case of U. S. v. Patrick (C. C.) 54 Fed. 338, the defendants were indicted for conspiracy and murder under the first clause of section 5508 (section 19 of the Criminal Code) and section 5509 of the Revised Statutes. The conspiracy charged against the defendants under section 5508 was to injure, oppress, threaten, and intimidate certain designated citizens of the United States in the free exercise and enjoyment of a right and privilege secured them by the Constitution and laws of the United States; three of these persons are described as deputy collectors of internal revenue of the United States, and two

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as deputy marshals of the United States, and another as a person summoned as a "posse."

The particular right and privilege alleged to have been secured to these persons by the Constitution and laws of the United States and in the free exercise and enjoyment of which the conspiracy was formed and prosecuted to injure, oppress, threaten, and intimidate was the duty, right, and privilege on the part of the deputy collectors of internal revenue to make searches for and seizures of distilled spirits upon which the tax imposed by the laws of the United States had not been paid, and the duty on the part of the deputy marshals and of the person summoned as a "posse" to aid and assist in the search for and seizure of such distilled spirits, and the arrest of persons who might be discovered in the possession of such distilled spirits. All engaged in the performance of official duties for and on behalf of the federal government.

In support of the demurrer to the indictment in that case it was contended that the statute had for its object the protection of citizens in the free exercise and enjoyment of the rights and privileges secured to them as citizens by the Constitution, and not for the protection of officers of the United States engaged in the performance of duties as such. To this contention Judge Jackson, afterwards a Justice of the Supreme Court, replied:

"In respect to citizenship, and the rights and privileges incident thereto, it should be borne in mind that we have in the political system of this country, since the adoption of the Fourteenth Amendment to the Constitution, if such did not previously exist, both a national and state citizenship, corresponding with our dual form of government, state and federal, which owes allegiance to and is subject to the jurisdiction and entitled to the protection of each government within the sphere of their respective sovereignties. 'The same person may be at the same time a citizen of the United States and a citizen of the state; but his rights of citizenship under one of these governments will be different from those he has under the other. The government of the United States, although it is, within the scope of its powers, supreme, and beyond the states, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or secured are left to the exclusive protection of the states.' U. S. v. Cruikshank, 92 U. S. 542 [23 L. Ed. 588]. Speaking generally, the Constitution and laws * * * add nothing to the rights of one citizen as against another, nor do they aim to protect one citizen from personal injury or violence by another within the limits of a state. These are matters coming properly within the sovereignty and jurisdiction of the states. But in respect to rights and privileges derived from the United States, or secured by their Constitution or laws, and exercised by their authority, within the scope of their powers and the sphere of their jurisdiction the general government may, under the legislation of Congress, protect its citizens. * * * The statute applies to any citizen in the exercise 'of any right or privilege secured to him by the Constitution or laws of the United States.' This language does not indicate or fairly imply that the right or privilege secured and exercised must be such right or privilege as is common to all citizens of the United States as such."

The case reviews the cases upon the question, and, referring to the fundamental rights which belong to any citizen as a member of society and who as such is protected by the state, quotes from U. S. v. Cruikshank, 92 U. S. 553, 554, 23 L. Ed. 588, where the Supreme Court said:

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"Sovereignty for this purpose rests alone with the states. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a state than it would be to punish for false imprisonment or murder itself."

The court concludes that sections 5508 and 5509 are confined to rights and privileges which are created or secured by the Constitution, wherein depends the authority of Congress to legislate for the protection of its citizens, and that such authority can never be allowed to extend to offenses affecting rights and privileges of citizens which exist by state authority independent of the Constitution and laws of the United States. The indictment was accordingly held sufficient in charging a conspiracy to injure, oppress, threaten, and intimidate citizens in the free exercise or enjoyment of the rights and privileges secured to them as agents or officers of the government discharging functions conferred or exercising rights and privileges secured by its laws and for its benefit.

It is clear that this case does not support the present indictment. The persons against whom the conspiracy of the defendants is alleged to have been directed in this case were not officers of the federal government, nor were they exercising any authority under that government. In the Patrick Case, had the persons conspired against had no other claim to the protection of the United States than that of being citizens of the United States, with the rights pertaining to the citizens of the state, as alleged in the present indictment, the indictment in that case would clearly have been held insufficient, for the reason, as there stated, that such protection would rest alone in the state.

We do not overlook Judge Jackson's reference to Baldwin v. Franks (120 U. S. 678, 7 Sup. Ct. 656, 763, 30 L. Ed. 766) on page 347 of 54 Fed., and his comment that—

"If the party affected or injured by the conspiracy had been a citizen, it is clear that the offense charged would have been embraced by the provisions of said section."

But this comment cannot prevail against what we believe to be the plain meaning of the decision of the Supreme Court in Baldwin v. Franks, as we shall show when we reach that case in this review. To repeat:

"It is no more the duty or in the power of the United States to punish for a conspiracy to falsely imprison for murder in a state than it would be to punish for false imprisonment or murder itself."

The attorney for the United States cites the case of U. S. v. Waddell, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. Ed. 673, holding that the exercise by a citizen of the United States of the right to make a homestead entry upon unoccupied land, and to reside thereon and be protected from personal violence with respect to such residence, is the exercise of a right secured by the Constitution and laws of the United States, and by analogy that such authority secures to a citizen the right to be and remain in a particular place under the protection of the federal government against violence on account of such residence. The

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decision of the court carefully excludes that construction of the statute. The court says:

"The right here guaranteed is not the mere right of protection against personal violence. This, if the result of an ordinary quarrel or malice, would be cognizable under the laws of the state and by its courts. But it is something different from that. It is the right to remain on the land in order to perform the requirements of the act of Congress, and, according to its rules, perfect his incipient title."

In Logan v. U. S., 144 U. S. 263–285, 12 Sup. Ct. 617, 36 L. Ed. 429, the defendants were charged under section 5508 (section 19 of the Criminal Code) with a conspiracy to injure and oppress certain citizens of the United States who were in the custody of the deputy United States marshal under a lawful commitment to answer the indictments in a federal court for offenses against the laws of the United States. The charge was that the defendants conspired to injure and oppress the persons in the custody of the deputy United States marshal in the free exercise and enjoyment of the right to be protected from violence while in said custody. Upon this question the court said:

"The prisoners were in the exclusive custody and control of the United States, under the protection of the United States, and in the peace of the United States. There was a coextensive duty on the part of the United States to protect against lawless violence persons so within their custody, control, protection and peace; and a corresponding right to those persons, secured by the Constitution and laws of the United States, to be so protected by the United States. If the officers of the United States, charged with the performance of the duty, in behalf of the United States, of affording that protection and securing that right, neglected or violated their duty, the prisoners were not the less under the shield and panoply of the United States."

The indictment was held sufficient, not because the persons conspired against were alleged to be citizens of the United States, but because it was charged that they were in the custody of the deputy United States marshal and in that relation they were entitled to the protection of the United States.

The case of In re Quarles, 158 U. S. 532–536, 15 Sup. Ct. 959, 39 L. Ed. 1080, was a conspiracy to injure and oppress a citizen of the United States in the free exercise and enjoyment of the right and privilege to report to a deputy United States marshal that a person named had violated the internal revenue laws of the United States by carrying on the business of distilling without having given bond as required by law. The court held that—

"The right of the private citizen who assists in putting in motion the cause of justice, and the right of the officers concerned in the administration of justice, stand upon the same ground just as do the rights of citizens voting and of officers elected."

The court quotes from the case of Ex parte Yarbrough, 110 U. S. 651–662, 4 Sup. Ct. 152, 157 (28 L. Ed. 274), where the court said:

"The power in either case arises out of the circumstance that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States. In both cases it is the duty of that government to see that he may exercise this right freely, and to protect

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him from violence while so doing, or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its members of Congress and its President are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice."

The right of the citizen of the United States to vote had reference to the act of May 31, 1870, to enforce the right of citizens of the United States to vote in the several states of the Union. Section 19 of the Criminal Code now under consideration was section 6 of that act and as there contained had reference to the right of a citizen of the United States to vote.

In Motes v. U. S., 178 U. S. 458–462, 20 Sup. Ct. 993, 995 (44 L. Ed. 1150), the conspiracy was of the same character as in the Quarles Case, but the case involved other questions. So far as the right of the person conspired against to give information to an officer of the government of the violation of the internal revenue laws, the court said:

"It was the right and privilege of" the person conspired against "in return for the protection enjoyed under the Constitution and laws of the United States, to aid in the execution of the laws of his country by giving information to the proper authorities of violations of those laws. That right and privilege may properly be said to be secured by the Constitution and laws of the United States. And it was competent for Congress to declare a conspiracy to injure, oppress, threaten or intimidate a citizen because of the exercise by him of such right or privilege to be an offense against the United States."

It follows, from this and other cases that might be cited, that the United States extends its jurisdiction and protection to its officers, agents, and employés against a conspiracy to injure, oppress, threaten, or intimidate them in the performance of their official duties. This jurisdiction and protection is also extended to citizens of the United States in the exercise of the right and privilege to freely pass from one state to another, or to the seat of government at Washington, to persons residing upon and making homestead entries upon public lands, and to persons engaged in service under or in connection with the constitutional operations of the government.

The United States also extends its jurisdiction and protection against any action of the state which impairs the constitutional privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property, without due process of law, or which denies to any of them the equal protection of the laws, secured to them by the Fourteenth Amendment. In U. S. v. Cruikshank, 92 U. S. 542–554 (23 L. Ed. 588), the Supreme Court, in discussing the subject, said:

"The Fourteenth Amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. * * * The Fourteenth Amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Con-

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stitution against another. The equality of the rights of citizens as a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states; and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty."

In U. S. v. Harris, 106 U. S. 629–639, 1 Sup. Ct. 601, 609 (27 L. Ed. 290), the court refers to the provisions of the Fourteenth Amendment in the following terms:

"The language of the amendment does not leave this subject in doubt. When the state has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the state, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons—the amendment imposes no duty and confers no power upon Congress."

In the Civil Rights Cases, 109 U. S. 3, 11–17, 3 Sup. Ct. 18, 21 (27 L. Ed. 835), the court again discusses the subject, adding emphasis that it is a limitation upon the action of the state, and does not deal with the invasion of the individual rights, the court says:

"It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation, but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights, but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. * * * In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress."

The United States also extends its jurisdiction and protection against state action by one state discriminating against citizens of another state. Section 2 of article 4 of the Constitution provides:

"Citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The second count of the indictment seems to have had this constitutional provision in view, when it charged that certain citizens of the United States residing in Arizona, against whom the conspiracy was directed, were exercising the rights pertaining to citizens of other states of the United States; but this provision of the Constitution does not apply to acts of individuals. It is a limitation upon the action of the state. U. S. v. Harris, 106 U. S. 639, 1 Sup. Ct. 601, 27 L. Ed. 290,

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supra. See, also, Le Grand v. U. S. (C. C.) 12 Fed. 577, an opinion by Mr. Justice Woods, who wrote the opinion in the latter case while sitting as Circuit Justice in the Eastern District of Texas, and who as a Justice of the Supreme Court wrote the opinion in U. S. v. Harris, supra. See, also, U. S. v. Morris (D. C.) 125 Fed. 322.

The prosecution on the oral argument relied very confidently upon the case of Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656, 763, 30 L. Ed. 766, heretofore referred to, as supporting the sufficiency of the indictment in this case. As we understand that case, instead of supporting the sufficiency of this indictment, the opinion of the court points very clearly and distinctly to its insufficiency. The conspiracy of the defendants in that case was to drive and expel certain Chinese aliens from the town of Nicolaus, in the state of California, where they were engaged in legitimate business and labor to earn a living under and by virtue of the treaties existing between the government of the United States and the emperor of China. The treaty of November 17, 1880, referred to, provided that the United States was to exert all its power to devise measures for the protection of Chinese laborers and Chinese of any other class residing in the United States, "and to secure to them the same rights, privileges, immunities and exceptions as may be enjoyed by citizens or subjects of the most favored nations, and to which they are entitled by treaty." The Chinese persons against whom the conspiracy of the defendants in that case was directed appealed to the jurisdiction of the United States court for the punishment of the defendants under the provisions of the statute, which included the section of the Revised Statutes here in controversy.

The question arose: "Who are the citizens of the United States to which the statute referred?" This was a controlling question under the statute, and a most important inquiry under the treaty, since the Chinese persons conspired against were entitled to appeal to the United States for the same protection as "enjoyed by the citizens or subjects of the most favored nations." The court, after referring to a number of cases on the subject, says:

"The person on whom the wrong, to be punishable, must be inflicted, is described as a 'citizen,' * * * sometimes used in popular language to indicate the same thing as resident, inhabitant, or person. That it is not so used in section 5508 in the Revised Statutes is quite clear, if we revert to the original statute from which this section was taken. That statute was the Act of May 31, 1870, c. 114, 16 Stat. 140, 'to enforce the right of citizens of the United States to vote in the several states of this Union, and for other purposes.' It is the statute which was under consideration as to some of its sections in United States v. Reese, supra, and from its title, as well as its text, it is apparent that the great purpose of Congress in its enactment was to enforce the political rights of citizens of the United States in the several states. Under these circumstances there cannot be a doubt that originally the word 'citizen' was used in its political sense, and as the Revised Statutes are but a revision and consolidation of the statutes in force December 1, 1873, the presumption is that the word has the same meaning there that it had originally.

"This particular section is a substantial re-enactment of section 6 of the original act, which is found among the sections that deal exclusively with the political rights of citizens, especially their right to vote, and were evidently intended to prevent discriminations in this particular against voters on account 'of race, color, or previous condition of servitude.' Sometimes, as

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in sections 3 and 4, the language is broader than this, and therefore, as decided in United States v. Reese, those sections are inoperative, but still it is everywhere apparent that Congress had it in mind to legislate for citizens, as citizens, and not as mere persons, residents, or inhabitants."

This opinion is a clear and distinct interpretation of the statute, declaring that it deals exclusively with the political rights of citizens especially establishing their right to vote, and not with the rights of citizens as mere persons, residents, or inhabitants. In the more recent case of United States v. Bathgate, 246 U. S. 220, 38 Sup. Ct. 269, 62 L. Ed. 676, the court reiterated its opinion that—

"Section 19 of the Criminal Code, of course, now has the same meaning as when enacted as section 6, Act of May, 1870."

In this latter case, the court states as pertinent to the construction of this section the rule referred to by the Supreme Court in U. S. v. Lacher, 134 U. S. 624–628, 10 Sup. Ct. 625, 626 (33 L. Ed. 1080), where the court said:

"There can be no constructive offenses, and before a man can be punished his case must be plainly and unmistakably within the statute."

The attorneys for the United States contend that these cases as here interpreted do not determine the questions involved in this demurrer for the reason that the conspiracy alleged in the indictment was to extend in its effect across the border of the state of Arizona into the state of New Mexico and involve interstate transportation, a subject over which the United States has jurisdiction and extends its protection in certain specified particulars; but this is not sufficient to bring into play the federal jurisdiction punishing acts of the character described in the indictment. There must be a statute of the United States to that effect enacted by Congress pursuant to constitutional authority either express or clearly implied.

It is nowhere stated in this section, or in the act in which it was originally passed, or in the statutes as revised, that the right to be enforced was a right pertaining to interstate transportation. We have therefore no basis from which we can draw a clear or necessary implication that the facts stated in the indictment come within the constitutional scope of section 19.

[6] Why has this prosecution been brought in the federal court rather than in the state court, which had unquestioned jurisdiction of the offense charged? The Assistant Attorney General stated on the oral argument that it might be because there was such bias and prejudice in the community where the offense was committed against the persons complaining of the offense that the law of the state could not be enforced against the defendants. This is not a legal or constitutional ground of federal jurisdiction, although frequently urged as a ground of federal legislation covering subjects where local authority is unequal to the task of administering equal and exact justice to all; but it is difficult to understand the explanation in this case, if the large body of persons against whom the conspiracy is charged to have been directed were in fact bona fide citizens of the United States as claimed. Those that were citizens by naturalization proceedings were each re-

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quired to prove to the satisfaction of the court by two witnesses at the time of naturalization that for five years prior thereto he had behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. Those that were native-born citizens should certainly have possessed an equally good moral character, have been equally loyal to the government of the United States, and equally attached to the principles of the Constitution of the United States, as those who had been naturalized. If this was the character of persons against whom the conspiracy was directed, we cannot understand why they could not submit their character and conduct to a tribunal in the community where they resided in proceedings against others for an open violation of the state law. The situation is indeed a lamentable one and one to be greatly deplored; but it ought not to influence this court to enlarge the statute to include an offense not within its constitutional authority. As stated by the Supreme Court in Hammer v. Dagenhart (recently decided) 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101:

"This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution."

It follows from these considerations that the demurrer to the indictment must be sustained, and the indictment quashed; and it is so ordered.

PETERSON v. DAVISON.

(District Court, S. D. New York. December 9, 1918.)

REFERENCE ⟹8(1)—PROCEDURE IN FEDERAL COURTS—APPOINTMENT OF AUDITOR.

In an action at law to recover for goods sold and delivered, which involves the examination of long accounts, many items of which are in dispute, a federal court may properly appoint an auditor to make a preliminary examination, hear the evidence, and report his findings, with a view to simplifying the issues for the jury.

At Law. Action by Walter Peterson, receiver, against Arthur Sidney Davison. On motion for appointment of auditor. Granted.

Kellogg & Rose, of New York City, for plaintiff.
Zabriskie, Murray, Sage & Kerr, of New York City, for defendant.

AUGUSTUS N. HAND, District Judge. This is a motion for the appointment of an auditor to report as to the facts and circumstances in an action brought to recover for coal sold and delivered. The items in dispute are very numerous. I am convinced, from reading the affidavits, that the trial of this case will involve a consideration of so many separate issues of fact that a jury will, under any circumstances, have constant difficulty in remembering and passing upon the issues

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involved. The contention of plaintiff's counsel that the facts are largely admitted ignores over 200 items, which the defendant proposes to attempt to establish by way of defense. Without a preliminary investigation the situation will be likely to be almost intolerable for the court, and the jury might become so confused as to reach its verdict largely by guesswork. This is the kind of case where a preliminary report by a skilled auditor will be of substantial service. The practice is approved, and is under proper conditions most desirable. Davis v. St. Louis Ry. Co. (C. C.) 25 Fed. 786; Fenno v. Primrose, 119 Fed. 801, 56 C. C. A. 313; Corporation v. Houlihan, 184 Fed. 252, 106 C. C. A. 394; Craven v. Clark (C. C.) 186 Fed. 959; Vermeule v. Reilly (D. C.) 196 Fed. 226; United States v. Wells (D. C.) 203 Fed. 146.

The practice of appointing an auditor in an action at law when numerous items are involved in the issues of fact raised by the pleadings appears to have originated in the method of procedure under the old common-law action of account. Various statutes have been enacted in different states to remedy the difficulty incident to the trial of an action involving a great number of disputed items by a jury.

In New York a referee has, since colonial times, been appointed under the state statutes in cases involving a so-called long account. This referee does not report in aid of the court or jury, but is, under the present Code of Procedure, appointed to try the issues.

The history of the New York practice is set forth with learning by Judge Earl, in the case of Steck v. C. F. & I. Co., 142 N. Y. 236, 37 N. E. 1, 25 L. R. A. 67. It appears from that case that, while under the Dutch rule actions involving long accounts could be referred to arbitrators, this mode of trial was not pleasing to the English colonists, and disappeared after the British occupation. For nearly 100 years thereafter actions in the common-law courts were wholly triable before juries, except the action of account, which was only applicable to the limited class of cases hereinafter mentioned. The difficulties inherent in this action were such that, as Judge Earl says:

"The practice became general for merchants and others having long accounts to enforce their collection by actions of assumpsit, which were always then triable by jury. But the embarrassments attending the trial of such actions by jury were such that, December 31, 1768, an act (2 Van Schaick's Laws of New York, 517) was passed, with a preamble as follows: 'Whereas, instead of the ancient action of account, suits are of late, for the sake of holding to bail, and to avoid the wager of law, frequently brought in assumpsit, whereby the business of unraveling long and intricate accounts, most proper for the deliberate examination of auditors, is now cast upon jurors, who at the bar are more disadvantageously circumstanced for such services; and this burden upon jurors is greatly increased since the laws made for permitting discounts in support of a plea of payment, so that by the change of the law and the practice above mentioned, the suits of merchants and others upon long accounts are exposed to erroneous decisions, and jurors perplexed and rendered more liable to attaints, and by the vast time necessarily consumed in such trials, other causes are delayed and the general course of justice greatly obstructed. Be it therefore enacted, etc., that whenever it shall appear probable in any cause depending in the Supreme Court of Judicature of this colony (other than such as shall be brought by or against executors or administrators) that the trial of the same will require the examination of a long account, either on one side or the other, the said court is hereby authorized, with or without the consent of parties, to refer such cause by rule to be made at discretion, to referees, * * * and if the report or award

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of the referees, or of the major part of them, shall be confirmed by the said court, and any sum be thereby found for the plaintiff, judgment shall be entered for the same, with a relicta verificatione, as by confession with costs, if by law the plaintiff would have recovered costs, had a verdict passed in the same cause for the sum so reported to be due; but if, after payment pleaded, any sum shall be reported to be due to the defendant, and the award be confirmed, he shall have judgment and recover his costs. * * * And when such referees shall report that nothing is due from the defendant, and the report be confirmed, then judgment shall be entered as by non pros., and the defendant shall recover his costs, to be taxed, and such judgment be a perpetual bar.'"

This statute was re-enacted and was in force at the time of the adoption of the state Constitution of 1777, and consequently was not subject to the guaranty as to jury trial provided therein.

It is to be noticed that these statutory enactments did not provide for a trial before a referee, for the report of the referee was subject to confirmation, but they did do away with jury trials in cases involving a long account.

Section 1013 of the Code of Civil Procedure makes the referee the court, dispenses with a jury, and judgment is entered upon his report as upon a decision of the court itself.

In Massachusetts, an official may be appointed, in such cases called an auditor; but his report is not necessarily a final determination upon which judgment is entered, but is prima facie evidence, if a jury trial of the issues is demanded.

In the federal courts, where a jury trial is a constitutional right, any auditor's report can be used only as an aid to court and jury. It can be regarded at most as evidence, and nothing more. The report is but a method of simplifying the issues.

Professor Langdell has, with much learning, expounded the history of the common-law action of account in his essay on Equity Jurisdiction published in the Harvard Law Review, vol. 2, pp. 243–257. This ancient form of action was allowed only against guardians, receivers, and bailiffs. A receiver in the sense used was a person who received money belonging to another for the sole purpose of keeping it safely and repaying it to the owner. A bailiff was in effect a person who was a managing agent of land, and was accountable for the rents.

It thus appears that the action of account always involved a fiduciary relation between plaintiff and defendant, and was limited to certain specific cases.

In the common-law action of account the defense consisted of either a denial of the fiduciary relation, or an affirmative plea of "plene computavit," and the issue as to whether the defendant should render an account or not was triable by a jury. If there was a verdict for the plaintiff, judgment "quod computet" was rendered against the defendant, upon which, unless he got bail, he was imprisoned until any judgment which might be rendered against him should be satisfied. In the judgment "quod computet," which was essentially interlocutory, the court appointed three auditors to take and state the account. If the account showed a balance in favor of the plaintiff, final judgment was rendered thereon for the balance due.

If a person liable to account at law converted plaintiff's money to his

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own use, or promised to pay it, an action of either "indebitatus assumpsit," or debt, would lie, provided the amount had been stated. See Langdell article, supra, pp. 253, 254, and cases cited.

It is easy to see how this ancient action of account served as a historical background for the modern statutory enactments in aid of actions at law, where multiplicity of items render a trial by jury very difficult. The action of "indebitatus assumpsit" gradually supplanted at common law the action of account, though it extended over a much wider field. This form of action involved but one stage, and provided for a jury trial without auditors, but was at times confused with account, and used where account was the strictly proper remedy, until the latter became practically obsolete as a form of action at law. Many of its features survived in a suit in equity for an accounting, and I think it may be said that all issues formerly determined in the common-law action of account were, after it became obsolescent, determined either at law in an action of indebitatus assumpsit, or in equity in a suit for an accounting.

It thus appears that the statement of Brewer, J. (then Circuit Judge), in the case of Davis v. St. Louis & S. F. Ry. Co. (C. C.) 25 Fed. 786, that "it was the practice in the old English courts, the old common-law practice, where it was apparent that the examination of a long account was involved, to refer such account to a referee to report on the facts," was historically quite inaccurate as applied to an action arising out of breaches of contract, where no fiduciary relation appears to have existed. Nevertheless his decision, like others I have heretofore cited, shows the tendency of the common law to seize upon analogies derived from former practice, and extend that practice to meet manifest needs.

The leading case on this subject is the case of Fenno v. Primrose, 119 Fed. 801, 56 C. C. A. 313, by the Circuit Court of Appeals of the First Circuit, which has been since followed in that circuit, and by Judge Holt in the case of Vermeule v. Reilly, supra, in this district, and approved of in a learned opinion by Judge Sanford in the case of United States v. Wells, supra.

I can see no constitutional difficulty in allowing a report of an auditor to simplify the issues to be introduced in evidence before the jury, subject, of course, to the control of the court as to all matters of law which may be applicable to the same, and subject to the final determination by the jury as to all matters of fact in the case, whether embraced in the report or not. Craven v. Clark (C. C.) 186 Fed. 959.

The case of Sulzer v. Watson (C. C.) 39 Fed. 414, which was heard before Wallace and Wheeler, JJ., in the Circuit Court for the District of Vermont, prior to the Circuit Court of Appeals Act, is in no way against the conclusion which I have reached and is an interesting case, showing the accurate knowledge of Judge Wheeler, who wrote the opinion, as to forms of action. That was an action of book account, known to Connecticut and Vermont lawyers, and involving an appointment of auditors to hear and finally determine the issues. The plaintiff moved for the appointment of auditors to try the issues. The court denied this for the very good reason that it

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would deprive the defendant of his right of trial by jury. Judge Wheeler said:

"It is an action at law, although not in any form known to the common law; and, although courts of equity have jurisdiction of some matters of account, they never have had any of matters merely in assumpsit, which may be involved in an action like this. These are called matters of account, because they may be kept on books of account, and not by reason of any relation of trust between the parties out of which the transactions might arise, such as courts of equity take cognizance of. * * * In this case there can be no trial by auditors, therefore no auditors should be appointed."

This case merely holds:

(1) That in any action of assumpsit brought in a United States court a trial by jury is necessary.

(2) That, where a defendant is in no fiduciary relation to a plaintiff, a reference which would dispense with a jury is never permissible.

(3) That a state statute cannot deprive the defendant of his right to a jury trial in any action brought in a federal court.

In the case of Swift v. Jones, 145 Fed. 489, 76 C. C. A. 253, the Circuit Court of Appeals for the Fourth Circuit held that in an action at law the trial judge had no power, even with the acquiescence of both parties, to order a trial before a special master, who should report his findings to the court, and that such mode of procedure deprived the parties of their jury trial. This case was referred to by Judge Sanford in United States v. Wells, supra, and does no more than decide that trial by jury must be preserved. In my opinion the form of the present order, just as the method of procedure under the Massachusetts statute, does essentially preserve trial by jury.

The order to be entered should appoint Wallace Macfarlane, Esq., auditor,

"to make a preliminary investigation as to the facts, hear the witnesses, examine the accounts of the parties and make and file a report in the office of the clerk of this court, with a view to simplifying the issues for the jury, but not finally to determine any of the issues in the action; the final determination of all issues of fact to be made by the jury on the trial, and the auditor to have power to compel the attendance of, and administer the oaths to, witnesses—the expense of the auditor, including the expense of a stenographer, to be paid by either or both parties to this action, in accordance with the determination of the trial judge."

The said auditor shall separately report as to the issues of fact, the following matters especially:

(1) All deliveries of coal alleged to have been made by the Interstate Coal Company to the defendant which are not disputed by the defendant.

(2) All payments alleged to have been made for coal delivered by the Interstate Coal Company to the defendant, which are not disputed by the plaintiff.

(3) All deliveries of coal alleged to have been made by the Interstate Coal Company to the defendant, which are disputed by the defendant, with his opinion as to each of such disputed items.

(4) All payments alleged to have been made by the defendant for coal delivered by the Interstate Coal Company to the defendant which

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are disputed by the plaintiff, with his opinion as to each of such disputed items.

(5) The amount of charges for freight and demurrage which the defendant claims to have been obliged to pay for the account of the Interstate Coal Company, the items thereof admitted by the plaintiff to be chargeable, and the items in dispute, with his opinion as to each of such disputed items.

(6) All deliveries of coal alleged to have been made by the Interstate Coal Company to the defendant, which are claimed by the defendant to have differed upon analysis from the requirements of the city of New York, with his opinion as to each of such items.

(7) All settlements claimed by the defendant to have been made between the Interstate Coal Company and the defendant, whereby deductions were allowed by the plaintiff, because the coal differed upon analysis from the requirements of the city of New York, with his opinion as to each of such allowances.

(8) The amount of coal alleged by the defendant to have been contracted to be sold to the defendant by the A. H. Dollard Coal Sales Company, and assumed to be delivered by the Interstate Coal Company, which, when analyzed, did not conform to the requirements of the city of New York, and the items of damage which the defendant claims to have suffered in order to fulfill its contracts for resale to William Farrell & Son and Burns Bros., with his opinion as to each of such items.

Judge Holt made an order much resembling the above in the case of Vermeule v. Reilly, supra.

ORIGINAL SIXTEEN TO ONE MINE, Inc., v. TWENTY-ONE MINING CO. (two cases).

(District Court, N. D. California, S. D. March 2, 1918.)

Nos. 292-E, 16001-L.

1. TRIAL ⊂⊃340(1)—VERDICT—CORRECTION BY COURT.
A federal court cannot look to the testimony for the purpose of correcting a faulty verdict, even though there is no dispute over the facts.

2. NEW TRIAL ⊂⊃9—DEFECTIVE VERDICT—NEW TRIAL AS TO SINGLE ISSUE.
A federal court has power to grant a new trial as to a single issue in the case, and such procedure is proper, where the jury has found generally for plaintiff, but failed to find his damages, although shown by undisputed evidence.

3. MINES AND MINERALS ⊂⊃31(3)—MINING CLAIMS—RIGHT TO FOLLOW VEIN—CONTINUITY OF VEIN.
A segment of an ore vein, commencing 15 or more feet below where the vein apexing in complainant's claim terminated in a fault, *held* a continuation of the same vein, which complainant was entitled to follow in its dip through the side lines into defendant's adjoining claim.

At Law and in Equity. Action and suit by the Original Sixteen to One Mine, Incorporated, against the Twenty-One Mining Com-

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pany. New trial granted in law action as to one issue. Decree for complainant in equity suit.

See, also, 153 C. C. A. 142, 240 Fed. 106.

William E. Colby, Grant H. Smith, and John S. Partridge, all of San Francisco, Cal., for plaintiff.

Frank R. Wehe and Bert Schlesinger, both of San Francisco, Cal., and Lynden Bowring, of Los Angeles, Cal., for defendant.

RUDKIN, District Judge. The plaintiff in the law action is the owner and in the possession of the Sixteen to One quartz mine or lode mining claim in the Alleghany mining district in the state of California. The defendant is the owner and in the possession of the Belmont, Valentine and Tightner extension mining claims, adjoining the Sixteen to One claim on the east. The complaint alleges that there exists within the Sixteen to One claim a lode or vein of rock in place, carrying gold and other valuable minerals; that such vein on its strike or course traverses the claim from end to end; that the top or apex of the vein lies wholly within the side lines of the claim; that on its downward course or dip the vein departs from the perpendicular and passes out through the easterly side line of the claim into and beneath the surface of the adjoining claims owned by the defendant, and into and beneath the surface of another claim owned by third persons, who are not parties to the action. The complaint then avers that the defendant entered upon this vein between planes drawn vertically downward through the end lines of the Sixteen to One claim, and removed ore therefrom of a value in excess of $100,000, for which sum the plaintiff demands judgment.

The answer in effect denies the title of the plaintiff, and by cross-complaint the defendant asserts title in itself, and avers that the plaintiff removed ore from the vein to the value of $125,000, for which sum it demands judgment.

The issues thus presented were tried before a jury. All testimony offered at the trial related to the title or ownership of the vein under the extralateral right statute, aside from a brief statement furnished by each of the parties showing the amount of gold extracted from the vein and the cost of mining, transporting, and reducing the ore. The charge of the court on the question of title or ownership was not excepted to by either party, and there is no claim of error in that regard at this time. On the question of measure of damages the court instructed the jury as follows:

"If the plaintiff is entitled to recover, the measure of damages will depend upon the nature of the trespass. If the trespass was a willful one, that is, if the ore was taken recklessly, willfully, or intentionally by the defendant, or by any person under contract with the defendant, then the plaintiff is entitled to recover the full value of the ore, without deduction for the labor performed by the trespasser."

"If, on the other hand, you find that the trespass was the result of inadvertence or mistake, the value of the property when first taken must govern, or if the conversion sued for was after value had been added to it by the work of the trespasser, he should be credited with this addition."

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Again:

"The measure of damages, as I have said, as against a willful trespasser, is the full value of the ore taken; whereas, if the trespass is an innocent one, the measure of damages is the value of the ore in place, or the value of the ore after its removal less the actual cost of mining, transporting, and reducing the ore."

Under these instructions the jury returned the following verdict:

"We, the jury, find in favor of the plaintiff, and assess the damages against the defendant in the sum of $100,000, less cost of extraction of the ore, on account of unwillful trespass."

The plaintiff has interposed a motion for a judgment on this verdict, either in the sum of $100,000, or for the sum of $100,000 less the sum of $46,315.58. It might be stated in this connection that this latter sum is claimed to be the cost of mining, transporting, and reducing the ore, as disclosed by the statement furnished by the defendant. The defendant, on the other hand, has moved to set aside the verdict and for a new trial, on the ground that the verdict is indefinite, uncertain, and void.

[1] It is manifest that the plaintiff is not entitled to a judgment on the verdict for the sum of $100,000. The complaint alleged that the trespass was a willful one, and prayed damages in the sum of $100,000 on that basis. The jury found that the trespass was not willful, and therefore, under the charge of the court, there should have been deducted from the amount found by the jury the cost of mining, transporting, and reducing the ore. Nor, in my opinion, can the court deduct from the amount of the verdict the cost of mining, transporting, and reducing the ore, albeit such cost be shown by the admitted facts in the case. In other words, it seems that a federal court cannot look to the testimony for the purpose of correcting a faulty verdict, even though there is no dispute over the facts.

In Hodges v. Easton, 106 U. S. 408, 1 Sup. Ct. 307, 27 L. Ed. 169, the facts were as follows:

"The record states that the jury, impaneled and sworn to try the issues, 'rendered a special verdict in answer to the questions propounded by the court.' The questions so propounded, with the answers thereto, were made the special verdict. The jury having been discharged, the plaintiffs, by counsel, moved for judgment upon the special verdict for the value of the wheat wrongfully converted by defendants, or for such damages as the court should adjudge, and for such other and further relief as might be granted in the premises. On a later day the defendants moved to set aside the special verdict and grant a new trial, upon the ground, among others, that the special verdict 'does not contain findings upon the material issues in the case.' These motions were heard together, and it was ordered by the court 'that the motion of defendants for a new trial be, and is hereby, overruled, and that the motion of the plaintiffs for judgment upon the special verdict of the jury, and facts conceded or not disputed upon the trial, be, and is hereby, granted.' The damages were assessed by the court at $12,554.89, for which sum judgment was entered against the defendants."

In reversing the judgment thus entered, Judge Harlan, speaking for the Supreme Court, said:

"It is not necessary, in this opinion, to enter upon an examination of those decisions, or to consider how far the local law controls in determining either

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the essential requisites of a special verdict in the courts of the United States, or the conditions under which a judgment will be presumed to have been supported by facts other than those set out in a special verdict. The difficulty we have arises from other considerations. The record discloses that the jury determined a part of the facts, while other facts, upon which the final judgment was rested, were found by the court to have been conceded or not disputed. If we should presume that there were no material facts considered by the court beyond those found in the answers to special questions, then, as we have seen, the facts found do not authorize the judgment. If, on the other hand, we should adjudge it to have been defendants' duty to preserve the evidence in a bill of exceptions, and that, in deference to the decisions of the state court, it should be presumed that the 'facts conceded or not disputed at the trial' were, in connection with the facts ascertained by the jury, ample to support the judgment, we then have a case at law, which the jury were sworn to try, determined, as to certain material facts, by the court alone, without a waiver of jury trial as to such facts. It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done was secured by the Constitution of the United States. They might have waived that right, but it could not be taken away by the court. Upon the trial, if all the facts essential to a recovery were undisputed, or if they so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury, by a peremptory instruction to find for plaintiffs, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court. The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and itself determine the remainder without a waiver by the defendants of a verdict by the jury."

See, also, Slocum v. New York Life Insurance Co., 228 U. S. 371, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029.

[2] If the jury finds in favor of the plaintiff, and there is no dispute over the amount of the recovery, it seems somewhat technical to deny to the court the power to supply the omission from the undisputed facts, but such seems to be the law of the land. It does not follow from this, however, that a new trial must be granted as to every issue in the case. There was no uncertainty in the verdict, in so far as the jury found for the plaintiff, thus establishing its title to the vein and its right to damages. I see no reason why that issue should be submitted to another jury, with little likelihood that a different result would be obtained. The power of a court to grant a new trial as to a single issue in a case is well settled in the state of California and in the federal courts. San Diego Land, etc., Co. v. Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; Duff v. Duff, 101 Cal. 1, 35 Pac. 437; Estate of Everts, 163 Cal. 449, 125 Pac. 1058; Calaf v. Fernandez, 239 Fed. 795, 152 C. C. A. 581.

This case, in my opinion, peculiarly calls for the exercise of the discretion of the court in awarding a new trial as to the single issue only. It was through mere inadvertence on the part of the jury that the case was not finally and forever disposed of at the last trial. There was at no time a substantial controversy over the amount of the recovery, and for reasons not disclosed by the record the plaintiff does not seem to be at all concerned as to the amount of the judgment for damages. Possibly the defendant is so far insolvent as to render the judgment for damages of no avail, if it loses the mine in controversy; but, whatever the reason, it would not be in the interest of justice or the exercise of a wholesome discretion to try the case over

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again in its entirety. The verdict will therefore be permitted to stand, in so far as it finds the issues in favor of the plaintiff, and a new trial will be awarded for the sole and only purpose of assessing the amount of the recovery.

[3] The same state of facts is presented in the equity case. The relief sought is a decree quieting title in the plaintiff and awarding an injunction against the commission of further trespasses by the defendant. At the commencement of the trial of the law action it was stipulated that the equity case should be considered by the court on the testimony offered in the law action and such further testimony as the parties might present. Some further testimony has been offered, and in addition the defendant has requested the court to appoint some disinterested mining engineer or engineers to examine the mines and the mine workings and report to the court. On the trial of the law action a vast amount of expert testimony was offered by the plaintiff, tending to show the identity of the vein from the outcroppings or apex on the surface of the Sixteen to One claim down through the various workings, and perhaps an equal amount of testimony was offered by the defendant tending to show the contrary. The experts on each side consisted of geologists, mining engineers, and practical mining men. It is almost needless to say that the opinions of these experts were positive and unequivocal in favor of the party who called them, and little would be accomplished by adding one or more additional experts to the long list already in the record. It was conceded throughout the trial that there is a vein on the Sixteen to One claim; that this vein dips in an easterly direction at an angle of 45 or 50 degrees; that the vein terminates at a fault at about the 200-foot level; and that by dropping down a distance of 15 or 20 feet at the shaft, and a distance of 35 or 40 feet at the northerly boundary of the claim, another vein is picked up, likewise terminating at a fault. The witnesses for the plaintiff testified that these two segments were one and the same vein, while the witnesses for the defendant testified to the contrary. Their theory is that, while there are two segments of veins there, the upper segment of the lower vein was thrown up several hundred feet above the present surface of the mountain and has eroded away, while the lower segment of the upper vein can probably be found several hundred feet lower down. The jury found it much easier to join the two existing segments together, thus making a single vein, than to speculate as to what has become of the two lost segments, and with that conclusion I am in full accord.

A decree will therefore be entered in favor of the plaintiff in accordance with the prayer of the bill.

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UNITED STATES v. RAM CHANDRA et al.

(District Court, N. D. California, First Division. August 4, 1917.)

No. 6133.

1. NEUTRALITY LAWS ⟹3—OFFENSES.
A single individual may violate Criminal Code, § 13 (Comp. St. 1916, § 10177), by providing or preparing the means for a military expedition referred to in the statute.

2. CONSPIRACY ⟹28—SETTING ON FOOT MILITARY EXPEDITION.
The offense of setting on foot a military expedition against the territory of any foreign prince, etc., with whom the United States are at peace, denounced by Criminal Code, § 13 (Comp. St. 1916, § 10177), does not require such a plurality of agents that those plotting such expedition cannot be punished for conspiracy, under section 37 (section 10201).

3. CONSPIRACY ⟹37—CONSUMMATION OF OBJECT.
The fact that the object of a conspiracy has been accomplished is no defense.

Ram Chandra and others were indicted under Criminal Code, § 37 (Comp. St. 1916, § 10201), for conspiracy to violate section 13 (section 10177). On demurrers to indictment. Demurrers overruled.

Daniel Yost, for defendants Leonheuser and Von Goltzheim.

Geo. A. McGowan and Charles Sferlazzo, both of San Francisco, Cal., for defendants Ram Chandra, Godha Ram, Sundar Singh Ghalli, Surendra Nath Kar, Ladli Prasad Varma, and Munchi Ram.

Geo. A. McGowan, of San Francisco, Cal., for defendant Von Brincken.

A. P. Black, of San Francisco, Cal., for defendants Deinat and Elbo.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, Cal., for defendants Bopp, Von Schack, Kaufmann, Rodiek, Bley, and Capelli.

Timothy Healy, of San Francisco, Cal., for defendants Bhagwan Singh, Santokh Singh, Gopal Singh, Bishan Singh, Nehdan Singh, and Ram Singh.

Robert M. Royce, of Oakland, Cal., for defendant Gobind Behari Lal.

Bert Schlesinger and Otto Irving Wise, both of San Francisco, Cal., for defendants Michaels and Hart.

Mrs. A. A. Adams, Asst. U. S. Atty., of San Francisco, Cal.

RUDKIN, District Judge. This indictment was returned under section 37 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1916, § 10201]), and charges a conspiracy to violate section 13 of the same Code (section 10177). The former provides that:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

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The latter provides that:

"Whoever, within the territory or jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be fined not more than three thousand dollars and imprisoned not more than three years."

[1, 2] A number of the defendants have interposed demurrers to this indictment, but the majority of them have been submitted without argument. The demurrers argued have been pressed largely, if not solely, upon the ground that the offense denounced by section 13 necessarily and logically requires the concurrence of a plurality of agents for its consummation, and that such agents cannot be charged with conspiracy to commit the offense. In other words, it is claimed that the indictment in substance and effect charges a conspiracy to commit a conspiracy which is not permissible under the law.

This argument is based largely on the rule laid down by Wharton:

"When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. As crimes to which concert is necessary (i. e., which cannot take place without concert), we may mention dueling, bigamy, incest, and adultery, to the last of which the limitation here expressed has been specifically applied by authoritative American courts. We have here the well-known distinction between concursus necessarius and concursus facultativus, in the latter of which the accession of a second agent to the offense is an element added to its conception, and in the former of which the participation of two agents is essential to its conception; and from this it follows that conspiracy, the gist of which is combination, added to crime, does not lie for concursus necessarius. In other words, when the law says: 'A combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name'—it is not lawful for the prosecution to call it by some other name. and when the law says such an offense—e. g., adultery—shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy." Wharton's Criminal Law (10th Ed.) § 1339.

But, even in the cases suggested by the author, parties who are *not* necessary participants in the crime may be indicted for a conspiracy to commit the crime.

I fail to see any analogy between the crimes of adultery, bigamy, incest, dueling, or the giver and receiver of a bribe, and the crime denounced by section 13. Doubtless a single individual would not constitute a military expedition, as that term is usually defined, and whether a single individual in an aeroplane, armed with bombs, would constitute a military enterprise, as suggested by one court, I will not inquire.

I see no reason, however, why a single individual may not begin or set on foot a military expedition or enterprise, and more especially why a single individual may not well provide or prepare the means for such an expedition or enterprise. Everything must have a beginning, and this must necessarily be true, if the words "to begin or set on foot" have the broad and comprehensive meaning attributed to them by counsel for the defense. They maintain that an act which would

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tend to effect the object of a conspiracy would also constitute the beginning or setting on foot of a military expedition or enterprise. I doubt the soundness of this view, but I have no doubt that a single individual may violate section 13 of the Criminal Code. Thus in Wiborg v. United States, 163 U. S. 632, 648, 16 Sup. Ct. 1127, 1133 (41 L. Ed. 289), the court said:

"We think that it does not admit of serious question that providing or preparing the means of transportation for such a military expedition or enterprise as is referred to in the statute is one of the forms of provision or preparation therein denounced."

Again the court said (163 U. S. 655, 16 Sup. Ct. 1136):

"It is true that the expedition started in the Southern district of New York, and did not come into immediate contact with defendants at any point within the jurisdiction of the United States, as the Horsa was a foreign vessel; but the Horsa's preparation for sailing and the taking aboard of the two boats at Philadelphia constituted a preparation of means for the expedition or enterprise, and if defendants knew of the enterprise when they participated in such preparation, then they committed the statutory crime upon American soil, and in the Eastern district of Pennsylvania, where they were indicted and tried."

It seems manifest that these acts might be committed without a plurality of agents; indeed, while not controlling, it is a significant fact that, for upwards of 100 years Congress has employed the singular number in defining the crime here denounced. I am satisfied, therefore, that there is no inconsistency or repugnancy in charging a conspiracy to violate section 13 of the Penal Code. I have read and examined the authorities cited by the defendants, but have neither the time nor the disposition to review them at length. Suffice it to say I find nothing in them inconsistent with the views here expressed.

[3] Of course, the fact that the object of the conspiracy may have been consummated, if such be the fact, is no defense.

"Again, it is said that, if the evidence proved the petitioner guilty of a conspiracy, it proved him guilty of the substantive offense. It may be that there has been an abuse of indictment for conspiracy, as suggested by Judge Holt in United States v. Kissel [C. C.] 173 Fed. 823, 828; but it hardly is made clear to us that this is an instance. At all events the liability for conspiracy is not taken away by its success—that is, by the accomplishment of the substantive offense at which the conspiracy aims." Heike v. United States, 227 U. S. 131, 144, 33 Sup. Ct. 226, 229 (57 L. Ed. 450, Ann. Cas. 1914C, 128).

The demurrers are accordingly overruled.

THE TERESA ACCAMA.

(District Court, E. D. Virginia. December 19, 1918.)

SALVAGE ⟸30—AMOUNT OF AWARD—RESCUE OF STEAMSHIP STRANDED AT SEA.

A salvage award of $12,000 made for the rescue of a steamship, laden largely with explosives, stranded outside the Virginia capes, off False Cape, in the winter, vessel and cargo being valued at $2,000,000, and the service, which was efficiently performed, including towage to a safe harbor, requiring some 24 hours.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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In Admiralty. Suit for salvage by the Merritt & Chapman Wrecking & Derrick Company against the Italian steamship Teresa Accama. Decree for libelant.

Hughes, Little & Seawell, of Norfolk, Va., for libelant.
Edward R. Baird, Jr., of Norfolk, Va., for respondent.

WADDILL, District Judge. This is a libel to recover for salvage services rendered by the libelant to the respondent. The facts are briefly these: In the early morning of the 24th of January, 1918, off False Cape, some 2 miles northeast half east of the life-saving station, and about 20 miles south of Cape Henry, the Italian steamship Teresa Accama grounded about amidship, on the port side, for a space of about 100 feet. While there, representatives of the life-saving station came aboard, and through them, communication was had with Norfolk, calling for assistance for the stranded vessel. The libelant, being advised of the wreck, immediately dispatched its tug Rescue, properly officered, manned, and equipped, to the ship's assistance. The Rescue left Norfolk about 10 o'clock a. m., reached the scene of the stranding about 2 p. m., and after some preliminary talk between her officers, and those on the steamship, made fast to the vessel, and with considerable effort, succeeded in getting her afloat about half past 4 o'clock that evening.

The respondent insists that only about 45 minutes was taken in the effort to float the ship, while libelant says it took approximately 2 hours. Respondent further claims that the vessel was not in any serious danger, and that she was extricated from her position largely as a result of the rise of the tide, and the pumping of some 300 tons of water ballast overboard. After the ship was released, the Rescue towed her into Hampton Roads, starting about 5 a. m., reaching a place of anchorage in the vicinity and to the northward of Sewell's Point, about 10 a. m. Early the next morning, the vessel was taken to Lambert's Point, and subsequently taken to the convoy anchorage grounds for vessels containing explosives.

Respondent further insists that her purpose in communicating with Norfolk was to secure the aid of a government vessel to assist her, which would be furnished at nominal cost, and that, upon the Rescue coming, it was allowed to make fast to the Teresa Accama upon the supposition that she was a government vessel, and after the ship was gotten off the shoal it was expressly understood that she would be brought into Hampton Roads free of charge; the Rescue's master explaining that the ship could not come in without a pilot, who was not then accessible, and would not be permitted to pass through the submarine net then closing the channel at all, at that hour of the night, and that the Rescue could bring her in without delay.

The Teresa Accama, 380 feet long, 48 feet wide, 26 feet deep, gross tonnage 7,500, was a large ocean-going ship, loaded in part with a cargo of explosives, was en route from Wilmington, Del., to Genoa, Italy, and went into Hampton Roads, on account of ice conditions prevailing along the coast at that time. The value of the ship and her

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cargo is alleged to be some $2,000,000. The Rescue is a large wrecking vessel, and with her outfit, worth about $250,000.

At the time of the service, the weather was good, sea smooth, and wind blowing a moderate breeze from the south. No special danger was incurred by the salvors, or the salved property, in making fast to and securing the release of the ship. The work was intelligently and expeditiously performed. The position of the ship was not one of extreme peril, but of considerable danger, having regard to the character of the coast, the size of the ship, the depth of water, and the nearness of the vessel to the shore, especially in case of a change of wind to the eastward, or of other weather conditions reasonably to be anticipated at that season of the year.

The court is not inclined to accept the respondent's statement that the services of the Rescue were availed of because it was a government ship. It was not such a ship, and, on the contrary, was one of the wrecking vessels of a well-known wrecking company, manned and operated by reputable and responsible officers, and the fact that they would have misrepresented themselves to be government officials is highly improbable. That there was some understanding that the ship would be towed in to the Roads, and that part of the service would be in the nature of towage, as distinguished from the salvage service, is strongly supported by the testimony. The court is inclined to treat that part of the service, including what was done the next day in removing the vessel from her first place of anchorage, to the safer anchorage set apart for vessels carrying explosives, as a towage and not a salvage service.

Just what would be a proper allowance for the entire service, taking into account all the circumstances of the case, is not free from difficulty, and, in fixing the same, the large values at stake and the dangerous position in which the respondent's ship was lying must be taken into account. She was en route from Wilmington, Del., to Hampton Roads, had encountered difficulty at the mouth of the Delaware river on account of large quantities of floating ice, and in proceeding to Hampton Roads had passed the Virginia Capes some 20 miles, and ran, in broad daylight, into the shoal waters off False Cape, where she went aground, and remained fast for hours, on an exposed shoal beach. Considering her value, the character of her cargo, and the vicissitudes of her journey thus far, the fact that she was promptly released, and safely gotten from the open sea into a harbor of safety and refuge, without exposure from possible weather conditions of another day and night, should not be lost sight of.

Under all the circumstances, the court believes an award of $12,000 is a reasonable one to make for the services rendered; and it will be so ordered.

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O'BOYLE v. NEW YORK STEAM CO. et al.

(District Court, E. D. New York. November 15, 1918.)

WHARVES ⟸20(3, 5)—UNSAFE BERTH FOR DISCHARGING—LIABILITY FOR INJURY TO VESSEL.

Consignee of a coal cargo *held* in fault for injury to the boat, caused by giving her an unsafe berth for discharging, where she rested on the bottom at low tide; and the master of the boat also *held* negligent in making no effort to ascertain the depth of water.

In Admiralty. Suit by Joseph F. O'Boyle, owner of the boat Stella Murphy, against the New York Steam Company and another. Decree for libelant for half damages.

Macklin, Brown & Purdy, of New York City, for libelant.
Frederick E. Fishel, of New York City, for respondents.

GARVIN, District Judge. A libel has been filed by the owner of the boat Stella Murphy against the New York Steam Company and the Coal & Delivery Company, Incorporated, alleging that the Stella Murphy, laden with a cargo of coal consigned to the respondents at Newtown Creek, arrived at the place of business of the latter on or about August 4, 1917; that the respondent failed to provide a proper and safe berth for the Stella Murphy; that as a result she grounded on the falling tide and was damaged.

The acts of negligence complained of are as follows:

(1) In that, being the consignees of said cargo, the respondents failed and neglected to furnish a proper, suitable, and safe place for the libelant's boat to lie at upon her arrival at her destination and until her cargo had been discharged.

(2) In furnishing for the libelant's said boat an unsuitable, unsafe, and improper berth, where the bottom was sloping, uneven, and of a hard substance.

(3) In failing to notify the libelant and those in charge of libelant's said boat of the dangerous and unsafe condition of the berth to which libelant's said boat was assigned.

There is no real dispute as to the material facts.

In view of the fact that no effort was made by the master of the Stella Murphy to ascertain how much water there was when he tied up at the respondents' wharf, it cannot be said that he was free from negligence. The Dave and Mose (D. C.) 49 Fed. 389.

But the owner of the pier was under a duty to employ reasonable diligence to have the place safe and proper for the vessel to lie. Union Ice Co. v. Crowell et al., 55 Fed. 87, 5 C. C. A. 49.

In the case of Nelson v. Phœnix Chemical Works, 7 Ben. 37, Fed. Cas. No. 10,113, the libel was dismissed; but that was not a case of inequality in the surface of the bottom.

It seems to me that The Dave and Mose, supra, is controlling. There will therefore be a decree for the libelant for one-half the amount of his damage, with order of reference to ascertain the amount.

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FIRST NAT. BANK OF EL CENTRO v. HARPER.

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3175.

BANKRUPTCY ⊂=303(3)—VOIDABLE PREFERENCES—PAYMENTS TO BANK.

Evidence *held* to sustain a finding that orders given by bankrupt, then known to be insolvent, to a bank where he had an overdraft, were not for deposit in the usual course of business, nor pursuant to prior arrangement, but on express understanding that they should be applied on the overdraft, and constituted a voidable preference.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Action by W. F. Harper, trustee in bankruptcy of H. G. Faubion, against the First National Bank of El Centro. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error, the trustee of the estate of H. G. Faubion, who was adjudged a bankrupt upon an involuntary petition filed October 11, 1913, brought this action against the plaintiff in error to recover $12,728 as a voidable preference. On and prior to September 1, 1913, one H. F. Davis, conducting a creamery business under the name of H. F. Davis Creamery Company, was doing his banking business with the plaintiff in error, hereinafter called the bank. He would purchase cream from ranchers, and from it make butter at El Centro, and consign the butter principally to Barber & Thompson, of Los Angeles. His property, consisting of the creamery, some automobiles, and other personal property, was covered by a mortgage to the bank for the sum of $2,000. For the cream which the creamery purchased from farmers it issued pay checks payable the 10th of each month. The merchants who purchased the butter did not always remit prior to that date, and the creamery was allowed to overdraw its account at the bank to meet its pay checks to farmers due on the 10th. This process was repeated each month.

About September 1, 1913, Davis sold the creamery to the bankrupt. The bankrupt paid Davis $7,500 and assumed all the outstanding liabilities. The $7,500 which Davis received was the money then due from Barber & Thompson for butter which Davis had sold them, but for which the ranchers who had furnished the cream had not been paid. On September 4, 1913, there was a balance in the bank of $53.75. About that time the bankrupt applied to the bank for continued credit upon the same terms as those previously given to Davis. Between that date and September 10 he drew pay checks to farmers aggregating over $12,000. On September 15 and 29, 1913, the bankrupt gave to the bank orders on Barber & Thompson and the Crescent Creamery Company, at Los Angeles, to which the bankrupt had transferred the business which had been formerly conducted with the Barber & Thompson company. The Crescent Creamery Company, upon such order, paid to the bank, September 29, $4,000, which was placed to the credit of the bankrupt, and reduced his overdraft to the amount of $4,133.17. The overdraft was thereafter increased by checks until October 5, when the bank received from the Crescent Creamery Company $4,904.49 and from Barber & Thompson $1,546.73 on the orders previously given by the bankrupt to the bank, leaving a balance in the bank of $260.67, which was subsequently paid to the trustee in bankruptcy.

It was the contention of the defendant in error that all payments made to the bank upon orders given by the bankrupt subsequent to September 18, 1913, were transfers made by the bankrupt as preferences, and received by the bank as such. It was the contention of the bank that it did all its busi-

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ness with the bankrupt in due course of business, that it had a lien upon all the moneys deposited by the bankrupt or received from orders which he gave, and that it had the right to set off and apply the same upon the bankrupt's overdrafts. The court submitted to the jury the question whether the bankrupt was insolvent at the time when he made any transfer to the bank, and whether the transfer enabled the bank to obtain a greater percentage of its debts than any other creditor of the same class, and whether at the time of the transfer the bankrupt had reasonable cause to believe that the same would effect a preference.

The jury returned a verdict for the defendant in error for the sum of $6,045.50, having found that said transfers from the Crescent Creamery Company and the Barber & Thompson Company created preferences.

Lynn Helm, of Los Angeles, Cal., and Phil D. Swing, of El Centro, Cal., for plaintiff in error.

Dan V. Noland and Walter B. Kibbey, both of El Centro, Cal., and Duke Stone and H. E. Wassell, both of Los Angeles, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The assignment of error upon which the bank relies is the denial of its motion, made at the close of the case, for an instructed verdict in its favor. It cites New York County Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, in which it was held that the balance of a bank account at the time of filing the petition is a debt due to the bankrupt from the bank, and that in the absence of fraud or collusion between the bankrupt and the bank, with a view of creating a preferential transfer, the bank need not surrender such balance, but it may set it off against notes of the bankrupt held by it. In the opinion the court said:

"It is true that the findings of fact in this case establish that at the time these deposits were made the assets of the depositors were considerably less than their liabilities, and that they were insolvent; but there is nothing in the findings to show that the deposit created other than the ordinary relation between the bank and its depositor. The check of the depositor was honored after this deposit was made, and for aught that appears Stege Bros. might have required the amount of the entire account without objection from the bank, notwithstanding their financial condition."

Again, the court said:

"As we have seen, a deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for, when he parts with the money, he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift, or security."

Among other cases cited for the bank are Continental Trust Co. v. Chi. Title Co., 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268, and Studley v. Boylston Bank, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313. In the first of those cases the court said that it was the main purpose of Bankruptcy Act July 1, 1898, c. 541, section 68b, 30 Stat. 565 (Comp. St. § 9652), to prevent debtors of the bank from acquiring claims against the bankrupt for use by way of set-off and reduction of their indebtedness to the estate. Said the court:

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"There is no question of the solvency of Prince when he deposited the money to secure the certificates, and what was done was not the acquisition of a claim against Prince with a view to setting it off against the bank's indebtedness on the certificates, but was the satisfaction, without diminution of the estate of the bankrupt, of possible claims of others who, in the event of Prince's default, would have been entitled to the deposits represented by the certificates. We do not think such transaction comes within the language or reason of section 68b."

In the second case the court said:

"There is nothing in the statute which deprives a bank, with whom an insolvent is doing business, of the rights of any other creditor taking money without reasonable cause to believe that a preference will result from the payment."

In that case the referee had found as a fact that the bank had no reasonable cause to believe that a preference would result. The court further said:

"The money so deposited was the proceeds of the sale of tickets to a large party of round the world tourists, and was put in bank, not for the purpose of preferring it, but in the expectation of being used for carrying on the business in the future as in the past. Indeed, the payments were made with the statement that the company would expect the bank to discount other notes. We find nothing in the record to indicate that the deposits were made for the purpose of enabling the bank to secure a preference by the exercise of the right of set-off."

But we find in the present case evidence which, if credited by the jury, was sufficient to distinguish the case from the cases so cited, and to justify the trial court in denying the motion for an instructed verdict. There was evidence: That on September 15 the bankrupt went to his attorney and told him he was unable to run the business any further. That he and his attorney then went to the office of Wachtel, the cashier of the bank, to whom the attorney repeated what the bankrupt had said, and further stated that the bankrupt had asked him (the attorney) to file a voluntary petition in bankruptcy for him. That Wachtel then requested that the bankrupt give an order on Barber & Thompson for the proceeds of the butter that was being shipped to Los Angeles, and said that the bank would try to carry the business along. That the order was thereafter given. That about the 28th or 29th of September the bankrupt and his attorney again went to Wachtel and the attorney stated to Wachtel that the bankrupt had renewed his request that he file a petition in bankruptcy. That his business was bankrupt. That the pay roll for help would come due the 1st of October, amounting to $2,000, and that the bankrupt had stated that Wachtel refused to pay any more advances to the creamery patrons because the overdraft had grown to such an extent that he did not feel it safe. That Wachtel replied, "This business is insolvent, and I cannot advance any more money," to which the attorney answered: "You are between the devil and the deep sea. The pay roll will be due here on the 1st. They have got a large overdraft at the bank. If you commence a suit against the business to recover your overdraft, these laborers, whose accounts have not been paid, amounting to nearly $2,000, will be preferred claims, and you would have it to pay anyway, and if you don't advance

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the money on the pay roll on the 1st, when their wages are due, we will close the business up, and they will be preferred claims anyway." That Wachtel said that he would advance enough more money to take care of the pay roll as it came due on the 1st, "provided you will give me another order for all of the proceeds of the business on the Crescent Creamery Company to whom you are now sending butter." That the bankrupt agreed and the order was given. That at that time the bank knew that the bankrupt was owing $20,000 to ranchers who had furnished cream.

The cashier, testifying as to the method of doing business with the creamery under the Davis management, stated that the overdraft would occur generally from the 10th of the month to a few days there following, and would be paid by deposits of checks which the creamery received for the sale of the butter, but that upon receiving the orders from the bankrupt on Barber & Thompson and the Crescent Creamery Company, an officer of the bank immediately went to Los Angeles (200 miles away), and received the money directly from those companies, although the bank thereafter credited the same upon its books as deposits by the bankrupt. When asked by the court if the orders on Barber & Thompson and on the Crescent Creamery Company were given for the purpose of depositing the money to his account, the bankrupt answered that it was to secure the bank for its overdraft, but that it was put into his deposit account.

This is not a case where there was a previous agreement between a bank and a depositor that the latter should assign accounts to the bank for collection to pay overdrafts as they might occur, for the court below instructed the jury that, if an assignment of accounts was effected prior to the overdraft of September 18 of $12,928.09, the plaintiff was not entitled to recover any sum from the bank, but that, if there was no assignment before September 18, the jury should take into consideration whether such an assignment was then a preference, and, if they found that it was, the bank would not have the right to apply any of the proceeds of such assignment on the overdraft. The jury have found by their verdict that there was no such prior assignment. Nor is this a case where there is absence of evidence to show that the moneys so collected by the bank were deposits created otherwise than in the ordinary relation between a bank and its depositor. Here there was evidence that the accounts were assigned and the proceeds were received by the bank, not in the usual course of banking business, but with the specific understanding that they were to be applied to the reduction of the overdraft. In Traders' Bank v. Campbell, 14 Wall. 87, 20 L. Ed. 832, the depositor gave his bank a check for the balance of his account, which the bank applied to his indebtedness. It was the contention of the bank in that case that, as it had a right to set off its claim against the deposit, it was immaterial that the same thing was accomplished by the check. But the court held that the transaction was a payment, and not a set-off, since both the parties thereto knew of the depositor's insolvency and that the payment was a preference. That ruling was followed in In re Starkweather & Albert (D. C.) 206 Fed. 797, and of similar import are In re National Lumber Co., 212 Fed. 928, 129 C. C. A. 448; Knoll v. Commercial

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Trust Co., 249 Pa. 197, 94 Atl. 750, L. R. A. 1916A, 683, Ann. Cas. 1916C, 988; Johnson v. Gratiot County Bank, 193 Mich. 452, 160 N. W. 544; National City Bank v. Hotchkiss, 231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. 115; Mechanics' Bank v. Ernst, 231 U. S. 60, 34 Sup. Ct. 22, 58 L. Ed. 121; Ernst v. Mechanics & Metals Nat. Bank, 201 Fed. 664, 120 C. C. A. 92.

The bank asserts that there is no evidence of the amount of the bankrupt's estate, and that therefore there is absence of proof that the transfers to the bank enabled it to obtain a greater percentage of its debt than any other creditor of the same class will receive. But such proof was unnecessary, in view of the undenied allegation of the complaint that the assets of the estate are not sufficient, including the sum of $12,728, the amount sought to be recovered in the action, to satisfy the claims of the creditors of the bankrupt. There was proof, however, that the bankrupt had no money or assets when he went into the business; that he diverted from the assets which he purchased $7,500 to pay Davis; that the creamery plant and personal property which he bought was worth $6,000 or $7,000, on which the bank held a mortgage for $2,000, and that on the mortgage the bank subsequently acquired the property; that claims against the estate aggregating $6,574.13 had been presented and allowed, and claims aggregating $10,798.23 had been presented and not yet allowed. This showing was clearly sufficient.

The judgment is affirmed.

JONES v. FORD et al.

In re MORRIS.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1918.)

No. 193.

1. BANKRUPTCY ⟸200(3)—PREFERENCE—LANDLORD'S ATTACHMENT FOR RENT.
An attachment for rent, right to which is given by Rev. St. Mo. 1909, § 7896, but which, under section 7897, must be followed by determination of the rights of the parties by proceeding in court, and then by execution, is not the equivalent of a common-law distress for rent, and so does not give the landlord's claim a preference, but, being within four months of petition in involuntary bankruptcy, is void under Bankruptcy Act, § 67f (Comp. St. 1916, § 9651).

2. BANKRUPTCY ⟸444—PETITION TO REVISE—CONTENTIONS AVAILABLE—RESPONDENTS.
Insistence of respondents, on petition of trustee in bankruptcy to revise order of District Court giving preference to their claim, thereby reversing order of referee, that the bankruptcy proceedings were not adversary, cannot be considered, not being covered by certificate of referee or order on review.

Petition to Revise Order of the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

In the matter of Sarah Morris, bankrupt. Petition by Joseph M. Jones, trustee, to revise the order of the District Court, on review,

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reversing the order of the referee allowing the claim of Alfred Ford and another as a general claim only. Petition sustained, with directions.

I. J. Ringolsky, of Kansas City, Mo. (M. L. Friedman, of Kansas City, Mo., on the brief), for petitioner.

Frank Titus, of Kansas City, Mo., for respondents.

Before HOOK, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. This is a petition by a trustee in bankruptcy to revise an order of the District Court giving preference to respondents' claim, thereby overruling and reversing the order of the referee, which had denied such preference and allowed it as a general claim only.

The claim in question was for rent of a store building where the bankrupt was conducting a mercantile business in Kansas City, Mo. Before the involuntary petition in bankruptcy was filed, the respondents secured, in accordance with the Missouri statutes, an attachment levy by the state sheriff, who took possession of the chattels in question, a part of the stock in trade. Later they were delivered by him, under an order of the United States District Court, to the receiver appointed in this bankruptcy proceeding. Respondents presented and prayed for an allowance of their claim as a preferred claim, which preference was denied by the referee, and upon a petition for review allowed by the District Court. There are only two points properly before the court under this petition to revise: Respondents' claim that petitioner is not an interested party, entitled to a revision petition under the bankruptcy statute; and petitioner's claim that the preference was improperly allowed by the trial court.

The petitioner is the trustee of the estate, and as such is representative of the estate, and interested in the allowances of claims and preferences. It is part of his duty to see that the assets are properly distributed among the creditors who file claims therefor. This comprehends the matter of allowance of claims, which naturally includes the allowance of preferences.

[1] The theory upon which the trial court allowed the preference was that, under the Missouri statute, an attachment for unpaid rent was the equivalent of a distress for rent, where the levy of the attachment perfected an existing inchoate lien, which did not require a judicial proceeding to make it effective. The petitioner contends that the attachment for rent authorized by the Missouri statute (hereinafter set out) is in no sense analogous to distress for rent, but is merely the creation of an additional ground for attachment, requiring a judicial proceeding to make its lien effective. As such he contends it is avoided by the Bankruptcy Act of July 1, 1898 (30 Stat. 564, c. 541), section 67f of which declares:

"That all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt. * * *" Compiled Statutes 1916, § 9651.

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The common-law distress for rent was a product of early feudal tenure. It is generally regarded as one of those instances in which the right or remedy, however it may be classified, was in the hands of the party, without the necessity of judicial aid. It may be that absolute accuracy would avoid this statement; however, if any judicial action was necessary to initiate or perfect the early distress, it belonged, not to royal tribunals, but to manorial courts, which meant, of course, the court of the lord who was enforcing the distress. History of English Law, by Pollock & Maitland, vol. 1, p. 589, and volume 2, p. 576.

Broadly defined, common-law distress allowed the landlord to go upon the demised premises and seize anything he might there find, irrespective of its ownership, and hold the same without sale or usage as a gage until the rental was paid. Interesting discussion of this remedy may be found in History of English Law, by Pollock & Maitland, vol. 1, pp. 353–355, 589, and volume 2, pp. 117, 130, 575–578; also in 16 R. C. L. 1003. Breaches of the peace were liable to occur in the enforcement of this summary method. To prevent such, in most, if not all, jurisdictions where distress is substantially preserved to-day, there are statutes providing that the seizure shall be by some official. Statutes have to an extent also altered the common-law distress in certain respects—such as limiting seizure to the property of the tenant, permitting seizure of such property away from the demised premises, and allowing sale of the property to satisfy the demand. But none of these statutes has annihilated the fundamental characteristic of distress, to wit, that the landlord shall, directly or indirectly, seize and control the gage without aid of judicial proceedings to establish his right.

The common-law distress for rent has never been countenanced in Missouri (Crocker v. Mann, 3 Mo. 472, 26 Am. Dec. 684), and, so far as we have been able to find, no statutory substitute therefor has been employed, except in some very early statutes applying to particular communities, where a "distress warrant" was for a time authorized (Quinnett v. Washington, 10 Mo. 53), but is no longer permitted. There are statutes giving liens upon crops and nursery stock grown on demised premises. R. S. Mo. 1909, §§ 7888, 7902. In other instances the landlord has been put to statutory actions for rent (Crocker v. Mann, 3 Mo. 472, 475), or for speedy possession of the premises (R. S. Mo. 1909, § 7904; Welch v. Ashby, 88 Mo. App. 400, 404). In aid of rent recovery, an attachment is allowed where the actions of the tenant are such as to justify the belief that the collection of the rent will be endangered, hindered, or delayed, or where the unpaid rent is overdue and demand has been made therefor. R. S. Mo. 1909, § 7896. The sections referring to attachment are as follows:

"Sec. 7896. *Attachment for Rent will Lie, When—How Obtained.*—Any person who shall be liable to pay rent, whether the same be due or not, or whether the same be payable in money or other thing, if the rent be due within one year thereafter, shall be liable to attachment for such rent, in the following instances: First, when he intends to remove his property from the leased or rented premises; second, when he is removing his property from the leased or rented premises; third, when he has, within thirty days, re-

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moved his property from the leased or rented premises; fourth, when he shall in any manner dispose of the crop, or any part thereof, grown on the leased or rented premises, so as to endanger, hinder or delay the collection of the rent; fifth, when he shall attempt to dispose of the crop, or any part thereof, grown on the leased or rented premises, so as to endanger, hinder or delay the collection of the rent; sixth, when the rent is due and unpaid, after demand thereof: Provided, if such tenant be absent from such leased premises, demand may be made of the person occupying the same. The person to whom the rent is owing, or his agent, may, before a justice or the clerk of a court of record having jurisdiction of actions, by attachment in ordinary cases, of the county in which the premises lie, make an affidavit of one or more of the foregoing grounds of attachment, and that he believes unless an attachment issue plaintiff will lose his rent; and upon the filing of such affidavit, together with a statement of plaintiff's cause of action, such officer shall issue an attachment for the rent against the personal property, including the crops grown on the leased premises, but no such attachment shall issue until the plaintiff has given bond, executed by himself or by some responsible person for him, as principal, in double the amount sued for, with good security, to the defendant to indemnify him if it appear that the attachment has been wrongfully obtained: Provided, if any person shall buy any crop grown on demised premises upon which any rent is unpaid, and such purchaser has knowledge of the fact that such crop was grown on demised premises, he shall be liable in an action for the value thereof, to any party entitled thereto, or may be subject to garnishment at law in any suit against the tenant for the recovery of the rent.

"Sec. 7897. *Proceedings, Same as What.*—Proceedings on all attachments issued under this chapter shall be the same as provided by law in case of suits by attachment. * * *

"Sec. 7902. *What Property Exempt From Rent.*—Property exempt from execution shall be also exempt from attachment for rent, except the crop grown on the demised premises on which the rent claimed is due."

In our judgment these sections of the statute (sections 7896 and 7897) were not intended to and do not create any lien, nor recognize the existence of any inchoate lien. They give to landlords additional grounds for attachment, which grounds are connected with the tenancy or payment of rent. It may be suggestive that the affidavit for attachment filed herein contains six grounds for attachment. The first three are under the general statute (R. S. Mo. 1909, § 2294); the other three under the landlord section (section 7896, supra). Such an attachment must take the course of any ordinary attachment suit under the statutes (R. S. Mo. 1909, §§ 2294–2359, 7897), and merely serves to sequester and control in the custody of the court the means of satisfying any judgment later secured upon the merits. There is no right of sale of the levied property until after a determination of the rights of the parties by a court in a legal proceeding, and then only upon execution (R. S. Mo. 1909, § 2351), and only such property as is subject to execution is liable to attachment for rent, except crops grown upon the premises (section 7902, supra).

This case is distinguishable from Henderson v. Mayer, 225 U. S. 631, 32 Sup. Ct. 699, 56 L. Ed. 1233, In re West Side Paper Co., 162 Fed. 110, 89 C. C. A. 110, 15 Ann. Cas. 384, Id. (D. C.) 159 Fed. 241, Austin v. O'Reilly, 2 Woods, 670, Fed. Cas. No. 665, and In re Morris, 159 Fed. 591, relied upon by the trial court; also from In re Mock (D. C.) 228 Fed. 95, In re City Drug Store (D. C.) 224 Fed. 133, In re Floyd Scott Co. (D. C.) 224 Fed. 987, In re Place (D. C.) 224 Fed. 779, 785, and In re Printograph Co. (D. C). 210 Fed. 567, 569, cited by respondents. The Henderson Case dealt with a Georgia statute

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expressly (225 U. S. 638, 639, 32 Sup. Ct. 701, 56 L. Ed. 1233) establishing "liens in favor of landlords," and giving them "power to distrain for rent as soon as same is due." Under such proceeding:

"The sheriff was not required to return it to any court, and no judicial hearing or action was necessary to authorize him to sell for the purpose of realizing funds with which to pay the rent. Such a lien was not created by a judgment nor 'obtained through legal proceedings.'"

In re West Side Paper Co. is a case purely of distress under the Pennsylvania law, where, as said by the court (162 Fed. 112, 89 C. C. A. 112, 15 Ann. Cas. 384):

"No suit or proceeding at law, whether in personam or in rem, in the proper sense of those words, was necessary for the assertion of this right. It belongs to that small category of personal rights, the assertion of which has always been independent of legal procedure, of which the right to abate a nuisance, under certain circumstances, and the right to distrain cattle damage feasant, are examples."

Austin v. O'Reilly is also an instance of distress under a Mississippi statute; the court saying:

"In Mississippi, it is true, the landlord is obliged to sue out an attachment for the purpose of effecting a distress for rent; but when the attachment is sued out, his rights are the same in effect as those of the landlord at common law. That they are founded on and grow out of those rights is evident from the fact that he is not compelled to pursue his claim to judgment like other creditors. The attachment in his case is in the nature of an execution; or, more properly speaking, of a distress."

In re Morris is of doubtful application, but at most is merely an application of the Pennsylvania statute discussed in Re West Side Paper Co., supra.

The Mock, City Drug Store, and Printograph Cases were on the district, and dealt, respectively, with the Pennsylvania, Georgia, and Mississippi laws discussed above. We think the Place and Floyd Scott Cases inapplicable.

[2] An insistence of respondents that the bankruptcy proceedings were not adversary cannot be considered, because, among other reasons, not covered by the certification of the referee or the order on review.

The petition for revision is sustained, with directions to the trial court to revise its order allowing respondents' claim as a preference into an allowance as a general claim against the bankrupt.

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PENN DEVELOPMENT CO. v. STONER et al.

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3107.

MORTGAGES ⊂=362—COLLUSIVE FORECLOSURE—RIGHTS OF VENDOR.

A corporation, which purchased oil property at trustee's sale under a mortgage, pursuant to contract with another corporation which had bought the property and assumed the mortgage, *held*, under the contract, to have only a lien as between the two corporations, leaving the property equitably that of the original purchaser and subject to foreclosure for its default in payments.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Suit by C. E. Stoner and others, directors and trustees of the Ventura-California Oil Company, against the Penn Development Company and others. Decree for complainants, from which defendant Penn Development Company appeals. Affirmed.

The amended bill, upon which this suit was tried and decided in the court below, first alleged that the complainant, Ventura-California Oil Company, a California corporation, was the owner and in possession of certain specifically described oil lands, situated in Ventura county, containing in the aggregate 569.54 acres, together with the oil wells thereon and the personal property connected therewith; that the defendants to the suit claimed some interest in the property, which claim was without the basis of any right; and for a second cause of suit the bill alleged, among other things, in substance that on the 22d of July, 1913, the complainant and the defendant Stephen W. Dorsey entered into a contract by which the complainant agreed to sell and the said Dorsey to buy all of the said property, the consideration therefor to be, according to the allegations of the bill, as follows:

"The defendant Dorsey agreed to transfer and assign, within 30 days of the date of said agreement, 11,000 shares of the capital stock of the Pacific Petroleum Company, one of said defendants, of the par value of $110,000. and $25,000 par value of first mortgage bonds of said Pacific Petroleum Company, secured by a mortgage on said property and other property in said state [of California] and to pay in cash $15,000 on or before November 1, 1913, and said Dorsey also assumed and agreed to pay an indebtedness represented by notes secured by a trust deed then existing against said property, made to and held by the Citizens' Trust & Savings Bank, as trustee, which notes had been executed to Benson Investment Company, a corporation, on February 19, 1913, and by it assigned to certain individuals residing in England. That the total amount of the issue of said notes secured by said trust deed made to said Citizens' Trust & Savings Bank was the sum of $50,000, but at the time when the said agreement was entered into the total amount unpaid thereon was the sum of $25,000, and interest at the rate of 6 per cent. for about three months, and that the assumption of said lien, and the payment thereof according to the terms of said notes and trust deed, was a part of the consideration for the purchase of said property on the part of said Dorsey."

The bill further alleged that Dorsey assigned the contract of purchase to the Pacific Petroleum Company, under which the latter entered into possession of the property, and that in and by the assignment that company "agreed to perform all the covenants on the part of said Dorsey contained in said contract to be performed, and assumed and agreed to pay all the payments provided therein, and to pay and satisfy the indebtedness secured by the trust deed to the Citizens' Trust & Savings Bank."

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The bill further alleged that subsequently the defendant Penn Development Company entered into an agreement with the Pacific Petroleum Company, by which it obtained some interest in the property, and that the individual defendants likewise obtained some interest therein, all of which interests so obtained were subject to the rights and interests of the complainant; that neither of the defendants paid to the complainant the $15,000 due on or before November 1, 1913, under the Dorsey contract, nor have they transferred or caused to be transferred the $25,000 par value of first mortgage bonds of the Pacific Petroleum Company, as required by the Dorsey contract, by reason of which failure each of the defendants forfeited all right to any of the property.

The answer of the Penn Development Company, while admitting that it had not paid to the complainant "the sum of $15,000, nor transferred nor caused to be transferred the particular mortgage bonds" referred to in the bill, denied that it was at any time legally or equitably required to make such payment or such transfer of bonds, and among other things alleged that on March 11, 1914, it purchased and acquired for a valuable consideration all of the property described in the bill, of which it has ever since been in continuous possession and its owner in fee.

The answer of the Pacific Petroleum Company denied that the complainant is, or at any time since March 11, 1914, has been, the owner of, or had any interest in, any of the property referred to, and alleged that ever since the day last mentioned the Penn Development Company has been its owner in fee. It also denied that the two defendant corporations ever entered into any agreement by which the Penn Development Company obtained any interest in the real property described in the bill, and denied that any interest ever acquired by the latter company was taken subject to any right of the complainant, and denied that the $15,000 referred to in the bill was not paid. The answer of the Pacific Petroleum Company admitted the nondelivery of the $25,000 par value bonds, in respect to which it alleged that it "duly authorized the issuance of bonds, including said bonds for plaintiff; that temporary receipts for such bonds were executed by this defendant, and delivered to and accepted by plaintiff; that this defendant has been hindered and delayed in the actual issuance and delivery of its bonds by the refusal of the trustee agreed upon to act, by litigation, and by other unforeseen events, but that this defendant intends in good faith to execute and deliver its said bonds to plaintiff as agreed, and that plaintiff has not been prejudiced or damaged by such delay in the issuance and delivery of said bonds"; and in addition to various other denials the Pacific Petroleum Company pleaded a judgment entered in the superior court of the county of Los Angeles, rendered in its favor against the Penn Development Company for $350,000, besides costs.

On the trial it was stipulated that the judgment so pleaded was in fact rendered on or about November 8, 1914, in an action brought by the Petroleum Company against the Penn Company for a breach of the aforesaid contract between those parties, and it was further stipulated that in February, 1913, the title to the property in controversy was in the Ventura California Oil Company.

Theodore Martin and William H. Cochran, both of Los Angeles, Cal., for appellant.

Tanner, Odell, Odell & Taft, Peyton H. Moore, and Porter & Sutton, all of Los Angeles, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The suit was commenced in one of the superior courts of the state, from which it was transferred to the court below on motion of the defendants thereto. The complainant, being the owner of the lands involved, on which oil was then being produced, and of the appurtenant property,

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had executed a trust deed covering it to the Citizens' Trust & Savings Bank of Los Angeles to secure certain of its indebtedness, on which there remained unpaid $25,000, with certain interest thereon. One Stephen W. Dorsey, owner of a majority of the stock of the Pacific Petroleum Company, a corporation, then entered into a contract with the complainant, by which the latter agreed to sell, and he to buy, all of the said property, the consideration therefor being his assumption of and agreement to pay the indebtedness to the bank, $15,000 in cash on or before November 1, 1913, $25,000 par value of first mortgage bonds of the said Pacific Petroleum Company, and 11,000 shares of its stock, of the par value of $110,000, and all taxes upon the property accruing subsequent to the fiscal year 1912–1913—the contract expressly providing that Dorsey should enter into possession of the property, and have the right to operate the wells thereon and to drill other wells, and to extract and sell the oil therefrom, during his performance of the contract, and that, in the event of the breach by him of any of the provisions of the agreement, the complainant should have the right to foreclose the contract, in which event Dorsey should forfeit any money, bonds, or stock theretofore paid by him, and surrender possession of the premises. The contract further provided that it should bind the successors and assigns of the respective parties, and that upon full performance of its provisions by Dorsey the complainant would execute to him or to his assigns a conveyance of the title to the property.

Two days after the contract was executed Dorsey executed to the Pacific Petroleum Company an assignment of the contract, concluding with the clause, "Subject to all the conditions contained in said agreement upon the part of the party of the first part herein to be performed and which the party of the second part herein agrees to perform," which assignment does not appear to have been signed by the assignee. The answer, however, of the Pacific Petroleum Company, as well as other portions of the record, abundantly show that such assignment was accepted by that company, and that it delivered to the complainant, in pursuance of its contract with Dorsey, the 11,000 shares of the stock of the said Pacific Petroleum Company stipulated for, and denied that it had not paid the $15,000 in cash as provided for by the contract, and, while admitting the nondelivery of the $25,000 par value bonds of the Petroleum Company, set up that instead thereof it had delivered, and the complainant had accepted, "temporary receipts," and what is designated in other portions of the record as "interim bonds."

The record shows that, the interest on the $25,000 remaining of the indebtedness to the Citizens' Trust & Savings Bank not having been paid when due, the trustee advertised the property in question for sale, pursuant to the provisions of the trust deed securing the said indebtedness, designating March 11, 1914, as the time when it would offer at public sale all of the said property in satisfaction of the lien thereon secured by the trust deed. Neither Dorsey nor the Pacific Petroleum Company, the majority of the stock of which, as has been said, he owned, and who with said company owned or claimed to own various leasehold interests in other oil-bearing lands in California,

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being able to pay the indebtedness against the property here in question, Dorsey went East in the endeavor to raise the necessary money, resulting in the incorporation of the appellant Penn Development Company, and in the execution February 17, 1914, of a contract between that company and the Pacific Petroleum Company, which, after reciting that—

"Whereas, Stephen W. Dorsey is the owner of a majority of the capital stock of the Pacific Petroleum Company; and

"Whereas, the said Pacific Petroleum Company is under contract to purchase, in fee simple, certain oil properties in the state of California, and is the holder of certain leasehold interests in other oil properties in California; and

"Whereas, the Pacific Petroleum Company has heretofore, under date of July 24, 1913, executed its mortgage or deed of trust to secure certain bonds upon the said property when acquired; and

"Whereas, certain certificates have been issued by the Pacific Petroleum Company, agreeing to deliver bonds if and when issued; and

"Whereas, certain of the agreed purchase price has not been paid on certain of the properties under contract of purchase as aforesaid; and

"Whereas, certain underlying mortgages assumed by the Pacific Petroleum Company have not been paid; and

"Whereas, the Pacific Petroleum Company is indebted to various parties, and is without means to pay said indebtedness; and

"Whereas, the Pacific Petroleum Company is desirous of entering into an agreement under which its property may be, to such extent as may be found possible, preserved, upon the terms and conditions set forth in this agreement; and

"Whereas, the property known as the Ventura-California property is about to be sold in proceedings under a trust deed"

—expressly provided, among other things, as follows:

"First. The Penn Development Company agrees to purchase at a sum not exceeding thirty thousand dollars ($30,000), at the forthcoming trustee's sale, the title in fee simple of the Ventura-California property [specifically describing the property in question]"—the Penn Development Company "to take title to the same in fee simple absolutely without conditions or trust relations of any kind whatsoever, except the Penn Development Company shall forthwith enter into an option in the form attached hereto as Exhibit A.

"Second. The Penn Development Company agrees to advance for the purpose of the preservation of the assets of the Pacific Petroleum Company the additional sum of thirty thousand dollars ($30,000) over and above the sum paid for acquiring the aforesaid Ventura-California property, which said sum shall be used and applied" to various specified purposes relating to the leasehold interests that have been referred to, and including "the payment for labor and other claims against the Pacific Petroleum Company," aggregating $6,500, and "$4,000 to be expended upon the cementing, redrilling, and bringing into operation of the two existing wells on the Ventura-California property. * * *

"Fourth. The Pacific Petroleum Company hereby transfers, sets over, and assigns to the Penn Development Company all its right, title, and interest of every kind and description in and to all the oil to be derived from the operation of all the properties owned or leased by it, or held by it under contract, to be held by the Penn Development Company, in trust" (a) to pay certain specified expenses; (b) "to retain the monthly sum of two thousand five hundred dollars ($2,500) for the period of four (4) months from the date hereof, and thereafter to retain the monthly sum of five thousand dollars ($5,000) until all the money advanced for the benefit of the Pacific Petroleum Company shall have been paid to the Penn Development Company, or until such further period as shall be sufficient to pay to the Penn Development Company the amount to be paid under the option hereto attached as Exhibit A for the Ventura-California property; (c) the balance to be used

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for the purposes of the Pacific Petroleum Company for the liquidation of the items named in paragraph 2 hereof, as the said Dorsey from time to time shall determine, and upon the property of the Pacific Petroleum Company as the said Dorsey and counsel for the Penn Development Company shall determine. * * *

"Sixth. In the event of the failure of the Penn Development Company becoming the purchaser at the sale of the Ventura-California property after a bid of not exceeding thirty thousand dollars ($30,000), no obligation shall exist upon the Penn Development Company to carry out any part of this agreement, but this agreement shall remain in full force and effect for the benefit of the Penn Development Company until the return to it of all sums theretofore advanced, together with all expenses incurred, and a counsel fee to counsel for the Penn Development Company."

And by the seventh paragraph of this contract the Pacific Petroleum Company covenanted, among other things:

"That upon the payment of not exceeding $30,000 the title in fee simple may and shall be purchased by the Penn Development Company of the Ventura-California property on March 11, 1914, or on any adjournment thereof," and "that there are two wells on the Ventura California property, that the same were oil-producing wells until September, 1913, and that the same can be and will be brought into operation by the expenditure estimated not to exceed four thousand dollars ($4,000)."

The Exhibit A referred to in the contract between these two corporations, and thereby made part thereof, is an exclusive option given by the Penn Development Company to the Pacific Petroleum Company to purchase the property here in question "at any time within three years for the sum of two hundred thousand ($200,000) in cash, and upon the further delivery to the Penn Development Company of 25 per cent. of all the capital stock issued and outstanding issued by the Pacific Petroleum Company or by its successor, less only" (a) such stock as should remain in the treasury or be issued pending the exercise of the option with the approval of counsel for the Penn Development Company for development or financing purposes; (b) such stock as should be issued and delivered for the funding of indebtedness of the corporation; (c) such stock as should be issued and delivered for "the payment in part purchase to other than the said Stephen W. Dorsey, for the part payment of the properties acquired by the Pacific Petroleum Company." And as conditions precedent to its exercise, the option expressly provided the following:

"(1) All outstanding bonds or agreements to receive bonds shall be canceled by the Pacific Petroleum Company and preferred stock issued therefor to an amount not to exceed $600,000.

"(2) Such amount of the preferred stock as shall be agreed upon by Dorsey and the counsel for the Penn Development Company shall be left in the treasury of the company for sale for development purposes, and not less than one-third of the capital stock shall be left in the treasury for development purposes.

"(3) There shall be subtracted from the purchase price under this option:

"(a) Twice such sum as shall comprise the difference between the amount advanced by the Penn Development Company and one hundred thousand dollars ($100,000);

"(b) Such sums as shall have been received by the Penn Development Company under the operation of subdivision (b) of paragraph 4 of a certain agreement made and entered into between the Pacific Petroleum Company and the Penn Development Company, and dated the 17th day of February, 1914.

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"(4) The Pacific Petroleum Company shall at the option of the said Stephen W. Dorsey have the right to sell all of its assets for cash or other securities for such sum or sums as shall in the opinion of the said Stephen W. Dorsey and counsel for the Penn Development Company not be equivalent to less than the total sum of two million dollars ($2,000,000). Should such sale be made, one-half of the sum to be paid to the Penn Development Company under the terms of this option shall be subtracted from the 25 per cent. to be received under the terms of this option by the Penn Development Company out of the proceeds of such sale.

"(5) Should the Pacific Petroleum Company in its discretion after the repayment of the amount due to the Penn Development Company for advances cease the payment to the Penn Development Company is authorized to retain under subdivision (b) of paragraph 4 of a certain agreement made and entered into between the Pacific Petroleum Company and the Penn Development Company, and dated the 17th day of February, 1914, this option shall forthwith terminate and expire."

The record shows that, in pursuance of the foregoing agreements between the parties mentioned, the Penn Development Company, through its attorney, purchased at the sale of the trustee bank on March 11, 1914, the properties in question, for $30,000, and received from such trustee a deed therefor, thereby acquiring the legal title to the property of the complainant without the payment to it of the consideration specified in the agreement between it and Dorsey, whose rights passed to and whose obligations were assumed by the Pacific Petroleum Company, which company, the record further shows, for breach of the foregoing obligations of the present appellant, recovered judgment against it in the sum of $325,000, which, so far as appears, is still in force.

As a matter of course, all of the instruments referred to must be read and considered together, and, so read, and considered, we think it clear that the claim of the appellant to ownership in fee of the property in question, by virtue of the deed from the trustee bank, as against the successors in interest of the Ventura-California Oil Company, cannot be sustained. The contract between the Pacific Petroleum Company and the Penn Development Company not only expressly recognized the existence of the contract between the complainant and Dorsey, and the assignment by the latter to the Petroleum Company, and its assumption of Dorsey's obligations, but a number of the provisions of the contract between the Petroleum and Penn companies, as well as the oral testimony in the case, clearly show that both of those companies, not only knew that the Penn Company bought and received the title to the complainant's property through the sale of it by the trustee bank because of the failure of the Petroleum Company to perform the obligations of Dorsey which it had assumed, but also well knew from unmistakable provisions of the contract between the Petroleum and Penn Companies that the latter took the legal title to the property here involved as part security for the various sum of money it agreed to advance in and about the development and operation of this particular property, as well as other property referred to in the contracts. Beyond question, equity regards the conveyance of the complainant's property by the trustee bank to the Penn Development Company as a mortgage as between the latter and the Pacific Petroleum Company, leaving the property therein de-

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scribed subject to foreclosure for default in the payment therefor which both of those companies by their agreements had assumed. These views are given substantial effect by the judgment of the court below, and in principle are well supported by the decisions of the Supreme Court of California, here applicable, in the cases of Keller v. Lewis, 53 Cal. 118; S. P. R. R. Co. v. Allen, 112 Cal. 455, 44 Pac. 796; Longmaid v. Coulter, 123 Cal. 208, 55 Pac. 791; Odd Fellows Savings Bank v. Brander, 124 Cal. 257, 56 Pac. 1109.

The judgment is affirmed.

UNITED STATES v. REDONDO DEVELOPMENT CO.

(Circuit Court of Appeals, Eighth Circuit. November 18, 1918.)

No. 5035.

1. BOUNDARIES ⟸3(1)—SURVEYS—RULES FOR CONSTRUCTION.
   The general rule of precedence of proofs for determining disputed boundaries is: First, natural monuments; second, artificial marks; third, courses and distances; and, last, recitals of quantity; but the rule is not imperative, and is adaptable to circumstances.

2. BOUNDARIES ⟸3(9)—SURVEY—CALL FOR QUANTITY—ACREAGE.
   Where persons entitled under a treaty to select certain lands out of the public domain undertook to locate nearly 100,000 acres of land, and the selection and location were made specifically to comprise that acreage, *held*, that the calls for quantity will prevail over the marks, etc., of contract surveyors employed by the Surveyor General; it being apparent from the field notes that such surveyors did not actually run the exterior lines of the location.

3. CONSTITUTIONAL LAW ⟸68(1)—POLITICAL QUESTIONS—JUDICIAL POWER—SURVEYS.
   The making and correction of surveys of public lands belong to the political department of the government, and the courts should not attempt to determine, in a suit by the United States against a patentee of public land, that a private survey is correct, though the court may adjudge a survey made to be incorrect.

4. PUBLIC LANDS ⟸28—RESURVEYS.
   The erroneous refusal of the Land Office to make a resurvey of a location of public lands based upon a misconception of the patentee's rights does not preclude a resurvey; the refusal not operating as a permanent bar.

Appeal from the District Court of the United States for the District of New Mexico; John C. Pollock, Judge.

Suit by the United States against the Redondo Development Company, which sought affirmative relief. From the decree, the United States appeals. Modified, and, as modified, affirmed.

J. O. Seth, Asst. U. S. Atty., of Santa Fé, N. M. (Summers Burkhart, U. S. Atty., of Albuquerque, N. M., on the brief), for the United States.

George S. Klock and Alonzo B. McMillen, both of Albuquerque, N. M., for appellee.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

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HOOK, Circuit Judge. This is a suit by the United States to enjoin the Redondo Development Company from fencing and cutting timber from a tract of land in New Mexico known as "Baca Location No. 1," outside the exterior boundaries thereof as established by the official government survey and marked upon the ground by the surveyors. The defendant affirmatively sought a judicial confirmation of its boundary claim. Upon final hearing the trial court held that the true boundaries were delineated in the field notes and plat of the survey officially reported, were not correctly marked upon the ground, and that the fencing of the defendant was upon the right lines. It dismissed the complaint of the government but retained jurisdiction of the cause for further orders if defendant was interfered with. The government appealed.

The Baca floats, locations, or grants as variously called, are five in number, and their history may be found in Shaw v. Kellogg, 170 U. S. 312, 18 Sup. Ct. 632, 42 L. Ed. 1050, involving No. 4, and Lane v. Watts, 234 U. S. 525, 34 Sup. Ct. 965, 58 L. Ed. 1440, and 235 U. S. 17, 35 Sup. Ct. 3, 59 L. Ed. 104, involving No. 3. See, also, Maese v. Herman, 183 U. S. 572, 22 Sup. Ct. 91, 46 L. Ed. 335. Only so much will be recited as is necessary to exhibit the present controversy. By Act June 21, 1860, c. 167, 12 Stat. 71, and proceedings under it, the heirs of Luis Maria Baca were entitled to select from the vacant, nonmineral, public lands in the then territory of New Mexico an aggregate of 496,446.90 acres in not more than five square tracts or bodies. In December, 1860, they made selection No. 1, to contain one-fifth of the quantity, or 99,289.39 acres, and located it by describing a point, definitely determinable by reference to section, township, and range of a distant government survey, "as a common center, and extending north, south, east, and west a sufficient distance to embrace the area last above mentioned, and that the boundaries of said location shall conform to the cardinal points of the compass." A few days later the surveyor general of New Mexico, being duly authorized, certified that he approved and had located the selection. His certificate recited the quantity and the description furnished by the heirs. The Commissioner of the General Land Office approved the selection. A survey was necessary to segregate the lands from the public domain. Lane v. Watts, supra.

In 1876 the Commissioner of the General Land Office directed the surveyor general to make survey in accordance with the selection and location. Following the practice which obtained in those days, the surveyor general contracted with a firm of surveyors to do the work, and in June, 1876, they returned field notes and plat showing a survey in exact accordance with the selection and location; that is to say, of a tract of land in square form containing the number of acres mentioned and with boundaries on the cardinal points of the compass equidistant from the center designated. The survey as reported was approved by the officials of the Department of the Interior. The lands in the location and the surrounding country were wild, mountainous, and principally in forest, unsettled in 1860 and ever since. In October, 1909, the defendant purchased the location, relying solely upon

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the field notes and plat for its boundaries and contents. In proceeding to inclose it, it was discovered that the marks upon the ground of the survey of 1876 were grossly inaccurate. Defendant's petition for a resurvey was denied by the Commissioner of the General Land Office, and on appeal by the Secretary of the Interior. In 1910 it caused a private survey to be made on the lines shown by the field notes and plat of 1876, and commenced the erection of fences. This suit by the government followed.

The field notes and plat of the survey of 1876 conformed to the selection and location and embraced the quantity of land intended to be confirmed to the locators. But it clearly appears that the surveyors practiced a gross fraud in that part of their duty which consisted in marking the boundary lines upon the ground. A tracing of the lines according to such of their marks and monuments as could be found disclosed a shortage in the required area of nearly 10,000 acres. In very few, if any, instances were the marks and monuments at the places indicated in their report, and for long distances none whatever were found. It is quite apparent that a considerable part of the exterior lines was not traversed at all by the surveyors. They reported a completion of their work in about one-sixth of the time reasonably necessary for a faithful performance by the force they employed; their contract rate of compensation was by the mile. We think that their marking of the lines upon the ground was fully discredited. To sustain them it is necessary that the intent of the government and the Baca heirs and the field notes and plat reported by the surveyors be put aside. The case is not one of mere deviation from mathematical accuracy, but one in which a part of what is comprised in the term "survey" may be said not to have been performed.

[1, 2] The government contends that the tracks of the original surveyors so far as they are discoverable upon the ground must prevail over the calls and distances of the field notes and plat notwithstanding their apparent inaccuracy and the great discrepancy in the area. The general order of precedence of proofs for determining disputed boundaries gathered from the multitude of adjudicated cases is: First, natural monuments or objects, like mountains, lakes, and streams; second, artificial marks, stakes, or other objects, made or placed by the hand of man, as in this case; third, courses and distances in documents or writings prescribing or reporting the establishment of the lines; lastly, recitals of quantity. But the rule is not imperative. It proceeds upon considerations of the comparative certainty or fallibility of the evidences of the intention of the qualified authority, public or private, by which the boundary was prescribed. The rule is one of construction, and, like all such rules, it is not conclusive or final, but is adaptable to circumstances. The intention controls when it is clear and manifest from all its evidences. In Ainsa v. United States, 161 U. S. 208, 229, 16 Sup. Ct. 544, 552 (40 L. Ed. 673) it was said:

"So monuments control courses and distances, and courses and distances control quantity; but, where there is uncertainty in specific description, the quantity named may be of decisive weight, and necessarily so if the intention to convey only so much, and no more, is plain."

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See, also, Ely's Adm'r v. United States, 171 U. S. 220, 234, 18 Sup. Ct. 840, 43 L. Ed. 142; Reloj Cattle Co. v. United States, 184 U. S. 624, 637, 22 Sup. Ct. 499, 46 L. Ed. 721; Conkling Mining Co. v. Mines Co., 144 C. C. A. 607, 230 Fed. 553.

A series of cases in this circuit involving a fraudulent government survey in Minnesota are particularly in point. The surveyor's report of the shores of a permanent lake as a boundary of surveyed tracts of land, officially approved and made of record, and upon which patents issued to innocent persons, was annulled years afterwards as fraudulent, and a correct survey was made by the government and judicially sustained. Security Land & Exploration Co. v. Burns, 193 U. S. 167, 24 Sup. Ct. 425, 48 L. Ed. 662; Id., 87 Minn. 97, 91 N. W. 304, 63 L. R. A. 157, 94 Am. St. Rep. 684; Kirwan v. Murphy, 189 U. S. 35, 23 Sup. Ct. 599, 47 L. Ed. 698; Murphy v. Tanner, 100 C. C. A. 125, 176 Fed. 537. The call of the lake as a permanent natural monument for the boundary line gave way to distances and quantity. In the first of these cases the Supreme Court said:

"The rule as to natural monuments is not, however, absolute and inexorable. It is founded upon the presumed intention of the parties, to be gathered from the language contained in the grant, and upon the assumption that the description by monuments approaches accuracy within some reasonable distance, and places the monument somewhere near where it really exists."

Again:

"It seems plain that the intention was to convey no more than the number of acres actually surveyed and mentioned in the patents. In Ainsa v. United States, supra, this is deemed to be a very important and sometimes a decisive fact."

These rules may work both ways—in favor of or against the United States. They are applicable in a direct proceeding to which it is a party, and in which it is seeking to give effect to a fraudulent survey to the injury of a private person. A definite and very important feature of Baca location No. 1 was the area. It was to contain 99,289.39 acres of land. Quantity was a primary, not a secondary, consideration. Moreover, it was not a largess or bounty to the Baca heirs, but a right founded on treaty obligations recognized by Congress, which thereafter no officer or employé of the government could deny or impair. The selection and location were made specifically to comprise the designated area, and all the official actions of the Land Office, including the report of the survey and the approval of it, were in accord with the right of the locators. The only thing out of harmony with the manifest intention of both parties as regards the quantity and the lines necessary to embrace it was the fraudulent conduct of the surveyors, which did not appear in their report. In the very nature of things, when the survey was approved in 1876, the government officials acted upon the field notes and plat, which were fair on their face. They could not have known of the marks on the ground. We find nothing in the case warranting a holding that defendant and its predecessors in title acquiesced in the error or are estopped.

[3, 4] In effect, the decree of the trial court dismissed the govern-

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ment's complaint, which was right; but it also permanently established defendant's private survey as defining the true boundaries of the location. We think that in the latter particular the decree went too far. The making and correction of surveys of public lands belongs to the political department of the government. Kirwan v. Murphy, 189 U. S. 35, 23 Sup. Ct. 599, 47 L. Ed. 698; Stoneroad v. Stoneroad, 158 U. S. 240, 15 Sup. Ct. 822, 39 L. Ed. 966; Murphy v. Tanner, 100 C. C. A. 125, 176 Fed. 537. It may well be that defendant's survey is correct, but the exterior boundaries of its property mark also the limits of a large amount of contiguous land which it does not own; and it is important that, while according to defendant the full measure of its location, the authoritative delimitation be that of the public officials to whom such things are committed. An erroneous refusal to resurvey, based upon a misconception of defendant's rights, ought not to operate as a permanent bar to the discharge of the duty.

The decree should be modified, so that the dismissal of the complaint upon the merits be without prejudice to the right of the government to make a correct resurvey by marking the boundaries of Baca location No. 1 upon the ground according to the selection and location, the field notes and plat of 1876, and to contain the area specified, and when so made to require the defendant to adjust its enclosure accordingly.

As so modified, the decree is affirmed.

In re P. J. SULLIVAN CO., Inc. (two cases).

Petitions of CITY OF SYRACUSE et al.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

Nos. 11, 12.

1. CONTRACTS ⟸306(3)—BUILDING CONTRACTS—CONSTRUCTION.
   Though a contract for the installation of plumbing in a school building authorized the city, in case of the contractor's default, to take over the work and use materials, *held*, that materials at the site must be deemed in the possession of the contractor, and until the city took over the same the contractor might recover them, or its creditors levy execution thereon.

2. CHATTEL MORTGAGES ⟸194—FILING—NECESSITY.
   The provision, in a contract for the installation of plumbing in a city building, that the city might take over and use the equipment at the site, and the contractor's assignment of the same to its surety, *held* to give the city and surety no rights, except on the theory of chattel mortgages; so neither were entitled to the equipment as against creditors of the contractor, the contract and assignment not having been filed as chattel mortgages, as required by Lien Law N. Y. § 230.

3. PLEDGES ⟸11—DELIVERY OF POSSESSION—NECESSITY.
   Though a contract for the installation of plumbing in a municipal building authorized the city to take over equipment in event of the contractor's default, and contractor, to secure bonding company against loss, had assigned to it all equipment on the site, *held*, that there was no valid pledge, which either the city or the bonding company might enforce; there having been no delivery of possession, which is essential to a pledge.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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4. BANKRUPTCY ⊂=205—TRUSTEE—RIGHTS OF.
Under Bankruptcy Act July 1, 1898, § 47a, as amended by Act June 25, 1910, § 8 (Comp. St. § 9631), and in view of sections 67a and 70a (5), being Comp. St. §§ 9651, 9654, *held*, that the trustee of a bankrupt contracting company was entitled to property at site of a building, where contracts between contractor and owner and contractor's surety, assigning to them materials, were not recorded, so as to be valid as chattel mortgages, and there was no delivery of possession, so that they could be enforced as a pledge.

Petitions to Revise Orders of the District Court of the United States for the Northern District of New York.

In the matter of the P. J. Sullivan Company, Incorporated, bankrupt. Petitions by the City of Syracuse and the Massachusetts Bonding & Insurance Company, and by the City of Syracuse and others, to revise orders of the District Court (247 Fed. 139), directing the delivery to H. A. Whiting, trustee, and Frank B. Hodges, ancillary receiver, of certain property. Orders affirmed.

Costello, Burden, Cooney & Walters, of Syracuse, N. Y., for Sullivan Co.

S. F. Hancock, of Syracuse, N. Y., for city of Syracuse and commissioners.

Gannon, Spencer & Michell, of Syracuse, N. Y., for bonding companies.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. The first cause is a petition by the city of Syracuse and the Massachusetts Bonding & Insurance Company for revision of an order of Judge Ray that H. A. Whiting, trustee, and Frank B. Hodges, ancillary receiver in bankruptcy of the P. J. Sullivan Company, Incorporated, recover of the city $1,550 value of material belonging to the bankrupt used by it and that they are entitled to certain tools and equipment in the possession of the receiver, but claimed by the bonding company.

December 8, 1916, the Sullivan Company, a corporation of the state of Massachusetts, was adjudicated a bankrupt on its own petition in the district of Massachusetts. Hodges was appointed ancillary receiver by the District Court for the Northern District of New York of the company's property in that district and Whiting was appointed trustee in bankruptcy by the District Court for the District of Massachusetts.

The case was tried summarily by consent of the parties upon a stipulation of facts, which is all we shall look at in determining whether the District Judge made any error of law.

October 21, 1915, the bankrupt entered into a contract to do certain plumbing in the Delavan School, belonging to the city, and the bonding company became surety for the faithful performance of the contract. To secure the bonding company against loss the bankrupt assigned to it all the tools, plant, equipment, and material that was then or ever should be located by the bankrupt at the site of the

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school. The bonding company did not file this assignment as a chattel mortgage and never was in possession of anything on the site.

In the contract with the city it was provided that in case the bankrupt abandoned the contract the city might after three days' notice in writing take over the work and use the plant, materials and equipment at the site in so doing. If the work were completed at more than the contract price the bankrupt was to pay the difference to the city and if at less the city was to pay the difference to the bankrupt. This contract was not filed as a chattel mortgage.

[1] The evidence of abandonment of the contract by the bankrupt was its adjudication. Some time thereafter the city gave three days' notice in writing of its intention to complete the work, took possession of the materials, valued at $1,550, and used the equipment at the site in doing so. The city paid nothing for either and completed the work at a loss. We regard the material and equipment at the site as in the possession of the bankrupt for the performance of the work and not as delivered to the city and we think that before the city actually took possession the bankrupt could have removed the material and equipment or could have sold it and that its creditors could have levied execution upon it.

[2] The city can only recover on the theory that it has a chattel mortgage or that it was pledgee of the property in question. There can be no claim as for a chattel mortgage because there was no filing nor any delivery of possession as required by Lien Law N. Y. (Consol. Laws, c. 33), § 230:

"*Chattel Mortgages to be Filed.*—Every mortgage or conveyance intended to operate as a mortgage of goods and chattels or of any canal boat, steam tug, scow or other craft, or the appurtenances thereto, navigating the canals of the state, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, is filed as directed in this article. This article shall not apply to agreements creating liens upon merchandise or the proceeds thereof for the purpose of securing the repayment of loans or advances made or to be made upon the security of said merchandise and the payment of commissions or other charges provided for by such agreement, where the conditions specified in section 45 of the Personal Property Law are complied with."

[3] And there can be no claim of a pledge, because there was no delivery of the possession, which is essential to a pledge of chattels. Pledges of stock and securities stand upon a different footing. For the same reasons the bonding company can claim no lien because it never filed its contract as a chattel mortgage and never had any possession whatever of the property.

[4] No doubt between the parties and as against purchasers with notice equity would complete and perfect these imperfect titles to the after-acquired property, but it would not do so as against general creditors. American Can Co. v. Erie Preserving Co., 183 Fed. 96, 105 C. C. A. 388. Or if the city and the bonding company had taken possession before the adjudication their claims might have been recognized and sustained. But upon adjudication the trustee, under

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section 47a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557), as amended in 1910 (Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [Comp. St. § 9631]), no longer stands merely in the shoes of the bankrupt, but—

"as to all property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

So under section 70a (5), being section 9654, upon adjudication the trustee became vested with the title of the bankrupt to property "which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him," and section 67a (section 9651) provides:

"*Liens.—a* Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

The District Judge followed the decision of the Court of Appeals of New York in Titusville Iron Co. v. City of New York et al., 207 N. Y. 203, 100 N. E. 806. In it the contract between the bankrupt and the board of education provided that in case of abandonment of the contract by the contractor the board might complete the work and use all materials on the line of the work in so doing. After adjudication the board did take and install certain boilers which were on the line of the work but were not there and did not belong to the bankrupt at the time the contract was executed. The assignee of the trustee in bankruptcy brought suit for conversion. The court held that he was entitled to recover. Judge Mayer in the case of Midtown Contracting Co. (D. C.) 238 Fed. 871, reversed upon a question of jurisdiction in Re Southern Arizona Smelting Co., 240 Fed. 50, 153 C. C. A. 83, followed the New York decision, and we agree with the views on that point there expressed by him and by Judge Ray in the instant case.

The trustee relies upon two decisions of the Circuit Court of Appeals for the Third Circuit to the contrary. Duplan Silk Co. v. Spencer, 115 Fed. 689, 53 C. C. A. 321, decided before the amendment of 1910 to section 47a, and In re Shelly, 242 Fed. 251, 155 C. C. A. 91, decided subsequently. In the first the owner made an additional advance of $15,000 to the contractor not called for by the contract, on the strength of the material then at the site. The court regarded this as a delivery of possession and specific appropriation of this property on the owner's premises to the owner for the advance, which gave its claim priority over the rights of the trustee under sections 67a and 70a (5). In the second case the principal inquiry was whether the amendment of 1910 required a different conclusion. The contractor in the latter case had agreed that—

"All work and materials delivered on the premises to form part of the works are to be considered the property of the owner, and are not to be removed without its consent; but the contractor shall have the right to remove all surplus materials after the completion of the work."

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The court reaffirmed the proposition that delivery on the premises of the owner by the contractor under such an agreement was a delivery or quasi delivery of possession superior to the rights of the trustee, even if the owner did not take actual possession until after adjudication. It will be seen that the provisions of the contracts enforced were much stronger for the owner than are those of the contracts in the instant case.

Chief Judge Cullen, in refusing to follow the Duplan Silk Co. Case, pointed out an additional reason, viz. a difference between the contract in it and in the Titusville Iron Co. Case, in that in the Titusville, Case, if the owner completed the work for less than the contract price, the contractor was to lose the difference, which would amount to a forfeiture of unused material. We fail to see the importance of this consideration in a case where the work was completed at a loss and there was no forfeiture of anything. In such case there is no forfeiture of unused material; all the material being used in part performance of the contract. Equity might well refuse its help to carry out a forfeiture, and yet give it willingly to protect a fair claim.

The real difference between the courts is in the view taken of the effect of delivery by the contractor of materials on the owner's premises which the owner is given the right to use in completing the work.

In the second case, of the Vocational High School, the respondents are the board of commissioners of Vocational High School and the Fidelity & Deposit Company of Maryland; but there is no substantial difference of fact or of law between the two cases under consideration—certainly none to make the second stronger.

The order is affirmed in each case, with costs.

In re BROSE.

Petition of PECK.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 6.

1. MORTGAGES ⟸199(1)—RENTS AND PROFITS—RIGHT TO.
   The general rule is that the mortgagee is not entitled to rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken in his behalf by a receiver, or until he demands and is refused possession.

2. COURTS ⟸372(9)—FEDERAL COURTS—WHAT LAW GOVERNS.
   In bankruptcy proceeding arising in New York, where there was a controversy between the receiver in bankruptcy and a receiver appointed in a subsequently instituted action to foreclose a mortgage, the federal court will follow the decisions of the state court as to the rights under the mortgage; the property being in New York.

3. BANKRUPTCY ⟸116—MORTGAGES—RENTS AND PROFITS—RIGHT TO.
   Where a New York mortgage provided that, in event of default, the mortgagee should have the right to enter and take possession of the premises and to receive the rents and profits, etc., *held*, that the mort-

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gagee was not entitled to the rents and profits until he entered into possession or foreclosed the mortgage, and hence the receiver in bankruptcy of the mortgagor is entitled to the rents and profits collected before the mortgagee foreclosed.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of Anthony Brose, bankrupt. Petition by Nathan Peck, as receiver in bankruptcy, to revise an order of the District Court directing him to pay over to a receiver in a mortgage foreclosure action rents collected, etc. Order reversed, and record remanded, with directions.

Taylor More, of New York City, for petitioner.

Gustav Lange, Jr., of New York City (Ralph Barnett and Wallace A. Kroyer, both of New York City, of counsel), for respondent.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. The question which is presented by this case involves the right to the rents of an apartment house owned by the bankrupt in the city of New York, and the controversy is between the trustee of the bankrupt and a receiver appointed in a foreclosure proceeding instituted by a second mortgagee, who is the petitioner. The petitioner's mortgage contains the following clauses:

"Fifth. That if default shall be made in the payment of any installment of the whole of the principal sum mentioned in the condition of the bond, or of the interest which shall accrue thereon, or any part of either, at the respective times therein specified for the payment thereof, the mortgagee shall have the right forthwith, after any such default, to enter upon and take possession of the said mortgaged premises, and to let the said premises, and receive the rents, issues, and profits thereof, and to apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said rents and profits are in the event of any such default hereby assigned to the mortgagee.

"Sixth. And the mortgagee shall also be at liberty immediately after any such default, upon proceedings being commenced for the foreclosure of this mortgage, to apply for the appointment of a receiver of the rents and profits of the said premises without notice, and the mortgagee shall be entitled to the appointment of such a receiver as a matter of right without consideration of the value of the mortgaged premises as security for the amounts due the mortgagee, or the solvency of any person or persons liable for the payment of such amounts."

It appears that the bankrupt filed a voluntary petition in bankruptcy on April 30, 1917, and on May 2d there was appointed a receiver in bankruptcy of the assets, property, and effects of the bankrupt. The receiver in bankruptcy has collected the rents from the premises on which the petitioner held a second mortgage for $10,000, which mortgage was long overdue, being due and payable on December 7, 1910. For reasons not necessary to state the second mortgagee took no steps to foreclose his mortgage until November 27, 1917, when he commenced an action in the Supreme Court of the state of New York for the county of New York and obtained the appointment of a receiver on December 1, 1917. Then on January 2, 1918, the mortgagee filed a petition in the bankruptcy court, in which he asked for an order directing that the rents collected by the receiver in bankruptcy

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be used for paying the taxes and assessments upon the property, as well as the principal and interest due under the mortgage. He also asked that future rents be payable to the receiver appointd in the foreclosure proceedings, and that possession of the premises be also turned over to that receiver. The District Judge thereupon entered an order directing the receiver in bankruptcy to pay over, to the receiver in the foreclosure action, all of the rents which he had collected, irrespective of the time or times when such rents had been collected by him less his expenses and disbursements incurred in the maintenance of the premises, and to turn over the possession of the premises. The order he directed to be entered was not in accordance with the opinion which he had previously filed in the case, in which he held that the rents previously collected should not be turned over. The explanation made is that, after filing his opinion, his attention was directed to the case of Sullivan v. Rosson, 166 App. Div. 68, 151 N. Y. Supp. 613, in which the Appellate Division of the Supreme Court of the state of New York of the First Department, in construing a similar mortgage, had held that the rent clause entitled the mortgagee to the rents upon default without entry and without the appointment of a receiver. In reliance upon that decision he signed the order now sought to be revised.

There is no doubt what the general rule is relating to clauses in a mortgage giving the mortgagee the right to take the rents in terms similar to those used in the mortgage herein involved.

[1] It was stated by the Supreme Court in Freedman's Saving Co. v. Shepherd (1888) 127 U. S. 494, 502, 8 Sup. Ct. 1250, 1254 (32 L. Ed. 163), when Mr. Justice Harlan, writing for the court, said, citing cases:

"The general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken, in his behalf, by a receiver, * * * or until, in proper form, he demands and is refused possession."

This general rule the federal courts will follow, except in cases where it appears that the law of the state where the premises are situated applies a different rule.

[2, 3] The mortgage, the meaning of which is involved here, is a New York mortgage, and if the New York courts have determined its meaning this court must give the same meaning to its words which would be given to them by the courts of that state.

The question involved herein does not appear heretofore to have been before this court. It has, however, been before the District Court of the Southern District, with the result that conflicting decisions have been rendered.

In 1907 the District Court held in In re Banner, 149 Fed. 936, that a provision in a mortgage, following the usual one giving the mortgagee a right to a receiver of rents and profits in case of default, operated merely as a pledge of the rents, and that the pledgee was not entitled to them until he asserted his right in some legal form, as by an application for a receiver and a demand by such receiver. The decision was rendered by Judge Hough, then District Judge, but now of this court. So in 1916, in In re Israelson (D. C.) 230 Fed. 1000,

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the question was whether under such a mortgage clause the assignment of rents became operative at the time of the default, or only upon the appointment of the state court receiver, and it was held by Judge Mayer that the clause only authorized a mortgagee to collect the rents after taking possession of the property, and not while he permitted it to remain in the possession of the mortgagor after default. In 1915 the question came before Judge Learned Hand in In re Jarmulowsky (D. C.) 224 Fed. 141, 35 Am. Bankr. Rep. 514. A mortgagee asked for an order directing a receiver in bankruptcy to pay to him rents which had been collected after default, but before the mortgagee had applied either for a foreclosure, receiver, or for a sequestration order; and the receiver in bankruptcy was directed to pay over the rents which he had so collected.

In all the cases in the Southern District the principle has been conceded that the question involved arising under a New York mortgage should be determined in accordance with New York law. The difficulty has been to determine what the law of that state upon the subject is. That difficulty has now been cleared up by a recent decision of the New York Court of Appeals in the case of Sullivan v. Rosson, 223 N. Y. 217, 119 N. E. 405, which reversed the decision made by the Appellate Division to which reference has already been made, and upon which the District Judge relied. A fourth mortgage in that case provided that in case of default the mortgagee should have the right forthwith "to enter upon and take possession of the said mortgaged premises, and receive the rents, issues, and profits thereof, and apply the same after payment of all necessary charges and expenses on account of the principal and interest," etc. It also expressly gave the mortgagee the right upon default to have a receiver of the rents, issues, and profits of the mortgaged premises, with power to pay taxes and assessments and to keep the premises insured, and after deducting all charges and expenses apply the residue of the rents to the payment and satisfaction of the mortgage. The plaintiff was the owner of this fourth mortgage, and had applied for and obtained the appointment of a receiver in her behalf. A second mortgage on the same premises contained a clause providing that upon default the mortgagee should have the right forthwith to enter upon and take possession of the premises and let the same, "and receive the rents, issues, and profits thereof," etc.; and a third mortgage provided that the mortgagee should be entitled, in any action to foreclose, to the appointment of a receiver of the rents, and that "the rents and profits in the event of any default hereby" are assigned to the holder of the mortgage as further security for the payment of the indebtedness. The owner of the second and third mortgages had not sought to collect the rent, either by voluntary payment with the consent of the mortgagor or through a receiver, but claimed the rents in the hands of the plaintiff's receiver. The order appointing such receiver had never been modified or in any way extended for his benefit; and the court held that the holder of the senior mortgages was not then entitled to appropriate the proceeds of the diligence of the junior mortgagee. The court said that a mortgage of real property is but a pledge of property as security

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for a debt, and that an assignment of rent of the character above described is of the like character as the transfer of the real property, and that a mortgagee desiring to obtain such rents to apply upon his mortgage should actually possess himself of them or of the right to them through some mutual arrangement therefor, or he should make application to the court to have the receivership extended for his benefit. The court in its opinion refers approvingly to the decision of the Supreme Court in Freedman's Case, supra. The case clearly settles the law of New York upon this subject, and establishes the principle that such a clause in a New York mortgage as is herein involved operates merely as a pledge of the rents, to which the pledgee does not become entitled until he asserts his right.

In view of that decision, this court holds that the receiver in bankruptcy herein is entitled to retain in his possession all rents due and collected by him prior to the time when the receiver appointed in the foreclosure proceedings acquired the right to possession of the premises by the entry of the order of his appointment on December 10, 1917.

The order complained of is hereby reversed, with costs, and the record remanded to the District Court, with directions to proceed in accordance with this opinion.

THE RICHLAND QUEEN.

RICHLAND S. S. CO. v. BUFFALO DRY DOCK CO.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 31.

1. CONTRACTS ⟸212(2)—REPAIRS—TIME.
Under dry dock company's contract to repair a vessel, where no time was specified, the repairs are to be made within a reasonable time; and where a strike occurred among the operatives of the dock company, which delayed the work, the question is whether the delay was reasonable or not, in view of the circumstances at the time the contract was being performed.

2. CONTRACTS ⟸300(5)—PERFORMANCE—EXCUSE—STRIKES.
Where, after a dry dock company had contracted to repair a vessel, its employés demanded shorter working hours, and struck because their demand was refused, *held* that, though the strike was not accompanied by violence, it was an excuse for delay in completing the repairs; the delay being reasonable in view of the strike, and there being no difference in principle between peaceable and violent strikes.

Manton, Circuit Judge, dissenting.

Appeals from the District Court of the United States for the Western District of New York.

Libel by the Buffalo Dry Dock Company against the steamship Richland Queen, her engines, etc., claimed by the Richland Steamship Company, together with a libel by the Richland Steamship Company against the Buffalo Dry Dock Company. From decrees for the Dry Dock Company, the Steamship Company appeals. Affirmed.

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Thomas C. Burke, of Buffalo, N. Y., and Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, for Buffalo Dry Dock Co.

Harvey D. Goulder and Goulder, White & Garry, all of Cleveland, Ohio, and Botsford, Lytle, Mitchell & Albro, of Buffalo, N. Y. (Thomas H. Garry, of Cleveland, Ohio, and Almon W. Lytle, of Buffalo, N. Y., of counsel), for Richland S. S. Co.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is an appeal from a decree of Judge Hazel in favor of the Buffalo Dry Dock Company for the reasonable cost of repairs to the steamer Richland Queen, and dismissing the cross-libel of the Richland Steamship Company for damages for loss of the use of the vessel due to unreasonable delay in making the repairs.

September 5, 1916, the steamer was sent to the Dry Dock Company's yard, and remained there until December 5th. No express contract for the repairs was made, but the reasonable value of the use of the dry dock and of the repairs is admitted to have been $39,984.08. The Steamship Company, in order to get possession of its vessel, paid $30,000 to the Dry Dock Company without prejudice, and gave a stipulation for the balance, and in its cross-libel alleged that the repairs should have been completed by October 9, 1916, and that it was deprived of the use of its steamer during the remainder of the season to November 13th, or 37 days, at the reasonable rate of $500 a day, aggregating $18,500.

The Dry Dock Company kept an open shop, and justified the delay by the fact that a strike of its workmen began October 14, 1916, without grievance or warning, which prevented by intimidation and violence old hands and new hands from working.

At the trial the only contention was as to the damages for delay, viz. whether the Steamship Company was entitled to a decree for $18,500, less the unpaid balance of the Dry Dock Company's bill of $9,984.08.

The working day in the Buffalo shipyards at the time in question was nine hours, with a half holiday on Saturday during the summer months, while some competing yards on the Lakes required a nine-hour, and some a ten-hour, day.

October 14, 1916, a committee of workmen demanded of the Dry Dock Company an eight-hour day without reduction of pay, which the company refused, and notified the men that thereafter they must work a straight nine-hour day for six days in the week. As a consequence 80 to 90 per cent. of the men left the yard, and although the company did its best to secure an adequate force of workmen, it was not able to do so. The strike involved no violence, although picketing was kept up in the neighborhood of the yard, and there was much persuasion of both old and new hands. The men gradually came back between November 15th and December 2d, without any change in the hours of labor, and there has been no labor trouble since that time.

[1, 2] Judge Hazel was of opinion that the Dry Dock Company, in view of all the circumstances, made the repairs to the steamer in a reasonable time, and was not liable under the decision of the Court of

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Appeals of the state of New York in D., L. & W. R. R. Co. v. Bowns, 58 N. Y. 573. In that case, however, there was an agreement to deliver coal within a fixed time, with an express exception of interference by strikes. No time was fixed in the case under consideration for making the repairs, so that the obligation of the Dry Dock Company was to make them within a reasonable time, and there was no exception of strikes. The question, therefore, is simply whether the delay complained of was reasonable or unreasonable, not in view of the circumstances existing at the time the contract was made, but in view of the circumstances existing when the contract was being performed. Empire Transportation Co. v. P. & R. R. R. Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623; Hick v. Rodoconachi, 2 Q. B. D. 626.

The Court of Appeals of the state of New York has held that a peaceable strike of the employer's servants is no defense to a claim for delay (Blackstock v. New York & Erie R. R. Co., 20 N. Y. 48, 75 Am. Dec. 372), while a strike with violence is a defense (Geismer v. Lake Shore & M. S. Ry. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837). The employer in each of these cases was a common carrier, but, as the recovery sought was for damages caused by delay in delivery, the decisions are applicable to the situation under consideration, because common carriers are not insurers of prompt delivery, but only liable for ordinary care and diligence. The duty is the same as in the present case, viz. the performance in a reasonable time in view of all the circumstances.

We do not appreciate the distinction made in these cases, thinking that the difference between a peaceable and a violent strike as a defense is one of degree only, a strike with violence being more likely to be a good defense than a peaceable strike. The question, however, in each case is the same, whether the conduct of the employer was reasonable. A peaceable strike upon frivolous grounds, which the employer did all he could to prevent, should be a defense against a claim for delay. On the other hand, a violent strike on justifiable grounds, which the employer either fomented or unreasonably resisted, ought to be no defense. Of course, the employer in either case could end the strike by surrendering. We are not disposed to differ with Judge Hazel's finding that the Dry Dock Company's performance was reasonable in view of the strike.

Decree affirmed.

MANTON, Circuit Judge (dissenting). I dissent. About the 10th of September, 1916, pursuant to an oral agreement, the appellee undertook to make repairs to the Richland Queen which was then placed in its dry dock. Work was immediately commenced thereon, and in the ordinary course of the company's business it should have been completed about October 24th. The repairs, however, were not completed until December 8, 1916. These facts are admitted. No time was fixed for the completion of the work, and it was therefore implied that the work would be done in a reasonable time. A reasonable time should be measured by when the work would have been done, but for the strike herein referred to. On October 12th the appellee posted a notice for its employés as follows:

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"Beginning October 14th, this yard will work 9 hours a day. The men will be paid off at 5 o'clock, instead of at 12, as previous."

This discontinued the half holiday on Saturday. The men rebelled, and did not work on the afternoon of October 14th, but returned as usual on Monday morning. They were met by a timekeeper, who asked each individual if he was ready to work the nine-hour day for six days of the week, and those who said they would were allowed to work; the others were refused work. Eighty or 90 per cent. of the men did not work. A committee of the men waited upon the president of the company to discuss the matter, and he took the position that he would not change his order or submit to the eight-hour working day, which was then demanded, and abruptly announced there was nothing to discuss. This was a matter of business regulation, which, concededly, he might decide as he did; but the testimony indicates plainly that, prior to the time of the acceptance of the Richland Queen for repairs, labor troubles were brewing in the Dry Dock Company's yard, which were unknown to the owners of the Richland Queen, but which were known to the officers of the appellee. No mention of this fact, however, was made to the vessel's owners.

During the time of this cessation of work, there was no violence of any character. The month's delay in making the repairs caused a loss of about $500 a day to the owners of the vessel. Judge Rogers, in Frankfurt-Barnett Co. v. Prym Co., Ltd., 237 Fed. 21, 150 C. C. A. 223, L. R. A. 1918A, 602, quoting and accepting the language of the New York Court of Appeals in Eppens, Smith & Wiemann Co. v. Littlejohn, used this language:

"If a contract fails to fix the exact time for delivery, the law fixes it for the parties, by presuming that a reasonable time was intended. The law was so declared in the Court of Appeals of New York in Eppens, Smith & Wiemann Co. v. Littlejohn, 164 N. Y. 187 [58 N. E. 19, 52 L. R. A. 811]."

And what is a reasonable time must be determined by what the parties had in mind when the contract was made, and this must be judged by the circumstances which surrounded the parties at the time the contract was made, rather than by the circumstances and conditions which subsequently arose, and in this connection knowledge which the appellee had as to its unsettled condition of labor, or the prospect of a strike, could not be locked up in the mind of the appellee, and should have been disclosed to the owners of the vessel; for it is true that the owner of the vessel, without knowledge, could reasonably have in mind that the work would be done within a reasonable time, such as normal conditions in the yard would permit. It was within the power of the appellee to disclose such information, and, indeed, to make it one of the conditions of accepting the work. Even where labor trouble is not anticipated, such provisions are frequently put in contracts. D., L. & W. v. Bowns, 58 N. Y. 573.

Judge Grosscup, in Iron Moulders' Union v. Chalmers Co., 166 Fed. 52, 91 C. C. A. 638, 20 L. R. A. (N. S.) 315, said:

"A strike is a cessation of work by employés in an effort to get for the employés more desirable terms. A lockout is a cessation of the furnishing of work to employés, in an effort to get for the employer more desirable terms."

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I think it of little importance to this case, under the proof, to determine whether this was a strike or a lockout. Certainly, there was nothing in the conduct of the employés who did not work that bordered upon or approached violence. I concede that there is no legal obligation for an employer to yield to the strikers on a matter of rate of wages and hours of labor, but here the contract was undertaken to be performed within a reasonable time, and the strike cannot be taken into consideration in determining what was a reasonable time. It was well said in School Trustees of Trenton v. Bennett, 27 N. J. Law, 514, 72 Am. Dec. 373:

"Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather the law leaves it where the agreement of the parties has put it; the law will not insert, for the benefit of one of the parties, by construction, an exception which the parties have not, either by design, or neglect, inserted in their engagement."

Here it was within the power of the dock company, before issuing the orders to the men, to finish the work upon this boat and the only other boat it had in its yard for repairs. It may be that as to the other boat it was protected by a clause which relieved it of obligation in the event of a strike or lockout. The law is well settled that, where a party by his contract creates a duty or charge upon himself, he is bound to make good notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. School Trustees, etc., v. Bennett, supra.

The case of D., L. & W. v. Bowns, 58 N. Y. 573, cited by the District Judge, does not help the appellee. It contained a provision which relieved the company from responsibility in the event of strike or lockout, and is not a useful authority here.

In Smith, etc., v. Littlejohn, supra, the contract for the sale of goods to be shipped from a foreign port fixed no time for the shipment. It was held that it must be made within a reasonable time, and what that is depends upon the circumstances of the particular case, such as the parties may be supposed to have contemplated in a general way in making the contract, and the burden was fixed upon the seller to show compliance, where an action was instituted to recover damages for the buyer's refusal to accept and pay for the goods. There the court said:

"Thus the jury could find that although the plaintiff made every reasonable effort to ship the coffee promptly, and did ship it at the first opportunity it could command, nevertheless the delay in the shipment was prolonged, not because of the conditions and circumstances of the shipping facilities themselves, but because of the plaintiff's personal inability to avail itself of them. The delay was therefore unreasonable as to the defendant, because uncommonly long, and made so by the conditions peculiar to the plaintiff, and not to the transportation facilities. This personal disadvantage was not within the contemplation of the contract, and is not available to the plaintiff either to disprove unreasonable delay or to excuse it."

In Blackstone v. N. Y. & Erie R. R. Co., 20 N. Y. 46, 75 Am. Dec. 372, in a suit for damages on account of nonfulfillment of a contract of transportation by a common carrier, it was held that a railroad corporation was responsible for damages resulting from a delay to trans-

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port freight in the usual way, which was caused by a great number of its servants suddenly and wrongfully refusing to work.

Nor do I consider the rule of the state courts different from that of the federal court. This subject was treated in an able opinion by Judge Sanborn in Empire Transportation Co. v. Phila. & R. Coal & Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623, but there the defendant was excused because there was violence and interference by illegal methods. Here such was not the case.

In Brown v. Certain Tons of Coal, 34 Fed. 914, Judge Severens, speaking for the Circuit Court of Appeals, said:

"It was therefore a part of this contract that this unloading should be done within a reasonable time. It being the duty of the consignee to unload this freight, it was his duty to provide the facilities for doing so. He was bound to promptitude and diligence. The measure of that diligence is to be estimated by the urgency of the case, by the circumstances surrounding the parties, by the loss and damage which would accrue to the owner of valuable vessels by detention during the earning season of the year; and the circumstances in this case required that the consignee should exercise promptitude and a high degree of diligence in unloading these vessels."

Hardship, expense, or loss to the party performing his contract, or anything short of impossibility of performance, will not excuse a breach of the contract. In my opinion there has been a breach here to the damage of the libelant, and it should have a decree on the cross-libel.

THE TRANSFER NO. 17.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 7.

1. COLLISION ⟹106—COLLISION RULES—WHAT GOVERNS.
   A vessel coming out of her slip and maneuvering to get on her course, or one maneuvering to get into her slip, is not on any course, and the steering and sailing rules do not apply, but article 27 of the Inland Regulations (Comp. St. § 7901), which is the special circumstance rule, is applicable.
2. COLLISION ⟹106—LOOKOUT—NECESSITY.
   Where the master of a tug, which was maneuvering to push its floats up the river, so as to berth them, would have known of the perilous situation as another tug was maneuvering in the vicinity, if proper lookout was kept, the first tug cannot escape liability on the ground that the master was not at fault for not sooner discovering the situation.
3. COLLISION ⟹106—VESSEL AT FAULT—LIABILITY.
   Libelant's tug, which with its tow attempted to squeeze in behind the stern of a second tug, which was attempting to push her floats up the river so as to berth them, etc., *held* at fault for the collision, and the second tug also was at fault for beginning its maneuver, without regard to the presence of libelant's tug, which could plainly be seen if lookout was kept.

Appeal from the District Court of the United States for the Eastern District of New York.

Libel by the Lehigh Valley Transportation Company against the steam tug Transfer No. 17, her engines, etc., claimed by the New York,

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New Haven & Hartford Railroad Company. There was a decree dismissing the libel, and libelant appeals. Reversed, with directions to reinstate the libel and enter a decree for half damages against the steam tug Transfer No. 17.

This is an appeal from a decree dismissing a libel of the Lehigh Valley Transportation Company, as owner of the tug Geneva, to recover damages sustained by the Geneva as a result of a collision which occurred on July 13, 1913, in the North River, off the Lehigh Valley Terminal at Jersey City, at about 4:30 a. m.

The libelant is a corporation organized and existing under the laws of the state of New Jersey, and it is conceded that the Lehigh Valley Transportation Company and the Lehigh Valley Railroad Company are one and the same: the Railroad Company being the owner of the Transportation Company.

An answer was filed by the New York, New Haven & Hartford Railroad Company, as claimant of the steam tug Transfer No. 17, in which it was alleged that the collision and damage complained of were not caused or contributed to by any fault of those in charge of Transfer No. 17, but was due wholly to the fault and negligence of the tug Geneva.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones, of New York City, of counsel), for appellant.

Charles M. Sheafe, Jr., of New York City, for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] This collision occurred in daylight, when everything was in plain view, and there was no difficulty in seeing. Daylight collisions do not occur without fault on the part of one, and sometimes of both, vessels. In the present case the District Judge has found that the Geneva was at fault, but that Transfer No. 17 was not at fault, and on that account the libel was dismissed.

This is a case of special circumstances under article 27 of the Inland Regulations (Act June 7, 1897, c. 4, § 1, 30 Stat. 102 [Comp. St. § 7901]), which is found in the margin.[1] In the William A. Jamison, 241 Fed. 950, 154 C. C. A. 586, this court declared that a vessel coming out of her slip and maneuvering to get on her course, or one maneuvering to get into her slip, is not navigating upon any course, and the steering and sailing rules do not apply. In this case Transfer No. 17 was maneuvering to get her floats into their slip, and the Geneva, which had just come out of a slip, was floating down with the tide to get into another slip, in close proximity, but had not actually begun the maneuver of entering the slip. It was the duty of each of these vessels to act with prudence. And the question is: Did they do it?

[2, 3] Transfer No. 17, with car float No. 48 on her port side and car float No. 39 on her starboard side, arrived at the Bridges at the Lehigh Valley Railroad Terminal at Jersey City on the morning of July 15th at about 1 o'clock. She found the Bridges all full, and lay outside until 3 a. m., when she was ordered to put the floats into Bridges 5 and 6, respectively. Two unsuccessful attempts to do this

1 "Article 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

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were made, and the time from 3 o'clock until the collision occurred was spent in getting the floats into position for entering the Bridges because of the unusually strong ebb tide. At about 4 o'clock the Transfer had the floats in a position where the tow of the float upon her port hand was against the outer end of the rack between Bridges 5 and 6. The bow of the outer float upon the starboard side was against the southerly side of Pier A, or close to it. The two floats were held together at the bow by a line, and another line ran from the starboard float bow to Pier A. The Transfer was backed out from between the two floats, and had her bow against the stern of the port float, in order to push the floats around and up the river, with the idea that the floats would be separated by letting out the cross-line and would "split" on the center pin, and with the idea of shoving the two floats into those Bridges when they reached a position where they could be forced in. The floats were 320 feet long and lying at an angle across the entrance of the Bridges. There was a float in Bridge No. 4, which was 234 feet in length, and the floats of the Transfer rested against the ends of this float in Bridge No. 4, and the latter float projected about 50 feet beyond the end of the rack between Bridges 4 and 5. The result was that the floats of the Transfer to a considerable extent locked the entrance to Bridge 1.

The steam tug Geneva had taken in tow on her port side on this same morning and at about 4 o'clock a Lehigh Valley car float which she was to put into Bridge No. 1. The tug had come out of the Morris Canal Gap which was north of where Transfer No. 17 was lying. The Geneva backed out from the upper side of Pier A into the river, and got her float upon her starboard side, and the tug and float were on a line substantially up and down the river. The Geneva then started to drop down with the tide, there being a very strong ebb tide. The captain of the Geneva testified that when he got out into the river and swung the float around he judged he was about 250 feet from the end of the pier and that he was out far enough to clear the floats by 100 feet, if not more, if Transfer No. 17 had remained at rest. Before he came out from Pier A he knew of the position of Transfer No. 17. After he got out into the river and was drifting down he says Transfer No. 17 started to push her floats up the river and that the out-river end of the float swung up in an arc of a circle. He claimed that he immediately blew an alarm and started his engine at once straight ahead, "hooked up to try to get away from him (Transfer No. 17), to get further up the river." Prior to this attempt of Transfer No. 17 to push her floats up the river the Geneva evidently intended to drop down and pass as close behind the stern of the New Haven floats as might be, and then attempt to shove her own float up and into Bridge 1. But in carrying out such a maneuver the duty was clearly upon the Geneva not to attempt to squeeze in behind the stern of Transfer No. 17 by a slight margin of safety and without indicating her navigation and making known that she desired the Transfer to remain still until she had passed. And as a matter of fact there was nothing in the river which would have prevented the Geneva from going out a little further into the stream instead of trying to pass under the stern of the Transfer and in such

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close proximity thereto. If the Transfer had remained stationary, it is by no means certain that the Geneva could have succeeded in the maneuver she contemplated. Some of the witnesses testified that the Geneva could not have accomplished it on an ebb tide, as she was a small boat, and did not have sufficient power to accomplish such a result. The captain of the Geneva, before he came out of his slip, had seen Transfer No. 17 maneuvering unsuccessfully to bridge her floats, and after he got out into the river he looked again at her, and saw she was at right angles on the stern of the float. He admitted that he did not observe the movements the Transfer was about to make, and that he acted without any reference to those movements. In so doing he certainly did not act with the prudence the law required, and the liability of the Geneva is undoubted.

The court, however, does not agree with the District Judge in his conclusion that no blame can be attached to Transfer No. 17. If the Geneva started down the river after No. 17 had begun to shove her floats up, as the District Judge has found, there would be a great deal to be said in favor of his exoneration of No. 17; but as we read the evidence it has convinced us that the Transfer began to shove after the Geneva started drifting down the river. The master of the Luzerne, who witnessed the collision, testified that after he saw the Geneva in the river, and drifting down with the tide, Transfer No. 17 started shoving the floats up, and that they were shoved quite a distance before the Geneva blew her alarm, which the New Haven tug answered. He was asked whether the New Haven tug (Transfer No. 17) stopped after the alarm was blown, and he was very positive she did not. He formed his opinion from the action of the water from the tugboat and from the bells, which he could hear being rung from the pilot house of the tug. The master of No. 17 testified that he saw the Geneva when he started to push the floats in, and that she was then out in the river dropping back. At a subsequent time he was asked whether he had gotten under way when he first saw the Geneva, and he replied, "Just starting to shove the floats up when I saw her." Afterwards he said he did not see her before he started to move the floats. "I had started to move the floats when I first saw her." When he started to push the floats into the river, it was necessary for him to swing between four and six points of the compass, and he was asked whether, before he started a maneuver of that sort, he would count himself a prudent man unless he looked to see what other boats there were in the river. He replied, "Well, it probably would be imprudent if I didn't look." He claimed, however, that he did look, and was asked, "How is it that you didn't see her when you first started out?" To this he replied, "Well, I don't know." Afterwards he was asked how long he had been shoving on his floats when he first saw the Geneva. His reply was, "A very short interval of time, possibly 10 or 15 seconds." The Geneva must have been in plain view when Transfer No. 17 began the maneuver which resulted in this collision. If the captain of No. 17 did not discover her before he commenced the maneuver, it must have been because he did not look, and if he began it without looking he was at fault. He was in like manner at fault if he began his maneuver, as we think he did, after *the*

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Geneva was out in the river and dropping down with the tide. If it could possibly be claimed that the master of No. 17 was not at fault for not sooner discovering the situation, the answer must be that the Transfer was at fault because of the absence of a lookout to give warning seasonably of the close proximity of the Geneva. Wolcott v. Union Ferry Co. of New York & Brooklyn, 225 Fed. 40, 140 C. C. A. 366; The William A. Jamison, supra. In any view it is possible to take, it seems to us that there was a lack of prudence as well on the part of Transfer No. 17 as on the part of the Geneva.

The decree dismissing the libel is reversed, and the court below is directed to reinstate the libel and enter a decree for half damages against the steam tug Transfer No. 17.

In re WEIDENFELD.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 57.

1. BANKRUPTCY ⟸236—EXAMINATION—ESTATE IN PROCESS OF ADMINISTRATION.
   The estate of an alleged bankrupt is in process of administration from the time of the filing of the petition, and hence, though adjudication had not been had, an order for the examination of the bankrupt's wife, pursuant to Bankruptcy Act, § 21a (Comp. St. § 9605), was warranted; it appearing that the bankrupt by his dilatory tactics had delayed adjudication more than one year.

2. BANKRUPTCY ⟸443—PETITION TO REVISE—PARTY IN INTEREST.
   An alleged bankrupt is not a party aggrieved, within Bankruptcy Act § 24b (Comp. St. § 9608), by an order for the examination of his wife, and he cannot maintain a petition to revise the same.

3. BANKRUPTCY ⟸234, 443—EXAMINATION OF WITNESSES—DISCRETION OF COURT.
   An order, under Bankruptcy Act, § 21a (Comp. St. § 9605), for the examination of witnesses is a discretionary order, and as such is not reviewable upon the application even of the party aggrieved, except for an abuse of discretion.

4. BANKRUPTCY ⟸234—EXAMINATION OF WITNESSES—ABUSE OF DISCRETION.
   In involuntary proceedings, an order under Bankruptcy Act, § 21a (Comp. St. § 9605), for the examination of the bankrupt's wife as a witness, *held* not an abuse of the court's discretion.

Petition to Revise Order of the District Court of the United States for the Eastern District of New York.

In the matter of Camille Weidenfeld, alleged bankrupt. Petition by the alleged bankrupt to revise an order of the District Court denying the bankrupt's application for an order directing that the referee or special master should determine for the information of the court whether a motion for the examination of the bankrupt's wife, which had been granted, was made in good faith. Order affirmed.

Herman J. Witte, of New York City, for alleged bankrupt.

Otto B. Schmidt, of New York City (Marshall S. Hagar, of New York City, of counsel), for creditor Fischer.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

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ROGERS, Circuit Judge. It appears that an involuntary petition in bankruptcy was filed against the alleged bankrupt on May 12, 1917. The alleged bankrupt appeared and filed his answer, and denied the allegations of the petition, and up to the present time no adjudication has been had; the trial of the issue having been repeatedly adjourned at his request. It appears, therefore, that for more than 17 months the creditors of this alleged bankrupt have been prevented from prosecuting or in any way endeavoring to collect their claims.

In July, 1917, one Bessie C. Fischer, a creditor with claims against the alleged bankrupt aggregating upwards of $14,000, and who had been unable to prosecute her claims by reason of the pending bankruptcy proceedings, made an application for the examination of the alleged bankrupt, his wife, Katherine C. Weidenfeld, and others, pursuant to section 21a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 551 [Comp. St. § 9605]), which may be found in the margin.[1]

The application to examine the alleged bankrupt was granted. The application to examine his wife was reserved subject to a renewal of the application. The alleged bankrupt having been examined, the application was renewed in December, 1917, for leave to issue a subpœna for the examination of his wife, and after due consideration the motion was granted on January 19, 1918, and an order to that effect was entered. That order, upon motion of the alleged bankrupt, and not upon the motion of his wife, was resettled, and, as resettled, was entered in the clerk's office on May 16, 1918. No application to review that order has ever been made by the wife.

Thereafter, and after the time to appeal or to revise the order of May 16th under section 24b of the act (Comp. St. § 9608), which is found in the margin,[2] had expired, the alleged bankrupt again, and not his wife, sought to obtain an order directing that a referee or special master should hear and determine for the information of the court whether the motion which had been made and granted for the examination of the wife was made in good faith. This application was denied on June 3, 1918, and on June 10, 1918, an order to that effect was entered; so that the petition to revise is to review this order of June 10th, and the petitioner is the alleged bankrupt, and not the wife, who is the witness to be examined.

The petitioner asks this court to declare the order erroneous, on the ground that the court before adjudication cannot inquire into

[1] "*Evidence.—a* A court of bankruptcy may, upon application of any officer bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: Provided, that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."

[2] "The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

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matters pertaining to the bankrupt's business, and had no right to make the order of April 10, 1918, and that it also exceeded its jurisdiction by denying the petitioner's motion by the order filed on June 10th, refusing to vacate the order of April 10th.

[1] Section 21a of the Bankruptcy Act, heretofore cited, authorizes the bankruptcy court upon the application of any creditor to require any designated person including the bankrupt's wife to submit to an examination concerning the acts, conduct or property of a bankrupt "whose estate is in process of administration" under the act. That Bessie C. Fischer, who made the application in this case, is a creditor, is not denied.

There has been a very decided difference of opinion in the courts as to when an estate "is in process of administration" under the act. But in 1914 the Supreme Court settled the matter in Cameron v. United States, 231 U. S. 710, 717, 34 Sup. Ct. 244, 58 L. Ed. 448. It declared, as we understand the decision, that the estate is in process of administration from the filing of the petition in bankruptcy; that being the time when the property of the alleged bankrupt passes in custodia legis. It is not material whether there has yet been an adjudication, or whether a receiver has yet been appointed; and it is not material whether the proceeding is in a voluntary or involuntary bankruptcy. The filing of the petition prevents any creditor from attaching the estate, and it is intolerable that a creditor should be left in the position in which this creditor finds herself for a period of a year and a half, with nothing determined as to her rights in the estate. The object of such an examination as is here proposed is to enable the court to discover the extent and whereabouts of the alleged bankrupt's estate, and to come into possession of it, in order that the rights of creditors may be preserved. The importance of an early examination in such cases has been more than once emphasized by the courts. In Cameron v. United States, 231 U. S. 710, 34 Sup. Ct. 244, 58 L. Ed. 448, the Supreme Court, in commenting upon the necessity of an early examination to ascertain the extent and whereabouts of the estate, said:

"If such examination is postponed until after adjudication, which may not take place for at least 20 days, within which the bankrupt in involuntary bankruptcy is given leave to appear and plead, the estate may be concealed and disposed of and the purpose of the act to hold it and to distribute it for the benefit of creditors defeated."

In the case of In re Fleischer (D. C.) 151 Fed. 81, 83 (1907), Judge Hough, then a District Judge, in referring to the necessity of prompt action in this class of cases said:

"The desirability and importance of promptly conducting an investigation into the affairs of any person petitioned into the bankruptcy court has been too often shown to be open to doubt. To wait until adjudication to ascertain from the bankrupt's own lips the situs of his property and his own explanations of the situation in which the creditors find themselves is in many cases giving to those guilty of fraud just the necessary time to permit the fraud to be consummated and the fruits thereof secured. In my opinion it is not too much to say that a skillful and vigorous use of early examinations of involuntary bankrupts is the one thing which enables creditors to prevent this statute being easily turned into a shield for dishonesty and a potent aid to fraud."

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[2] The petitioning creditor is clearly entitled to the order which has been entered. The alleged bankrupt has no standing in this court to complain of the order; he not being the party aggrieved within the meaning of section 24b.

[3, 4] We may add that in any event the order sought to be reviewed is a discretionary order, and as such would not be reviewable upon the application even of a person aggrieved, except for an abuse of discretion, and no abuse of discretion in the making of the order is shown.

In conclusion it must be said that the petition to revise which the alleged bankrupt has brought indicates what his policy has been throughout. He has sought to delay and to obstruct the orderly and proper administration of the bankruptcy court. The examination of his wife should take place at the earliest practicable time, and an end be put to the obstructive tactics which have been employed to hinder and delay creditors contrary to the intent of the Bankruptcy Act.

The petition to revise is dismissed, with costs.

LEHIGH VALLEY R. CO. v. NORMILE.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 18.

1. COMMERCE ⟸27(6)—"INTERSTATE COMMERCE"—RAILROADS.
A brakeman, employed by a railroad company engaged in interstate commerce, is himself engaged in interstate commerce, while working on a train carrying goods destined for points outside of the state.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. APPEAL AND ERROR ⟸1062(1)—SUBMISSION OF ISSUES TO JURY—IMPROPRIETY.
Where two issues of negligence were submitted to the jury, and the verdict was general, a new trial should be granted, if either was improperly submitted.

3. MASTER AND SERVANT ⟸137(3)—INJURIES TO SERVANT—SIGNALS.
In an action by a railroad brakeman, who was thrown from a car on which he was standing to give signals during switch maneuvers, *held*, that the failure of the engineer to give notice of his intention to back the train was immaterial.

4. APPEAL AND ERROR ⟸262(1)—REVIEW—EXCEPTIONS.
Where the defendant railroad company did not except to the improper submission of an issue of negligence, *held*, that it cannot take advantage of the matter on writ of error.

5. MASTER AND SERVANT ⟸286(30)—INJURIES TO SERVANT—NEGLIGENCE—JURY QUESTION.
In an action by a railroad brakeman, who was thrown from a car on which he was standing to give signals for switching, evidence *held* sufficient to carry to the jury the question whether the engineer was negligent in backing the train with unnecessary violence, and to sustain a verdict against the company.

In Error to the District Court of the United States for the Northern District of New York.

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Action by Frank L. Normile against the Lehigh Valley Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Cobb, Cobb, McAllister, Feinberg & Heath, of Ithaca, N. Y. (Riley H. Heath, of Ithaca, N. Y., of counsel), for plaintiff in error.

Dorr & Seubert, of Syracuse, N. Y., for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] The defendant below, a railroad corporation, was engaged in interstate commerce. On the 28th of November, 1916, plaintiff below, an employé of the defendant below, was working as a brakeman upon a train of 30 cars in the east-bound yards of the defendant below at Sayre, Pa. This train carried commerce and was destined for a point outside of the state of Pennsylvania, and was therefore engaged in interstate commerce, as was the plaintiff below at the time of his injury. In its yard, the defendant below maintained sidings which diverged from the lead or leader track. They were numbered upon the drawing in evidence from 2 to 28, among which are sidings 16 and 18. Plaintiff below was directed to his work on this train at about 6 o'clock in the evening, and between that time and up to 7:30, the hour of his accident, helped in various movements in the making up of the train. When completed, the train consisted of an engine, 30 cars, and a caboose. As thus made up, the plaintiff below was a member of the crew which, it was intended, should move the train from siding 16 south to Coxton, Pa., and points outside the state.

At the time of the injury to the plaintiff below, the train was engaged in the doubling-over movement from siding 16 to siding 18. Plaintiff below took a position, for the purpose of signaling, on the second or third car from the rear end of the 30 cars, about 7 or 8 feet from the head end of his car, and from this position he was later thrown and sustained very serious injuries. From here the train started out of siding 16 onto the lead track at a speed of about 8 miles per hour, to a point about 128 feet beyond siding 16, and then came to a full stop, pursuant to signals transmitted from the conductor, who was stationed on the ground, to the plaintiff below, and in turn by him to the head brakeman, who was on the seventh or eighth car from the engine. The conductor immediately gave plaintiff below a slow back-up signal, which he transmitted to the head brakeman with his lantern, who passed it on to the engineer. This was responded to by backing up, which plaintiff below says he felt through a slight backward move of the car under him. The engineer then moved the train forward without any signal, and the car on which the plaintiff below was standing moved forward through a space of about 15 feet, then without signal the movement was reversed, the engine backed, forced the cars between the plaintiff below and the engine back against the car he was standing on, which, at the time, he says, was still in forward motion, with great force and violence, resulting in the plaintiff below being thrown forward through a space of 7 or 8 feet, and he fell between his car and the next one. Just

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prior to this last movement, which resulted in his fall, plaintiff below stood in a position braced with feet apart and toes pointed outward, which is described as the usual and customary position for trainmen to take on the top of moving cars under similar circumstances.

[2] The court below left two questions to the jury with reference to the liability of the defendant below: First, whether the engineer negligently failed to give a whistle signal before he began to back the train, as he was required either by a rule or by the practice of the company to do, for the purpose of giving notice of his intention; second, whether he negligently backed the train with such unnecessary violence as to cause the injury to the plaintiff below. No one can say whether the jury arrived at their verdict in favor of the plaintiff below on both these grounds, or one of them, or, if so, upon which. Therefore, if either was improperly submitted, there should be a new trial.

[3, 4] The plaintiff below testified that he knew the engineer, after going ahead to take up the slack between the cars, was going to back, and, of course, he was further advised of this fact by the bumping of each car between his and the engine until his own car was reached. Therefore the failure to give a signal to that effect was absolutely immaterial. If given, it would not have informed him of anything more than he already knew. If the engineer was negligent in this respect, his negligence did not contribute in any way to the accident, and the question should not have been submitted to the jury as a reason for holding the defendant below liable to the plaintiff below. But as this point was not presented to the court below, and no exception was taken to cover it, it is not helpful to defendant below here.

[5] The defendant below disputed the severity of the violence caused by the abrupt stopping of the car the plaintiff below stood on, and the reversing of its movement; but the evidence as to this raised a question for the jury as to whether or not there was an unusual and violent movement such that an ordinary prudent engineer would not have caused in the exercise of ordinary care and caution. Texas & Pacific Ry. Co. v. Behymer, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. Ed. 905; Curran v. Lake Champlain Co., 211 N. Y. 60, 105 N. E. 105; Breed v. Lehigh Valley Co., 131 App. Div. 492, 115 N. Y. Supp. 1019.

We believe the court below correctly submitted the issue of fact to the jury as to whether or not the engineer negligently backed the train with such unnecessary violence as to cause the injury. Considering these facts, the length of the train, the position of the plaintiff below near the rear end thereof, and that the train was in forward movement when suddenly reversed, and a violent movement backward was indulged in, not in response to any signal from any member of the crew, but for reasons known only to the engineer, the jury could predicate negligence thereon.

The fact that there was a forward movement and then a sudden reverse, with growing momentum, produced by the force of each car (some 25 or more in number) striking the other, would cause the car on which the plaintiff below was standing to be bumped backward with a very unusual and dangerous blow.

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The court properly submitted the question of contributory negligence to the jury, as it did also the question of assumption of risk. For all that appears, the jury may have charged the plaintiff below with some contributory negligence, for the verdict is a small one, $5,000 for the loss of his arm.

We find no error, to which exception has been taken, which warrants a reversal.

Judgment affirmed.

GREAT NORTHERN RY. CO. v. JOHNSON.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5130.

1. MARRIAGE ⟸13—COMMON-LAW MARRIAGE—RECOGNITION.
Minnesota recognizes common-law marriages.

2. MARRIAGE ⟸3—WHAT LAW GOVERNS.
Where a man sent a woman residing in Missouri a written contract, signed by him, stating that the parties would henceforth be husband and wife and so conduct themselves, the laws of Missouri, where the woman accepted the contractual offer, govern.

3. MARRIAGE ⟸13—COMMON-LAW MARRIAGE—RECOGNITION.
Missouri recognizes and enforces common-law marriages (Rev. St. Mo. 1909, § 8279); the rule being that marriage is a civil contract, possessing in its creation in præsenti the elements, and only the elements, attaching to any contract.

4. MARRIAGE ⟸20(1)—COMMON-LAW MARRIAGE—CREATION.
In Missouri, mutual assent to the present institution of the status of matrimony is sufficient to establish a valid common-law marriage; so the marriage may be established where a nonresident duly executed an agreement that he and a woman residing in Missouri should henceforth become husband and wife, and she accepted the offer.

5. MARRIAGE ⟸3—STATES.
The question whether the parties must be together, or within the same jurisdiction, at the time of celebrating a marriage, is for the states, except in the District of Columbia and the territories.

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Action by E. H. Johnson, as administrator, etc., against the Great Northern Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

M. L. Countryman, of St. Paul, Minn., and C. J. Murphy, of Grand Forks, N. D. (T. A. Toner, of Grand Forks, N. D., on the brief), for plaintiff in error.

L. J. Palda, of Minot, N. D., for defendant in error.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

STONE, Circuit Judge. Writ of error from judgment for damages on account of personal injury death claim brought by wife.

The plaintiff founded her right of recovery upon the claim that she

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was the wife of deceased through a common-law marriage. Plaintiff based the marriage upon a written contract sent from Minnesota, where deceased then was and continued for some time afterwards, to her in Missouri, where she resided and was employed. Her testimony was that upon receipt of the duplicate papers, which had been signed by deceased, she signed them and returned one to him. The contract in question was Exhibit C in this case and was as follows:

"St. Paul, Minn., March 10, 1916.

"It is hereby agreed, by and between E. R. Spiers and Mayme Woodall, from this date henceforth to be husband and wife, and from this date henceforth to conduct ourselves towards each other as husband and wife, the said E. R. Spiers to contribute to the support and maintenance of the said Mayme Woodall as her husband, and the said Mayme Woodall to conduct herself towards the said E. R. Spiers as a dutiful wife.

"[Signed] E. R. Spiers.
"Mayme Woodall."

The contentions of plaintiff in error are concisely stated in a portion of the printed argument as follows:

"* * * Claimant has testified in the case at bar that she intended at the time of executing Exhibit C to then become the wife of decedent. If this statement of hers must be believed, and the law does not require the parties to agree in the presence of each other, then we concede that the finding of marriage in this case must be sustained."

[1-3] The state of Minnesota recognizes common-law marriages, but the contract is governed by the laws of the state of Missouri, where acceptance by plaintiff of the contractual offer made by deceased occurred. That state recognizes and enforces common-law marriages. R. S. Mo. 1909, § 8279; Dyer v. Brannock, 66 Mo. 391, 27 Am. Rep. 359; State v. Bittick, 103 Mo. 183, 15 S. W. 325, 11 L. R. A. 587, 23 Am. St. Rep. 869; State v. Cooper, 103 Mo. 266, 15 S. W. 327; Banks v. Galbraith, 149 Mo. 529, 51 S. W. 105; Topper v. Perry, 197 Mo. 531, 95 S. W. 203, 114 Am. St. Rep. 777; Bishop v. Investment Co., 229 Mo. 699, 129 S. W. 668, Ann. Cas. 1912A, 868; Imboden v. Trust Co., 111 Mo. App. 220, 86 S. W. 263; Davis v. Stouffer, 132 Mo. App. 555, 112 S. W. 282. Under these decisions the rule seems to be that marriage is a civil contract, possessing in its creation in præsenti the elements, and only the elements, attaching to any contract, but that because it establishes a legal status of grave concern to the state and society, and because of the natural temptations to perjury, and the difficulties of combating such testimony, both of which frequently arise, the courts will closely scrutinize testimony intended to establish such a contract after the death of one of the parties thereto.

[4, 5] The court fairly submitted the facts of execution, time of execution, and intent at time of execution of the contract. The evidence has been carefully examined, and in our judgment there was substantial evidence upon all of those points to sustain the verdict of the jury in favor of the plaintiff. In fact, so far as the matter of present intention of the parties is concerned, it may be doubted whether there was any room for submission to the jury. The con-

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tract was written, and its expressions are not only unambiguous, but are emphatic as to that point. The agreement is:

"* * * From this date henceforth to be husband and wife, and from this date henceforth to conduct ourselves toward each other as husband and wife. * * *"

In approaching the proposition that the parties must be together or within the same jurisdiction, it is to be noted that this matter of marriage is for the states, except in the District of Columbia and the territories (Davis v. Pryor [8th Cir.] 112 Fed. 274, 50 C. C. A. 579; 26 Cyc. 829, and citations in notes 12 and 13 thereto), and is to be determined by the law of the state where it was contracted or celebrated (26 Cyc. 829, and citations in note 14 thereto). So far as the law on the point here involved has been defined by the adjudications of the Missouri courts, it will be followed, irrespective of the view which might be taken by this court, if the question were open. A careful examination of the above-cited Missouri cases, and of many others from that state, convinces that in that state the marriage contract possesses the elements of an ordinary contract and none others. That contract establishes a very important status, but the contract itself is in no respect peculiar. Mutual assent to the present institution of the status is all sufficient. No other act, such as cohabitation (Davis v. Stouffer, 132 Mo. App. 555, 112 S. W. 282), is necessary to complete the institution of the status where the mutual assent contemplates a marriage in præsenti. Why should the physical presence of the parties be essential to the legality of this contract, any more than of any other? It is not for us to devise means of making common-law marriages difficult. It is our duty to recognize the law as it exists. Nor is there any reason why the parties should be within the same jurisdiction. The existence and validity of the contract must be determined by the law of the place where it is legally regarded as made. Here, however, there is no point in the suggestion, for both of the states involved approve common-law marriages.

The judgment is affirmed.

TRAMMELL v. YARBROUGH et al.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1918. Rehearing Denied Feb. 13, 1919.)

No. 3305.

1. BANKRUPTCY ⟸88(2)—PETITION—INTERVENTION.
While Bankruptcy Act, § 59f (Comp. St. § 9643), provides that creditors other than the original petitioner may at any time enter their appearance and join in the petition, yet, where a petition in involuntary bankruptcy is entirely dismissed, it is improper for the court to reserve to other creditors the right to intervene and have the matter reopened, and where creditors attempted to intervene, pursuant to such leave, such proceeding cannot be deemed a continuation of the original one.

2. BANKRUPTCY ⟸56—ACTS OF BANKRUPTCY—PETITION.
Under Bankruptcy Act, § 3b (Comp. St. § 9587), a petition in bankruptcy cannot be maintained on alleged acts of bankruptcy occurring more than four months before the filing of the petition.

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Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

On the petition of Jack Yarbrough and others to intervene in bankruptcy proceedings previously instituted, Thomas Trammell was adjudicated a bankrupt, and he appeals. Reversed, with directions that the proceeding be dismissed.

Frank Willis, of Canadian, Tex., and J. H. Beall, of Sweetwater, Tex. (Ed. J. Hammer and Beall & Douthit, all of Sweetwater, Tex., on the brief), for appellant.

R. C. Chambers, of Abilene, Tex. (James P. Stinson, of Abilene, Tex., on the brief), for appellees.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. On the 11th day of July, 1917, three creditors of Thomas Trammell filed an involuntary petition in bankruptcy against him, alleging the commission of acts of bankruptcy within four months prior to the date mentioned. The alleged bankrupt's answer to that petition put in issue its averments of insolvency and of acts of bankruptcy, and averred a state of facts relied on as estopping the petitioners to maintain the proceeding. On July 26, 1917, other alleged creditors of Trammell filed an intervening petition, which, so far as appears, was not acted on by the court, and was not served on, or answered or pleaded to, by Trammell. On September 21, 1917, another alleged creditor filed an intervening petition, which the alleged bankrupt demurred to and answered. On October 16, 1917, the court made the following order:

"On this the 16th day of October, A. D. 1917, after the above styled and numbered cause had been regularly set down for a hearing upon this day, came on to be heard the said creditors' petition in bankruptcy, seeking to secure an adjudication in bankruptcy, and the intervention as filed by other creditors seeking an adjudication, and the petitioning creditors and the intervening creditors having failed to appear and prosecute their action, the case was heard upon the answer and demurrers of the alleged bankrupt, and it appearing that the petitioners and interveners have failed to prosecute their action, and that the demurrers as filed by the alleged bankrupt are sufficient:

"It is therefore ordered that the above styled and numbered cause be dismissed, at the costs of petitioning creditors and interveners, reserving, however, to any other creditors of the alleged bankrupt the right to intervene and have this matter reopened within 30 days, and in the event no other creditor of said alleged bankrupt so intervenes for said purpose, then this order of dismissal to be final. It is further ordered that a copy of this order be published three consecutive days in a leading Dallas newspaper."

[1] On November 15, 1917, Jack Yarbrough and others filed a petition, which averred the above-stated prior occurrences in the bankruptcy proceeding, and that petitioners were creditors in amounts stated, adopted the allegations of the original and previously filed intervening petitions in regard to the acts of bankruptcy and the insolvency of Trammell, and prayed that the above-mentioned order dismissing the proceeding be set aside, that the proceeding be reopened, that the petitioners be permitted to intervene therein, and that a hearing be had on the original and intervening petitions. On Decem-

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ber 5, 1917, Trammell demurred to and answered the petition just mentioned, and prayed that the same be referred to a jury. The court made an order reopening the bankruptcy proceeding, and permitting the petitioners in the last-filed petition to intervene in the cause and to join with the original petitioning creditors therein, but referred the cause to a special master in chancery for a hearing upon the issues of fact therein. An adjudication of bankruptcy was made on such master's report. Trammell appeals from that decree.

The above order of October 16, 1917, adjudged that the petitioning creditors and those who theretofore had intervened were not entitled to maintain the proceeding. The court's action was not based alone upon the failure of those creditors to prosecute the proceeding. No reservation was made in favor of the parties adversely affected by that ruling. They did not again appear in the proceeding, and it then ended in so far as they were actors in it. The order undertook to reserve "to any other creditors of the alleged bankrupt the right to intervene and have this matter reopened within 30 days." A revival of the proceeding at the instance of other creditors was not a joinder by them with those who previously had prosecuted the proceeding, because the latter had ceased to be actors in it. So far as they were concerned, the proceeding was not revived. They remained out of it. A reopening of the proceeding to let in other creditors to carry it on, after the elimination from it of all who previously had been actors in it, was in necessary effect the institution of a new proceeding. The statute provides that "creditors other than the original petitioners may at any time enter their appearance and join in the petition." Bankruptcy Act July 1, 1898, c. 541, § 59f, 30 Stat. 561 (Comp. St. § 9643). This provision presupposes the continued presence in the proceeding of petitioners with whom other creditors may join. It does not contemplate a revival of the proceeding after its life has been ended by the elimination of all who were actors in it. When that occurred, there was nothing left to intervene in. In re Bolognesi, 223 Fed. 771, 139 C. C. A. 351. We do not think that what was done by and at the instance of the creditors who appeared in the proceeding after the making of the order quoted properly can be regarded as an intervention in a pending proceeding.

[2] The petition under which the proceeding was opened was filed more than 4 months after the commission of the alleged acts of bankruptcy. This was too late for a new proceeding based upon those acts to be maintainable. Bankruptcy Act, § 3b (section 9587). It follows that the adjudication appealed from was erroneous. It is reversed, with direction that the proceeding be dismissed.

Reversed.

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In re CAREY.

Petition of GRAUTEN.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 59.

BANKRUPTCY ⟸78—PETITION—RIGHT TO ANSWER.

As Bankruptcy Act July 1, 1898, § 67f (Comp. St. § 9651), vacates judgments rendered within four months of the filing of the petition, *held* that, under sections 1(9), 18b, and 59f (sections 9585, 9602, 9643), a judgment creditor of an alleged bankrupt, whose judgment was recovered within the four months period, might answer the petition; the filing of the petition destroying the lien of the judgment and leaving the judgment creditor an unsecured creditor.

Petition to Revise Order of the District Court of the United States for the Eastern District of New York.

In the matter of Charlotte A. Carey, alleged bankrupt. Petition by Elizabeth J. Grauten to revise an order striking out, on the ground that she was a preferred and secured creditor, the answer of the petitioner opposing the adjudication. Order reversed, and cause remanded.

Petition to revise an order in bankruptcy entered in the District Court for the Eastern District of New York. The District Judge granted an order on the 15th of June, 1918, striking out the answer of the petitioner, a creditor, for the reason that she was a preferred and secured creditor, and retained her preference and security, and had no standing to oppose adjudication of the alleged bankrupt. The petitioner appeals.

Walter B. Milkman, of Brooklyn, N. Y., for Elizabeth J. Grauten, answering creditor and petitioner.

Maurice B. Gluck, of New York City, for petitioning creditors.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The petitioner recovered a judgment in the New York Supreme Court for $3,680.21 and issued execution to the sheriff, to whom a fund sufficient to satisfy the judgment came on the 19th of March, 1918. An involuntary petition in bankruptcy was filed by creditors. An order staying the sheriff of Kings county from paying over the moneys so held was granted. Before adjudication, the petitioner herein filed her answer to the petition in bankruptcy, denying that the petitioning creditors were bona fide and actual creditors of the alleged bankrupt, denying insolvency, and that any act of bankruptcy had been committed, and that the facts did not set forth sufficient to constitute an act of bankruptcy. The trial presented by this issue was had on the 5th of June, 1918. A motion was then made "to dismiss the answer, and for an order declaring the alleged bankrupt to be insolvent," on the ground that the petitioner was a preferred and secured creditor and not entitled to be heard. Later the court struck out the answer and decreed that an adjudication follow. In this the court erred.

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The petitioner was a creditor up to the time of the satisfaction of her judgment. When the bankruptcy intervened on March 23d, the benefits she had secured by her judgment and execution thereunder were suspended, but she still maintained her rights as a creditor. Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555. It is provided in section 67 of the Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 564 (Comp. St. § 9651):

"f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same. * * *"

And section 18b (section 9602) provides that any creditor may plead to the petition, and section 59f (section 9643) that creditors other than original petitioners, may file an answer. Section 1, cl. 9 (section 9585), defines a creditor as one who owns a demand or claim provable in bankruptcy.

By virtue of section 67f of the act, if it should be ultimately determined that Charlotte A. Carey is in fact a bankrupt and therefore that this petition is well founded, the petitioner would be a creditor. She would still have her claim or demand provable in bankruptcy, although deprived of her preference. If, in the event of a legal adjudication, she is such a creditor, she must be a creditor for the purpose of contesting the propriety of an adjudication. In re C. Moench & Sons Co. (D. C.) 123 Fed. 977; Jackson v. Wauchula, etc., Co., 230 Fed. 409, 144 C. C. A. 551; Blackstone v. Everybody's Store, Inc., et al., 207 Fed. 752, 125 C. C. A. 290.

In Re Columbia Real Estate Co., 112 Fed. 643, 50 C. C. A. 406, relied on by the court below, the petitioner sought to intervene, not as a creditor of the bankrupt, but alleging that he had an equitable lien on real estate which stood in the name of a third person, but which real estate was in equity the property of the bankrupt. The petitioner claimed the lien was acquired through the ostensible owner, without knowledge of the rights of the bankrupt in the property. The Circuit Court for the Seventh Circuit held that a dismissal of the petition on demurrer was not a final decision upon the merits of the petitioner's rights as equitable mortgagee, and concluded that the order was not appealable. Under the facts of the case the court considered the petitioner as a stranger to the proceeding.

The order is reversed, with costs, and the cause remanded, with instructions to vacate the adjudication in bankruptcy, and to permit petitioner's answer to stand, and proceed with the trial of the issue accordingly.

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REYNOLDS et al. v. HOURIGAN et al.

In re HANCE.

(Circuit Court of Appeals, Third Circuit. December 9, 1918.)

No. 2400.

BANKRUPTCY ⊂=341—CLAIM AGAINST TRUSTEE FOR RENT—DISCRETION OF COURT.

Disallowance of the claim of bankrupt's landlord for rent after all the personal property had been sold by the trustee and removed, except articles to which the landlord made an unwarranted claim as fixtures, and which remained in the building pending decision as to their ownership, *held* within the court's discretion.

On Petition for Review from the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

In the matter of John Hance, bankrupt. On petition to review order denying claim of Reynolds & Reynolds for rent. Affirmed.

Reynolds & Reynolds, of Wilkes-Barre, Pa., for petitioners.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

PER CURIAM. This case arises in the settlement of the bankrupt estate of John Hance. That estate consisted of a lot owned by Hance, having a store building erected thereon, and certain personal property in said building. At the time of the bankruptcy, this property was under execution on process issued by Reynolds, a mortgage creditor. The receiver of the Hance estate notified the sheriff not to sell any personal property, but, in answer to inquiry by Reynolds, stated he was willing the sheriff's sale of the real estate should proceed. It did proceed, and Reynolds became the purchaser, and thereafter the receiver retained possession of the real estate for the purpose of disposing of the personal property in the store building, and sold all of the personal property in the building, except certain articles which Reynolds claimed were fixtures, notified the receiver not to sell, and which in his petition in the bankrupt court, before the attempted sale by the receiver, Reynolds there averred—

"are a part of the permanent structure, and any attempt of the removal will cause everlasting injury to your petitioners."

It subsequently appeared by a decision of the court that the claim of Reynolds was unwarranted, that the personal property he claimed belonged to the bankrupt estate of John Hance, and it is clear it would have been sold with the other personal property, had not Reynolds made this unwarranted claim. The referee made a proper allowance to Reynolds for the use and occupation of the premises up to the date of said sale and for 4 days thereafter, and refused to allow the claim of Reynolds for 38 days of alleged use and occupation before he subsequently got the key, and for some 7 or 8 months' alleged use and occupation thereafter, pending which the goods or the fixtures which Reynolds unwarrantedly claimed remained on the

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premises. It will thus be seen that, if Reynolds had not made the unwarranted claim for the personal property, he would no doubt have been given full and exclusive possession of the premises, at the time the unclaimed part of the personal property was sold. It is equally clear that out of his unwarranted claims this difficulty has arisen. The court below has reached the conclusion that the—

"referee's disposition of the rent claim of Reynolds fairly meets the equity of the case, and his opinion is accepted and adopted as expressing the opinion of the court."

We shall not enter into a discussion of the facts and circumstances of the case, further than to say that if either the receiver, who was then about giving way to the trustee, or the landlord, or both of them, had promptly called the attention of the court to the landlord's desire to have the key, and to the situation which was caused by his holding onto the personal property of the estate after the key was delivered to him, that the court could have made some order both as to the occupancy of the building and of the personal property of the estate therein which Reynolds was wrongfully claiming, but which the trustee was warned not to remove from the premises by Reynolds' averment of permanent injury. The case presented was one for an administrative exercise of discretion, which could have been readily met by either the trustee or the landlord, or both together, calling to the attention of the court. But neither of them did anything. If there was any act of omission or commission involved, clearly it may be said that Reynolds, as well as the trustee, shared therein. But, granting this, we see no reason why the creditors should suffer from a situation in which the landlord is not wholly free from fault. Under all the circumstances of the case, we think the case was one for the exercise of wise discretion, and the court below, in awarding Reynolds rent up to the time of the sale and a few days thereafter, fairly met the equity of the case.

We therefore affirm the decree of the court below, but, under all the circumstances of the case, we direct the costs of this appeal be paid by the bankrupt estate.

DALY v. NEW YORK DOCK CO.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 30.

1. WHARVES ⊜20(3)—WHARFINGER—CARE.
   While a dock company is not bound to provide enough water for any boat which may choose to come into the slip, it is bound to notify boats of any dangers or obstructions, the existence of which it knows, or ought to know, and which may be in the way of boats coming into the wharf.

2. WHARVES ⊜20(5)—INJURIES TO VESSELS—CONTRIBUTORY NEGLIGENCE.
   Where wharfinger failed to notify master of barge of a sunken spile, which the barge struck while it was being hauled into the wharf to be berthed, the master was not negligent for failure to examine the bottom; it appearing that he was unfamiliar with the obstruction.

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3. SHIPPING ⟸12—SURVEY—NOTICE TO WHARFINGER.
Where a barge was injured while being berthed at a dock by reason of a sunken spile, of which the wharfinger should have warned, the wharfinger is entitled to notice of survey of the barge, and, notice not having been given, a decree against the wharfinger should be affirmed, with only half costs.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by Bartle Daly against the New York Dock Company. From a decree for libelant, respondent appeals. Affirmed.

Davies, Auerbach & Cornell, of New York City (Charles E. Hotchkiss and Martin A. Schenck, both of New York City, and Henry C. Field, of Brooklyn, of counsel), for appellant.

Herbert Green, of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The libelant's barge Harrison, loaded with a cargo of coal, was sent on January 13, 1917, to Pier 29, there to be discharged. The tug placed the barge in the slip between Pier 28 on the north and Pier 29 on the south (which slip is about 141 feet wide). She was damaged while the master was attempting to berth her at Pier 29 by running upon a sunken spile. At the time of the injury, she was being hauled to the bulkhead at the inner end of the slip, there to be discharged of her cargo. The captain was hauling her into place by a line he caused to be tied to the dock and pulling her in thereby.

The appellant contends there was deep waterway on the southerly side of the slip, which was available for passage, and that the captain took the shallower water on the northerly side of the slip, and was therefore at fault. It is not made to appear that the captain had knowledge that the water was shallower on the northerly side; and, furthermore, it does appear that this was the one way for him to proceed in order to reach her berth at the place intended for unloading. This free space, the witnesses agree, was at the bulkhead at the foot of Harrison street, and there was no other way open to him. Not only did the captain testify to this, but the appellant's witness Flower. The appellant controlled the whole bulkhead under a lease, and owned and controlled the whole of Pier 29, and collected wharfage for the use of the same. There was testimony that both light and loaded boats tied up "all along here" (indicating the entire bulkhead); and it was the custom for boats to berth at the coal dock, as well as at Pier 29, for which the dock company collected wharfage.

[1, 2] While the dock company was not bound to provide enough water for any boat which chose to come into the slip, it was bound to notify boats of any dangers of obstruction, the existence of which it knew or ought to have known, and which may be in the way of boats coming into its wharf. If the boat had berthed, and the master had selected the place where the damage occurred, without examining the bottom with a pike pole, as usual, he would have been at fault; but the damage occurred while he was hauling her into her berth. He

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was unfamiliar with any obstruction, was without knowledge thereof, and there was nothing to put him on guard to cause him to sound. What was discovered later as submerged spiles at the point where the captain says the damage occurred, and all the surrounding circumstances, are sufficient to justify the District Judge in finding, as he did, that the damage was due to a submerged spile. Under the circumstances, the appellant, as a wharfinger, was obliged to give notice to the public of conditions that render the slip dangerous in the exercise of ordinary care and diligence. Heissenbuttel v. Mayor, etc., of N. Y. (D. C.) 30 Fed. 456; Toxaway Tanning Co. v. Sulzberger & Sons Co. et al., 242 Fed. 888, 155 C. C. A. 476.

[3] It appeared at the argument that a survey of the damaged vessel was had, but no notice thereof was given to the dock company, nor did the appellant have the advantage of being represented. This is a grievous fault, and one which is now not infrequently occurring. We disapprove of such practices, and, because it has been indulged in by the libelant here, we shall affirm with half cost only.

Decree affirmed.

TRUMANN COOPERAGE CO. v. DILLARD.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5107.

1. MASTER AND SERVANT ⟸278(16)—INJURIES TO SERVANT—EVIDENCE.
In an action by a servant, hurt by a piece of wood thrown by a rapidly revolving drop saw, evidence *held* sufficient to sustain a verdict in favor of the servant, on the ground that the mechanical dogs holding the wood were defective, and that the master knew it, but failed to repair.

2. EVIDENCE ⟸ 474(11)—OPINION—MACHINERY.
In an action by a servant, injured by a piece of wood thrown by a drop saw, testimony by an experienced sawyer, who had seen the accident, that, if the mechanical dogs intended to hold the wood had held, the piece would not have been thrown, was admissible.

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Action by J. A. Dillard against the Trumann Cooperage Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

J. H. Hawthorne, of Kansas City, Mo., and J. C. Hawthorne, of Jonesboro, Ark., for plaintiff in error.

C. T. Carpenter, of Marked Tree, Ark., for defendant in error.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

HOOK, Circuit Judge. [1] Dillard recovered a judgment against the Trumann Cooperage Company for personal injuries sustained in its service and caused by defective machinery. He was hit by a piece of wood thrown by a rapidly revolving drop saw, used to cut into short lengths logs held by mechanical dogs operated by steam. The negli-

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gence charged was in a defective condition of the dogs, which permitted the logs to wabble and be thrown out of position while being cut.

It is urged that the evidence was not sufficient to sustain the verdict; but there was substantial testimony that the dogs were working defectively, that the company knew it and failed to repair, and that the accident consequently resulted. Counsel weigh it too nicely and technically. The testimony of men as to conditions and occurrences which they have observed in the ordinary walks of life and with which they are familiar should be taken more roughly and practically.

[2] Complaint is also made that a witness was allowed to testify that, if the dogs had held the log, the piece would not have been thrown by the saw. The witness had seen the accident. He was a man of six years' experience as a sawyer, had operated drop saws, and for five years had been in the service of the defendant in nearly every capacity, except that of foreman. The court did not err in admitting the testimony. Gila Valley, Globe & Northern Ry. Co. v. Lyon, 203 U. S. 465, 474, 27 Sup. Ct. 145, 51 L. Ed. 276.

The judgment is affirmed.

S. STERNAU & CO., Inc., v. GEORGE BORGFELDT & CO.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 78.

APPEAL AND ERROR ⊜839(1)—REVIEW—MOOT CASE.

Review of a decision of the Circuit Court of Appeals cannot be had by agreement between counsel for the respective parties, but only on a record and hearing presenting a real contest.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by S. Sternau & Co., Incorporated, against George Borgfeldt & Co. From a decree for defendant, complainant appeals. Appeal dismissed.

John Robert Taylor, of New York City (J. Edgar Bull, of New York City, of counsel), for appellant.

Hans v. Briesen, of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. This appeal is dismissed without prejudice, under our decision in Stromberg Co. v. Arnson, 239 Fed. 891, 153 C. C. A. 19. Reconsideration of that case cannot be had by agreement between counsel for the respective parties, but only on a record and hearing presenting a real contest.

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JACOB SCHMIDT BREWING CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 27, 1918.)

No. 5128.

INTOXICATING LIQUORS ⟸188—INTERSTATE COMMERCE—BRANDING OF LIQUOR—SHIPMENTS.

Where defendant made interstate shipments of beer, and the only external marks indicating the nature of the packages were the name of the defendant brewing company, the trade-name, "Select," and a serial number, etc., *held*, that defendant was guilty of violation of Criminal Code, § 240 (Comp. St. 1916, § 10410), prohibiting the interstate shipment of liquors, unless the package be plainly labeled on the outside, etc.; the fact that the nature of the contents might have been inferred or learned from other sources being immaterial, etc.

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

The Jacob Schmidt Brewing Company, a corporation, was convicted of violating Criminal Code, § 240, and it brings error. Affirmed.

Halvor L. Halvorson, of Minot, N. D. (James Manahan and Paul G. Bremer, both of St. Paul, Minn., on the brief), for plaintiff in error.

John Carmody, Asst. U. S. Atty., of Fargo, N. D. (M. A. Hildreth, U. S. Atty., of Fargo, N. D., on the brief), for the United States.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

HOOK, Circuit Judge. The Jacob Schmidt Brewing Company was convicted of violating section 240 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1137 [Comp. St. 1916, § 10410]), which prohibits the shipment of intoxicating liquors in interstate commerce unless the package or container "be so labeled on the outside cover as to plainly to show the name of the consignee, the nature of its contents, and the quantity contained therein."

What defendant did was this: It shipped certain packages containing beer from St. Paul, Minn., to customers in Minot, N. D., on which the only external marks indicating the nature of the contents were, "Return to Jacob Schmidt Brewing Co.," with street address in St. Paul; the trade-name "Select"; and "Serial No. 33." The name of defendant and the trade-name it adopted for its product may be put aside. An inference might, perhaps, be drawn from them by some persons that the packages contained beer, instead of a nonintoxicating beverage, but the act of Congress has not left the matter to such inconclusive inferences. Nor is defendant in any better position with its expression, "Serial No. 33." It appears that defendant's "Select" beer, so called, was registered with officials of North Dakota under a pure food law of that state, and that the designation "Serial No. 33" was assigned to it. But that was done merely for the local purposes of the state law. It was not designed to give a new or additional name to a well-known article, when outside the purview of that law or in relations with which that law had no concern.

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Defendant invokes the rule that that is certain which can be made certain. The rule does not apply to a case like this. The act of Congress says that the nature of the contents of the package shall be plainly shown and shown on the outside cover. The requirement is a definite one, very easily complied with. It means that the marks must be of manifest, self-evident import, and must appear at the place indicated. It clearly excludes the idea of reference elsewhere for information, or of a general knowledge of the trade-names or brands adopted by particular merchants for their business, which have not gained a place in the common vocabulary of the country. What has been said also precludes resort to bills of lading issued by the carrier.

The judgment is affirmed.

BAYLEY & SONS, Inc., v. BLUMBERG et al.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 55.

1. JUDGMENT ⟸632—PERSONS WHO MAY ASSERT BAR.
A judgment in a suit by a patentee against different parties, holding the patent invalid, is not a conclusive adjudication, which will bar a suit by the patentee against another for infringement of the same patent.
2. PATENTS ⟸310(4)—INFRINGEMENT—BILL.
A bill for patent infringement *held* sufficient to state a cause of action; averments as to previous litigation over the patent being immaterial.
3. EQUITY ⟸362—BILL—DISMISSAL.
A bill should not be dismissed, as not stating a cause of action, unless it is possible to conceive that, even if all of the allegations in the bill are true, the bill must be dismissed at hearing.
4. PATENTS ⟸313—BILL FOR INFRINGEMENT—DISMISSAL.
In view of the claim of the patentee that it would produce new evidence at trial, *held*, that it was improper to dismiss a bill setting up the infringement of a patent, notwithstanding it appeared that on previous suit against other parties the patent had been held by the Circuit Court of Appeals to be invalid.

Appeal from District Court of the United States for the Southern District of New York.

Suit by Bayley & Sons, Incorporated, against Michael J. Blumberg and Mrs. J. Blumberg, doing business under the name of J. Blumberg. From an order dismissing the bill, plaintiff appeals. Reversed.

Lester F. Dittenhoefer, of New York City (Dodson & Roe, of New York City, of counsel), for appellant.

Sidney S. Bobbe, of New York City, for respondent.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The appellant seeks to recover for willful infringement of design patent No. 49,593, for a lighting fixture, issued to the appellant's assignor, and for which the appellant now holds an assignment. The issues were framed by the service of an amended bill, an answer, and supplemental answer. A motion was then made to dismiss the bill on the merits, for the reason that the

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same "fails to state facts sufficient to constitute a cause of action in equity," and for the further reason that the facts sought to be adjudicated by the said complaint are res judicata. The District Judge dismissed the bill upon the merits.

[1] It does not appear that the District Judge has held that "the facts sought to be adjudicated by the appellant are res judicata," and apparently this part of the relief sought was not granted. The claim of the appellee was that, because of the decision of this court in Bayley & Sons, Inc., v. Standard Art Glass Co., 249 Fed. 478, —— C. C. A. ——, the court having passed adversely to the claim of invention in the patent in suit, this action is not maintainable. This claim is untenable. The present action is between different parties and the complainant is entitled to present its proof, including such additional evidence in amplification as it may have, in addition to that offered in the trial of Bayley & Sons, Inc., v. Standard Art Glass Co. The District Judge would be obliged, of course, to be guided by what has been held by this court in our decision in that case.

[2-4] The amended complaint alleged the incorporation of the plaintiff, facts sufficient to justify the jurisdiction of this court, the issuance of the patent, and the date thereof, together with the recital of the assignment to plaintiff.

In the fifth paragraph it is alleged that when the fixture was placed upon the market, embodying the design patent thus issued, it sprang into instant popularity, resulting in large sales, creating a large and profitable business in the sale of said fixtures to this plaintiff.

In paragraph 6 it is alleged that in defiance of the plaintiff's rights thus secured by his patent, and the benefits obtained by its popularity in the trade, the defendants manufactured, sold, and exposed for sale electric lighting fixtures, which were substantial duplicates of the plaintiff's patent and fixtures and they have derived unusual gains and profits from such infringement, damaging the plaintiff thereby.

In paragraph 7 it is alleged that the defendants' electric light fixtures, which they placed on the market, were such a close copy of the plaintiff's as to make it difficult to determine defendants' article from the genuine, and that, contrary to the plaintiff's wishes and demands, the defendants persist in a continued infringement. It is further alleged that all this was done without license or consent of the plaintiff. This, standing alone, is sufficient to charge that appellant has a valid patent, and the infringement of the patent.

In paragraph 10 it is alleged that in an action upon the same patent tried in the District Court for the Southern District of New York (246 Fed. 314), in which the appellant here was there the plaintiff, and Braunstein Bros. Company the defendant, a decree was granted and entered, holding the patent valid and infringed.

By his supplemental answer the defendants alleged that upon appeal this decision of the District Court was reversed, and it was held that the patent was invalid and void. See Bayley & Sons v. Standard Art Glass Co., 249 Fed. 478, —— C. C. A. ——. The allegation set forth in the tenth paragraph of the complaint is not essential to the plaintiff's success here. It may have been omitted. If the appellee

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desired to raise the question which apparently his counsel had in mind when the motion was made to dismiss before the court below, it could be presented by a general demurrer, after demanding profert of the patent. However, we have not here in the record, nor was there produced or attached to the bill of complaint for the court below, a copy of the patent as issued. The appellee rests his right to dismissal here because "said bill of complaint fails to state a cause of action." Unless it is possible to conceive that, even if all the allegations in the bill are true, the bill must be dismissed at the hearing, a court of equity will not sustain a demurrer when interposed, nor will it dismiss a bill. Kansas v. Colorado, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838.

In Ralston Steel Car Co. v. National Dump Car Co. (D. C.) 222 Fed. 590, it is said:

"Under our practice, the federal courts are inclined to allow a case in equity involving important matters to go to issue and proofs, where a doubtful question is raised by the pleadings. It has been the practice to overrule a demurrer, unless it is founded upon an absolutely clear proposition that, taking the allegations to be true, the bill must be dismissed at the hearing."

The practice which prevails in the courts of equity, in disposing of motions to dismiss bills because the bill does not set forth facts sufficient to constitute a cause of action, is to overrule the motion and let the case go to hearing, unless it is made absolutely clear that, taking all the allegations to be true, the bill must be dismissed at the hearing. The appellant contends that, upon the trial, it intends to go back of two of the patents, and produce such additional evidence as would result in sustaining the patent in this action.

In view of this prospect, and, further, that the bill on its face set forth facts sufficient to constitute a cause of action, we are of the opinion that the District Judge erroneously granted the motion, and the order is therefore reversed.

FLIGEL et al. v. SEARS, ROEBUCK & CO.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 35.

1. PATENTS ⟸328—CONSTRUCTION—VALIDITY.
   Patent No. 1,099,031, for a waterproof garment, including a cape and hood, with the hood having a front band capable of folding forward to constitute a visor when hood is up, and capable of contraction and fastening to give the appearance of a military collar when hood is down, *held* valid, and to disclose invention, in view of the ingenuity and popularity of the device.

2. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
   Patent No. 1,099,031, a waterproof garment, including a cape and hood, *held* not infringed.

Appeal from the District Court of the United States for the Southern District of New York.

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Bill by Bernard I. Fligel and Mitchell Fligel, copartners doing business as Fligel & Son, against Sears, Roebuck & Co. From a decree dismissing the bill, complainants appeal. Affirmed.

Munn, Anderson & Munn, of New York City (T. Hart Anderson, of New York City, of counsel), for appellants.

Duell, Warfield & Duell, of New York City (C. H. Duell, F. P. Warfield, and L. A. Watson, all of New York City, of counsel), for appellees.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] The patent in suit, No. 1,099,031, was for a waterproof garment, including a cape and hood, with the hood having a front band capable of folding forward to constitute a visor when the hood is up, and capable of contraction and fastening to give the appearance of a military collar when the hood is down. The defendants, a large mail-order house, do not manufacture, but sold the alleged infringing garments, which were manufactured by another. The District Judge held there was no invention and no infringement. We disagree with his conclusion that there was no invention but agree with him that the defendants' garment, as made up and sold, did not infringe the plaintiffs' patent.

The testimony showing the various devices of the prior art does not indicate a hood provided with a convertible collar, which, when the hood is over the head, provides a shade, or, when allowed to fall in a dependent position at the back, constitutes a finish having the effect of a military collar. The patentee placed on this hood a band, which, when the hood is down, is used as a standing collar about the neck, which had never been applied to hoods attached to capes. This band has been referred to in the trade as the "Billey Burke" band. The type of hoods on raincoats used theretofore, when attached to the cape, were elastic about the front edge, and this so as to accommodate the size of the head and make the cape adjustable therefor. It was not practical to have the attached collar, as provided by the patent in suit, entirely elastic, for this would destroy the appearance and the idea of its function as a collar. It resulted in the patentee making the collar shorter than the hood, and for the space between the ends of the band or collar and the edge of the hood were inserted elastic sections. This afforded a smooth collar, which could provide for the military effect when down, and at the same time retain the elasticity of the hood and thus secure the fit. There was this novelty presented, and the inventor, during the period of three years, sold many thousands of these garments. While this construction is within a limited scope and may be of minor importance, yet it added this novelty and resulted in considerable sales. Its ingenuity and popularity warrants the sustaining of the patent.

In Greenwald Bros. v. La Vogue Petticoat Co., 226 Fed. 449, 141 C. C. A. 278, this court sustained a patent for a petticoat, where the novelty consisted only in the application of an elastic waistband and a knitted hip portion to a woven skirt portion. And again in Witzel v.

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Berman, 212 Fed. 734, 129 C. C. A. 344, this court sustained a patent for a wire mattress having along its longitudinal edges a spring guard to hold the upper mattress in place. And in David et al. v. Harris, 206 Fed. 902, 124 C. C. A. 477, a patent for improvements in sweaters, consisting of an attachment to a low-necked sweater of two enfolding lapels and a collar which could be turned up to convert it into a high-necked sweater, was sustained. These cases follow the reasoning and law in the case of the Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154.

[2] The conception of a convertible collar and band as a desirable adjunct to a rain cape, and the inserting of an elastic whereby it could be applied to a rain cape, embodied inventive thought. The defendant's rain capes do not comprise a convertible military collar; indeed, it is in no way made apparent that it was ever the intention of the defendant to use the collar and hood as such. The band upon the defendant's cape is sewed down and fastened by buttons, and, in order to bring forward the band, it would be necessary to unstitch and alter the structure of the garment. The band appears to be a piece of decorative trimming, and, in its condition when sold, does not seem capable of manipulation to serve either the function of drawing forward to extend the hood as a bonnet, or of so contracting it when let down at the shoulders as to provide a military collar. It would require some strap, either of elastic or cloth, to bring the ends of the band together about the front of the neck, so as to hold the collar upright and tend to give the military effect.

No such strap or band is sold with the garment, and no instructions seem to have been given that such use might be made of the defendant's garment, or result produced, and no evidence is adduced that any such use was ever made of it. The defendant's present garment, as marketed by it, omits these features which give novelty and popularity. The band about the hood of defendant's garment constitutes decorative trimming and serves no functional purpose. It is a type of rainproof garment which was old in the art, and at least not such an article of wearing apparel as infringes the complainant's patent.

Judgment affirmed.

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LUTEN v. MARSH et al.

(District Court, S. D. Iowa, C. D. January 7, 1919.)

No. 4009.

1. PATENTS ⟸328—INVENTION—CONCRETE BRIDGE.
The Luten patent, No. 852,970, for concrete bridge, *held* void for lack of invention.

2. PATENTS ⟸328—INVENTION—ARCH STRUCTURE.
The Luten patent, No. 853,202, for arch structure, *held* void for lack of invention.

3. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—REINFORCING CONCRETE BRIDGES.
The Luten patent, No. 853,203, for method of reinforcing concrete arches in bridges, *held* void for lack of invention; also *held* not infringed, if conceded validity.

4. PATENTS ⟸328—INVENTION—WALL.
The Luten patent, No. 934,411, for wall, *held* void for lack of invention.

In Equity. Suit by Daniel B. Luten against J. B. Marsh and others. Decree for defendants.

Hood & Schley, of Indianapolis, Ind., for complainant.

Wallace R. Lane, of Chicago, Ill., and Henry E. Sampson, of Des Moines, Iowa, for defendants.

WADE, District Judge. I am going to dispose of this case now, notwithstanding the fact that it must be self-evident that I have not had time to study the various items of evidence presented here upon both sides, and, if I had any doubt in my mind as to what the decision ought to be, I would take the time to go through this record more carefully. But I have not the time to study this record within the next few months, and I feel that this is a case that should be promptly disposed of—first, because of the public importance of it, the far-reaching effect it may have; and, second, because of some of the methods, disclosed here, which have been employed by the plaintiff in the business of constructing bridges or getting the business of designing bridges. These methods no court can approve—some of them, at least. I am not sure but what they ought to be construed as sufficient to deny the party relief on the ground that he does not come into court with clean hands. I refer especially to the half-truths, which are worse than falsehoods, in some of these representations made to contractors; because, when a man recites a list of cases as having been tried, or in which decisions have been rendered, without disclosing that nearly all of them have been consent decrees, it is not the truth. It is only half the truth. Those consent decrees should never have been utilized for any such purpose. It ought to appear upon their face, stamped plainly "by consent of parties," and not be held out as the solemn action of the court, which has never inquired into the facts at all. In fact, I am not sure but that there ought to be a prohibition of consent decrees in patent cases, because of the fact that they are by some per-

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sons used as the basis of obtaining settlements, when the one party knows that the decree is not the decree of the court, but the decree prepared by consent of parties and simply approved by the court without investigation, and the other party does not. So that I feel that this is a matter which ought to be disposed of promptly, and I also feel that, in view of the disclosures in this case, Congress ought to pass a law providing that the Attorney General, or some one else, may institute a proceeding testing the validity of patents, settling the rights of parties on both sides—at least, as to the validity and as to the construction of the patent. Of course, anybody can see, in a field of this kind, which extends so far, that until these patents are settled they will always be an obstacle, or always may be an obstacle, to the development of the art, and to the utilization by communities of the best there is in bridge engineering. Plaintiff has certain rights, or he has not, and the plaintiff in this length of time certainly should have some of these rights determined finally. I do not know whose fault it is, but so far as the case which Judge Lewis decided so long ago, which has been lying there two years after his decision was rendered, with the rights of the public still in the balance, it is all wrong. The final decision of that matter should and would aid very materially the rights of the plaintiff here, and the rights of the public. There is something wrong.

[1] Well, now, in this first group of claims under patent No. 852,970, nobody claims that this pavement under a bridge is new. No one claims that the method provided for putting in this pavement is new; but what plaintiff claims is, as I understand it, that the tapering edge extending into the bed of the stream is a new invention. Well, if there is any invention about it, I do not think it is new. Without going into the evidence, the publication in the Engineering News in 1891 is such that I feel that any mechanic, called upon to do that work, would do it, if he was sufficiently well educated to understand the matter, in the manner pointed out by Mr. Luten in his patent. This Engineering News says:

"Wherever water is to be carried, it is very necessary to protect both ends by sheet pile aprons or curb walls, as shown in Figures 1 and 3. This is needed as much, if not more, at lower than at upper ends, because if water is at all rapid, and material soft, failure most frequently takes place at lower ends, as shown by the line of scour in Figure 3.

"A filling of large and small broken stones to carry this protection still farther is desirable, and, in case of a rapid fall in the water surface, several cross-walls to protect the scour are often useful. Sheet piles can be used instead of cross-walls, if always wet."

And further:

"These remarks cover an important and much-neglected matter. Our observation is that the protection is needed very much more at the lower end than the upper. Great carelessness is often shown in this respect, when great care should rather be used to carry the water safely away from the structure."

In other words, anybody with powers of observation and experience in handling beds of streams—trying to pave the bed of a stream—would know instinctively, when he saw the paving tapering off there, that if it stopped with the actual technical bottom of the stream the

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effect of the current would be to do the very thing described in this Engineering News. The very danger that the Engineering News gives for the protection of the lower end must be provided against, or else you would have a washout, and of course any one could see, without the exercise of any inventive genius, that a floor on the bottom of the stream, just level with the bottom of the stream, not extending into it to any degree, would simply invite a counter-current under the edge there, which would wash it out. In this patent, of course, it shows the curve of the whole paving downward, to and into the bottom of the stream; but that is not essential at all. It does not make any difference, nor is it any advantage, what form the bottom of the paving is. The only thing that is of importance is what is the form of the top of the paving. In other words, if you put paving in there a foot deep in the bottom of the stream, and have the lower edge taper off in the form described by Mr. Luten, I assume that you have the same thing exactly as if you had a three-inch paving, which curved down and extended into the bed of the stream to the same degree that the surface of the other pavement extended. I do not think, in the state of the art at the time that this patent was granted, that Mr. Luten's patent is of any validity.

Now, group 2 is under patent No. 852,970. That relates to the extending of the spandrel and the wing walls. I have not yet been able to determine what Mr. Luten claims to have invented. I understand, of course, what he has described in his application, and what is described in the patent. I understand the purpose which he claims this construction will serve; but the particular thing invented I have not yet been able to grasp. It is not disputed that the extension of the spandrel was old. There cannot be any question about that. It did extend, prior to that time, sometimes to a greater or less degree, beyond the pier. Of course, if it was old and varied in its extension, then it became simply a matter of experience and custom of those skilled in the art, working in the peculiar roadway involved in each particular case, as to how far the spandrel ought to extend out—how far it would have advantage in extending out, depending, of course, upon the length of the bridge and other things; and there is no claim here that the extension of the spandrel is a patentable novelty, or was at that time.

As to the wing wall, it is nothing more or less than a retaining wall, which probably has been in use as long as civilization has existed, because I apprehend that even the savage, if there was a bank of earth liable to wash down by the rains upon the back end of his tent, would go out and take stones or other material and try in a crude way to retain it from sliding. Now, whether you need a retaining wall in connection with a bridge, or not, depends, of course, upon the nature of the soil, the height of the banks, the extent to which the spandrel goes, and all those things. But I can find no patentable novelty or patentable idea in combining the old extended spandrel and the old retaining wall. It is true that Mr. Luten may have added very materially to the usefulness of the art of building bridges by pointing out a way in which the amount of material necessary for the retaining wall might be reduced by the proper conformation of the embankment or fill which

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might be possible with an extended spandrel; but this mere reduction of the amount of material, after all, is purely an engineering proposition, and, while to the layman it may seem to involve invention to reduce materially the amount adequate to stand strain, to the mind of the engineer it is just as simple as the adjustment of battens on the cracks of a barn to the ordinary man—or should be, at least. It is simply the application of knowledge which he possesses. In judging whether these things involve inventive genius, we have got to consider the field of scientific knowledge in which the party undertook to work. Things that might seem very dense to us, who are not educated in that field, would be matters of common knowledge there.

I thought yesterday, when counsel was referring to the opinion of Judge Orr in the Melber Case, that this language was peculiarly apt as applied to the claims put forth on this particular group:

"A man is not entitled to a patent for a structure which is old, just because he determines the reason why the structure should be used."

Now, it may be that nine-tenths of the men who build circular cisterns do not know or understand the reason why they can build a solid, strong structure with so few brick; they do not understand the arch construction, which gives support, one brick to another, all the way around; but it does it, and it has been done right along. If some man comes along and points out that masons are using too many brick, that all pressure and strains can be met by a wall half the thickness of the structure usually constructed under the methods employed by cistern builders, he has not invented anything at all; he has merely pointed out something that any competent person with knowledge, who sits down and studies the situation, would know.

[2] Now, as to group 3, under patent No. 853,202, I cannot agree that this extended rod or wire, or support across, is, or was at the time this patent was issued, a patentable invention. It is true that I have not given the study to this matter that possibly the subject requires; but I gave it considerable study at the time of the trial of the Thacher Case, and I have very grave doubts whether any of this method of reinforcing is patentable invention, or has been for 20 years, or has been at all after some man first found that reinforcing could be put into concrete and maintained, and that it would add to its strength. Once you have settled the problem that reinforcing can be added to concrete formation by the use of wires and rods, and that it is possible to form these structures and maintain them intact, and give them strength and power because of this reinforcement, all the rest is a matter of engineering knowledge, pure and simple. The cantilever principle which Mr. Luten sought to apply in this patent, of course, was old and well known. The cantilever principle has been applied in a thousand ways to bridges and other structures, and I do not believe that, because a man uses it in a particular structure in which it was never used before, he can get a patent on that structure, or the form of use in that structure. It is a matter of simply sitting down and figuring it out with a pencil and paper (that is, for the skilled engineer), where the reinforcement ought to go, in order to bring the best support to the structure; and, as I understand, it is a matter which any competent engineer can

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figure out. Some of them, I admit, are more skillful than others, being perhaps better able to figure it out; but I do not believe that, because one man is more skillful in that particular science than some other man, what he figures out purely, I might say, as a mathematical problem, is invention, and I do not believe that it is patentable.

I do feel that somewhere along the progress of the art, when somebody discovered that it was possible to use these rods, and that they might be utilized to good advantage in particular work, that he may have exercised inventive genius in bringing that knowledge to the world; but certainly after the Monier patent, and certainly after the disclosures made by the publications in the field of knowledge in which Mr. Luten worked, and certainly after the extensive discussion and great public interest in the work of reinforcement, I do not feel that anybody, who in his structure simply applies well-settled principles of mathematics applied to strain, has any patentable invention.

Judge Lewis says something about that, and his remarks ought to be approved. He says:

"The complainant as a witness disclaimed that his patents, or any of them, embodied anything beyond or more than placing the steel in a new way that produces better results in a more efficient form. Now, in a concrete bridge, the greatest efficiency is always secured by resisting tension or pull with steel rods. That has been established for a half century; not perhaps with curved tension members, but the basic idea is very old. There is no question about that."

This relates to the claims of complainant in this case, as I understand Judge Lewis' opinion. Judge Lewis continues:

"But none of complainant's patents in its specifications, including drawings, and in the claims, gives any specific direction as to just where any of the reinforcing members should be placed. This I suppose would in each instance depend upon the maximum load to be carried."

In other words, strictly speaking, the contention here must logically end in the proposition that you have patented a principle and not a structure. Again, Judge Lewis says:

"This I suppose would in each instance depend upon the maximum load to be carried, the length of the spans, and other elements which involve mechanics only, and would necessarily, I assume, be worked out in determining the amount of compression and tension under the established formulas in statics. In a general way the points of greatest stress can be roughly approximated without the use of mathematical tables, but this is centuries old—that is, it is open to common observation, and the fundamental purpose of reinforcing concrete was to strengthen the structure at these points; such a discovery in Luten's day is no evidence of inventive genius."

I agree with that statement of Judge Lewis. Somewhere along in civilization, humanity got to the point where they came to use barbed wire fences; before that it was a smooth wire fence. The man who put up the first wire fence of any character found that he had to have his corner posts stayed in some way or his fence would fall down. From that time, and since, there have been various devices produced to better stay the corner posts. The first man that put a stay there may have fastened it on the post 4 feet from the ground, and may have carried it back 8 feet into the earth, and his fence may have slackened

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because the post gave way in 6 months or a year. Some other man came along, and fastened the wire to the top of the post, and carried it back 20 feet, and better results were obtained. I do not think he has invented anything at all. I think he has simply applied the ordinary rules of mechanics to a situation the whole field of which was disclosed in the first conception of bracing a post in that way. The rest was a mere matter of detail in carrying it out, depending upon the height of the post and the weight of the fence. Another man comes along, and to hold the fence he uses a brace on the inside, and I do not think he invented anything. Now, to the mind of the skilled and educated engineer these bridges are but to a large extent corner fence posts. Simple to their mind and complex to ours. And in the varying applications of supports to strains and stresses they are not using inventive genius. I cannot sustain this patent. Aside from the considerations I have already expressed, long before this patent was granted, Monier and Von Emperger had given it to the world—not, perhaps, the particular piece of wire or iron which the Luten patent contemplated, but the method of doing that very thing. The art is old.

[3] Now, patent No. 853,203, of 1907, relates to the arch supported on abutments or piers, as shown in claim 1:

"An arch supported on abutments or piers having tension members embedded near its concave surface, and other tension members passing back and forth through the material of the arch and between the first-mentioned tension members and the adjacent surface, substantially as described."

What I have said with regard to the previous patent, No. 853,202, is applicable to this as well. I have also given some consideration to the questions involved in a similar claim in the Thacher Case, and I feel that, if this patent be valid at all, in view of the prior art, it would be so narrow that this construction of the defendant would not be an infringement. My own judgment, with all the consideration I have given to the matter, is that, in the description of the invention in this patent, the inventor or patentee simply disclosed an application of the knowledge which at that time had been disclosed by engineers and publications and patents. True, he may have given some study to it; but his conclusion from that study was not inventive. It was merely demonstrative—the application of well-settled, well-disclosed principles to peculiar conditions, which vary in each structure, perhaps. But if I should be wrong, if he got something in that patent, it must be limited simply to the very thing that he has disclosed, and that very thing, in my judgment, is not infringed in this case. I need not say more about that, because I have already considered this same question—not upon the same patents, of course, but in the Thacher Case, where the same principles were involved.

[4] Now, as to group 5, patent No. 934,411, which pertains to the wall with the coping of such top formation as to divert attention from the defects of the lower wall: There Mr. Luten was applying knowledge which has existed ever since men have understood the placing of lights and shadows in art. So far as that being the particular function of the structure is concerned, I do not think it is patentable at all. He did no more, in that, so far as that particular purpose is concerned,

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than the men over in France who are now doing the camouflage for the army. If that wall for that purpose was patentable, then every gun over there, with its barrel painted to represent a zebra or some other animal, to try to conceal its presence from the enemy, is patentable. As I see it, the principle involved in the patent is simply to adopt a method that will attract attention to one feature of an object and detract from another. It is simply the application of the known peculiarities of humanity that we usually think about only one thing at a time; and if you can attract attention to the top of this wall, we do not see the rest. I think it was Josh Billings who disclosed the same theory to us when he said that tight boots were the greatest blessing of humanity, because they made a man forget all of his other miseries. I do not think there is anything patentable in that, at all. In so far, now, as he did create a method of putting on a coping, which would be more effective, or which might be easier constructed, or having some other valuable purpose in the construction of a wall, there might be a chance for a patentable invention.

But it is quite apparent to me that, in that particular structure which he describes, he was not doing any more than applying matters of knowledge common at that time. The building of a wall partially, and then allowing it to harden, and then building on an additional portion on top, whether it takes the form of a coping or the mere extension of the same size wall, I do not think is claimed to have been new. I think it must be conceded, in view of the record here, that it was in common use. When I say "common use," and when we talk about "common use," with relation to this art, of course, it does not mean what is ordinarily meant by the word "common," because back at that time there was very little of this concrete used. It was in the beginning of the development of the art, the building of concrete bridges and concrete structures, so that I could not say it was an everyday event; but what I mean is that such structures were actually in use and built before this patent was issued, in a manner practically as described in the patent. In other words, I see nothing in the patent of an inventive nature to improve on the methods the other fellows employed in the manner of building the coping or tops of walls. For that reason I cannot sustain that claim, and the complainant's petition is dismissed, and judgment will be allowed against him for costs.

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LYONS v. F. LEWALD & CO.

(District Court, N. D. Illinois, E. D. January 6, 1919.)

No. 1014.

PATENTS ⟸328—VALIDITY AND INFRINGEMENT—CUFF BUTTON.

The Barney patent, No. 885,135, for a separable cuff link button, is valid, and covers in a limited way a primary invention, which entitles it to a wider range of equivalents than for a mere improvement; also *held* infringed.

In Equity. Suit by Charles D. Lyons against F. Lewald & Co. Decree for complainant.

Emery, Booth, Janney & Varney, of Chicago, Ill., Thomas B. Booth, of Boston, Mass., and Laurence A. Janney, of Chicago, Ill., for plaintiff.

Walter H. Chamberlin, of Chicago, Ill., for defendant.

SANBORN, District Judge. Infringement suit as to patent No. 885,135, issued to F. P. Barney, April 21, 1908, for a separable cuff link button.

The cuff buttons covered by the patent have been on the market for some years and are mainly used with soft or unstarched cuffs, one part being put in each buttonhole, and snapped together by means of a link similar to the glove button fastener. Patents prior to Barney, such as Buchanan reissue, No. 12,020, and Marks, No. 712,080, show similar buttons for attaching the cuff to the sleeve, but Barney was the first to produce a flexible cuff button, so he is in a limited way a primary inventor. There is no question of the validity of his patent.

As to infringement, defendant claims it is making its buttons under the prior Marks patent. Claim 1 only is in issue and reads:

"As an improved article of manufacture a separable cuff link button, the same comprising a pair of independent button members, each provided with a fixed shank terminating in a lateral flange or enlargement adapted to pass through a buttonhole of the cuff and retain said member therein, a swinging coupling member or link mounted in one of the button members and extending longitudinally beyond its flange, and having the free end of said link constructed to engage with the fellow button member for detachably securing them together."

Defendant has changed the Marks construction by lengthening the coupling member or link, so as to permit it to swing upon its free end when it is attached to the other button member. It is literally, therefore, a swinging link, answering the claim in this respect. The word "swinging" was introduced into the claim by amendment, to define a flexible structure, as distinguished from an absolutely rigid one, as shown in the Marks patent.

The two parts or members of defendant's buttons are locked together by a link integral with one part, and fitting into and swinging in a socket of the other, as if pivoted therein. It is insisted that this construction does not meet that part of the claim which requires the link to be "mounted in" one of the members, because defendant's link is

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simply stuck against the side of the member, and not in or into it. From the specifications and drawings, as well as plaintiff's commercial form, it appears that the words were used in the sense of loosely connected with or pivotally mounted in the member. But Barney was a primary inventor, in a relatively unimportant field it is true, but still entitled to a wider range of equivalents than a mere improver. The only possible distinguishing feature between the two constructions is that plaintiff's link swings on both ends, and defendant's only on one. Thus plaintiff's button is more flexible. The claim should be given a construction broad enough to cover a link attached to, but not literally mounted in, the member. The two types can hardly be distinguished from each other. If it were not for the fact that every part of the structure of both performs a useful part, so that the device is highly "functional," the sale of either one might be unfair competition as to the other.

There should be a decree sustaining the plaintiff's patent and finding claim 1 infringed, with costs.

CHAPELLE v. APPLEBAUM.

(District Court, E. D. New York. June 4, 1918.)

TRADE-MARKS AND TRADE-NAMES ⊂=95(4)—INFRINGEMENT—PRELIMINARY INJUNCTION.

Preliminary injunction granted, restraining defendant from using, on bottles containing a preparation of sandalwood oil, labels and wrappers with lettering and devices which, while not identical with those used for many years by complainant and his predecessors, and registered as a trade-mark, are so like as to indicate an intention to deceive purchasers.

In Equity. Suit by Philippe Chapelle against Samuel K. Applebaum, trading as the Montauk Chemical Company. On motion for preliminary injunction. Granted.

Mock & Blum, of New York City, for plaintiff.
Eadie, Innes & Walser, of New Brighton, N. Y., for defendant.

GARVIN, District Judge. Plaintiff moves to enjoin the defendant pendente lite from further making, offering, or selling the preparation known as "Santal Comp.," bottled by the Montauk Chemical Company, of Port Richmond, N. Y., or from further making, using, offering, or selling labels, wrappers, or containers used for said preparation.

The moving papers set forth that, for more than 40 years last past, plaintiff and his predecessors in title have continuously manufactured and sold throughout the world a preparation known as "Santal Midy," which consists of sandalwood oil in capsules, and that this preparation and the trade-mark and labels connected therewith have obtained a great and favorable reputation throughout the world; that the trade-mark "Santal Midy" has been duly registered as a trade-mark by

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plaintiff's predecessors in the United States Patent Office on May 25, 1897, and again on October 17, 1911.

It further appears that in marketing this preparation Santal Midy bottles of peculiar shape and design have been continually employed, having a black seal with a yellow design thereon, bearing the words L. Midy, attached to the cork of each bottle. Each bottle has a label with a red and black border, having thereon "Santal Midy" in black, with a yellow and white design in the center. This design is unusual in character. It consists of a white circle, something over an inch in diameter, which contains a white design on a yellow ground. This design is described, in the statement which accompanied the application for the trade-mark filed in the United States Patent Office March 27, 1897, as a rising sun. The design also bears a striking resemblance to a full-face representation of an Indian chief. Each bottle has a wrapper upon which appears a duplicate of the label appearing on the bottle. On each end of the wrapper is a black seal, with a similar design thereon, and the words "L. Midy."

The defendant has caused to be made seals, labels, wrappers, and bottles, each of which complainant claims imitate those in use by him. The bottle of the defendant as wrapped presents an appearance similar to that of the plaintiff. It is true that the black and red border on the label and wrapper used by the plaintiff is replaced by a border of green; but the general appearance presents many points of striking similarity, which satisfies me that the defendant had attempted to employ them in marketing his wares for the purpose of deceiving the public. There is no reason to suppose that dealers would be deceived, but, as was remarked by Judge Lacombe in National Biscuit Co. v. Baker et al. (C. C.) 95 Fed. 135, "No one expects that they will be." The article marketed by the defendant is likewise a preparation of sandalwood oil, which accounts for his attempt to imitate the methods employed by the plaintiff in placing his preparation before the public.

The defendant denies that plaintiff has properly pleaded the continuous claim of title to the trade-mark in plaintiff and his assignors. I am of opinion that this allegation is sufficiently set forth in the bill of complaint, although the various assignments must be proved at the trial.

In December, 1914, defendant was using labels on packages containing a preparation of Santal Compound which plaintiff claimed was an imitation of the registered trade-mark of "Santal Midy." Plaintiff objected, and defendant forthwith discontinued their use. Defendant claims that in his opinion the labels he was using did not imitate or infringe upon plaintiff's registered trade-mark of "Santal Midy." Plaintiff claims that, after defendant agreed to discontinue the use of the labels, he knew nothing of the acts of defendant now complained of until about April 1, 1918.

The defendant also claims that the plaintiff thereupon gave him permission to use the labels and seals to which objection is now made. This is vigorously denied by the answering affidavit submitted in behalf of the plaintiff, and in view of the similarity of the labels and seals in question I cannot credit defendant's contention, particularly

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as there was a previous use by the defendant of a design to which plaintiff objected as infringing upon his trade-mark, which he (defendant) abandoned.

I am of the opinion that the defendant has endeavored to take advantage of a market developed by the plaintiff and his predecessors, as the result of many years of business activity, and that he has, with that end in view, prepared a package which was calculated to mislead. The design in the center of the label satisfied me of this beyond doubt. This design consists of a white circle of the same size as that on plaintiff's label, containing a white design on a ground of substantially the same color as that used by plaintiff. This design is a profile of an Indian chief. The circle, colors, and subject-matter could have been selected with no other aim than to mislead the public.

The motion is granted, and an injunction will issue, restraining the defendant, until further order of the court, from further making, offering for sale, or selling the preparation bottled by the Montauk Chemical Company, of Port Richmond, N. Y., in the labels, wrappers, or containers now used for said preparation, and from further using said labels, wrappers, or containers in any manner whatsoever.

Ex parte COHEN.

(District Court, E. D. Virginia. April, 1918.)

1. ARMY AND NAVY ⟸20—SELECTIVE DRAFT ACT—POWERS OF LOCAL BOARD.
A local draft board, which certified for service a Russian subject, who had not declared his intention of becoming a citizen and was therefore not subject to the Selective Draft Act, which facts were shown by his claim of exemption and affidavit filed in due form, and were undisputed, and was denied a hearing, *held* to have exceeded its authority, and its action held void.

2. HABEAS CORPUS ⟸16—PERSON ILLEGALLY INDUCTED INTO ARMY.
Failure of one certified for service by a local draft board, although not subject to draft, to appeal to the district board, does not exclude the jurisdiction of a court to discharge him from the army on habeas corpus, where the local board, before making its order, had consulted with and obtained the approval of the district board.

Application by David Cohen for writ of habeas corpus. Writ granted.

Nicholas Aleinikoff, of New York City, for petitioner.
Clifford V. Church, Major Judge Advocate, for the United States.

WADDILL, District Judge. [1] The petitioner seeks to be discharged from the military service of the United States. The facts are substantially these:

That he is a subject of the Russian Empire, and has never declared his intention of becoming a citizen of the United States; that for some three years prior to the summer of 1917 he had been a resident of Virginia Beach, Princess Anne county, Va.; that on the 30th of July, 1917, he was notified by the local board of the county to report for

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physical examination, with a view of serving in the army of the United States; that on the day named he appeared before the board, filed claim for exemption from military service in due form, supported by his affidavit, setting forth that he was exempt because a resident alien, not German, and had never declared his intention of becoming a citizen; that said petition for exemption was duly made under subsection F of section 18 of the rules and regulations prescribed by the President under the Selective Draft Act, approved May 18, 1917 (Act May 18, 1917, c. 15, 40 Stat. 76). This act requires that petitioner's affidavit should set forth the following information:

"1. Date and place of birth. 2. Date of emigration to the United States. 3. Whether he has taken out his first papers—that is, declared his intention to become a citizen of the United States. 4. Present address; and upon presentation of affidavits or such other evidence as may be required in the opinion of the board to substantiate the claim."

No request was made of affiant to furnish other or additional evidence than that contained in his own affidavit, and his case was taken up by the local board and decided adversely to him, and the local board took the case up with the district board, and that board approved the action of the local board, and petitioner was therefore certified for draft in the army, and on the 10th day of October, 1917, he was inducted into service at Camp Lee, Va. He subsequently, on the 3d of December, 1917, presented his petition to the commanding general at Camp Lee, praying to be discharged from military service, on the ground that he was an alien and had never declared his intention to become a citizen, and to this application he attached affidavits in support of his claim which were not before the local board. The commanding general declined to discharge the petitioner, because there was no claim that he had been denied a full and fair hearing before the local board, or that said board acted beyond its jurisdiction or contrary to the procedure required by law.

These suggestions by the commanding general are renewed here by the government in opposition to petitioner's discharge on habeas corpus, and the further fact is urged that the petitioner failed to appeal to the district board from the action of the local board; and the government earnestly insists that the writ of habeas corpus cannot be used as an appellate procedure and the courts are without jurisdiction unless the executive and military authorities whose action is brought into question either exceeded their jurisdiction or denied to the petitioner a fair and impartial hearing.

These legal positions taken by the government may be conceded, but nevertheless it is undisputed, as is shown by the authority relied upon by both sides (Angelus v. Sullivan [Circuit Court of Appeals, Second Circuit, October, 1917] 246 Fed. 54, 158 C. C. A. 280), that if the tribunal whose action is complained of acted beyond the scope of their authority, or failed to accord to the accused a fair trial, or rejected proper evidence offered by him, then that such relief can and should be afforded by habeas corpus. The petitioner filed the precise affidavit required under the law, and no other or additional evidence was required of him, as the act in terms contemplated, if needed, and up-

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on his affidavit it is entirely clear that he was not subject to draft, but, on the contrary, he was a Russian subject who had made no declaration of his intention to become a citizen of the United States. That was the sole point in the case. There was no dispute then as to his being a Russian subject; there is none now; nor has there been a suggestion to the contrary apparent from the record.

[2] It is true he did not appeal to the district board, as perhaps he should have done, but he ought not to be denied his rights to habeas corpus, where his personal liberty and nationality are involved because of his failure to have done a vain thing. The local board for some reason took the matter up with the district board, which board approved the action of the local board, and hence to have appealed to them would have been an act of folly. It is entirely clear that an impartial hearing, the facts not being disputed, required the granting of petitioner's claim to exemption, and that both that board and the district board and the commanding general acting upon his case, with his nationality and the fact that he had made no previous declaration of his intention to become a citizen undisputed, and that he made due claim to his exemption and filed proper affidavit in support thereof, and was denied a hearing, acted beyond their authority in inducting a Russian subject into the army of the United States, and their action and orders in that respect are void.

Moreover, under Compiled Rules of the Provost Marshal, dated September 27, 1917, No. 12, form No. 44, paragraph B of subdivision No. 2 of said regulations, it would appear that, under the authority reposed in the military authorities at the mobilization camp, this petitioner should have been relieved as coming within the class against whom hardship would be worked, arising from error in law on the part of the authorities acting in this case, or the nonculpable ignorance of the registrant in failing to properly protect himself from the consequences of the illegal ruling against him.

The petitioner will be discharged.

CHASE v. LATHROPE et al.

(District Court, E. D. New York. May 23, 1918.)

COURTS ⊂=318—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP.

In an action in a federal court on a promissory note against two defendants, both of whom have appeared and raised the question of jurisdiction, plaintiff cannot vest the court with jurisdiction by a dismissal as to one, who is a citizen of the same state as himself.

At Law. Action by Samuel C. Chase against Maxwell D. Lathrope and Henry R. Lathrope. Dismissed for want of jurisdiction.

Joseph D. Baucus and George H. Rice, both of New York City, for plaintiff.

Franklin Leonard, Jr., of New York City, for defendants.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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GARVIN, District Judge. This is a motion by plaintiff for judgment on the pleadings upon the ground that the answer interposed is fictitious. The action is on a promissory note. The plaintiff is a citizen of the United States, residing in the state of Pennsylvania. Both defendants are citizens of the United States; Maxwell D. Lathrope residing in the state of Pennsylvania, and Henry R. Lathrope residing in the state of New York. Both defendants have joined in an answer setting up, first, that the court has no jurisdiction of the subject of the action; second, that the court has no jurisdiction of the persons of the defendants.

The plaintiff submits a memorandum, in which he states that the defendant Maxwell D. Lathrope was not served with process, and that the plaintiff desires to discontinue as against him, if he is now before the court. The service of an answer by both defendants brings all of the parties into court, and the plaintiff may not, by asking leave to discontinue, at this time, deprive the defendants of the right to raise the question of jurisdiction.

This is an action on a promissory note. The plaintiff and one of the defendants are citizens of the United States and residents of the same state. This is an action where the jurisdiction of the court depends upon diversity of citizenship. There being more than one defendant, all must be liable to be sued, and the court has no jurisdiction when one defendant and the plaintiff are citizens of the same state. Mirabile Corp. v. Purvis (C. C.) 143 Fed. 920; Columbia Digger Co. v. Rector (D. C.) 215 Fed. 618.

There are numerous other authorities to this effect. The action must be dismissed.

UNITED STATES v. JACOB SCHMIDT BREWING CO.

(District Court, D. North Dakota. December 28, 1918.)

1. INTEREST ⟸22(1)—JUDGMENT.
   At common law a judgment does not bear interest as an absolute matter of right, and ordinarily the question whether interest is recoverable depends on the nature of the judgment and, as a rule, whether allowed by some statute.
2. FINES ⟸17½—JUDGMENTS IN CRIMINAL CASE—SURVIVAL.
   Judgments imposed as a punishment for the violation of a criminal law stand in a class by themselves, and do not survive the death of the party against whom they are entered, so as to be a charge against his estate.
3. INTEREST ⟸22(8)—JUDGMENTS IN CRIMINAL CASE.
   In view of Rev. St. § 966 (Comp. St. 1916, § 1605), providing for allowance of interest on all judgments in civil cases, the United States cannot recover interest on a judgment imposing a fine for violation of a criminal statute, though enforcement was stayed pending defendant's writ of error by a stay bond.

The Jacob Schmidt Brewing Company was convicted of violating Criminal Code, § 240 (Comp. St. 1916, § 10410), and, the conviction being affirmed on defendant's writ of error, the question whether the United States was entitled to interest on the judgment, the defendant

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having given a stay bond, was submitted on stipulation of counsel. Interest denied.

M. A. Hildreth, of Fargo, N. D., for the United States.
James Manahan, of St. Paul, Minn., for defendant.

AMIDON, District Judge. A question has arisen in this case which is submitted to the court by stipulation of counsel. Defendant is charged in the indictment with violation of section 240 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1137 [Comp. St. 1916, § 10410]), upon the ground that it shipped intoxicating liquors without properly marking the package in which the same was contained. It was found guilty, and as punishment therefor adjudged to pay a fine amounting in the aggregate to $7,250. It sued out a writ of error to review this judgment, and gave a stay bond. The question submitted by the stipulation is whether the government is entitled to interest upon the judgment from the date it was entered to the time of its payment, which the company now desires to make; the judgment having been affirmed by the Circuit Court of Appeals. Jacob Schmidt Brewing Co. v. United States, 254 Fed. 695, — C. C. A. —.

The first impression is that the judgment created a debt due from the defendant to the government, and that it was the duty of the defendant to pay this judgment immediately upon its rendition. As it escaped that duty by suing out a writ of error, interest would, in the ordinary course of things, constitute the damage caused to the government by reason of the delay in making the payment.

This, however, proceeds upon the assumption that interest is recoverable as a matter of right. Such is not the case. The judgment, by its terms, did not bear interest. No interest is awarded specifically by the judgment of the Circuit Court of Appeals. On the contrary, that court has even withheld costs.

[1] At common law, a judgment does not bear interest as an absolute matter of right. Whether interest is recoverable depends upon the nature of the judgment, and as a rule upon whether interest is awarded by some statute upon all judgments of the class to which the particular judgment belongs.

[2] Judgments imposed as a punishment for the violation of a criminal law stand in a class by themselves. They do not survive the death of the party against whom they are entered, so as to be a charge upon his estate. United States v. Mitchell (C. C.) 163 Fed. 1014; United States v. Dunne, 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145. California has a statute almost identical with that of the state of North Dakota, and it has been ruled under that statute that judgments imposed as a fine for the violation of criminal law do not bear interest. People ex rel. Warfield v. Sutter, 129 Cal. 545, 62 Pac. 104, 79 Am. St. Rep. 137.

[3] This subject, however, is settled for federal courts by section 966 of the Revised Statute (section 1605 of United States Compiled Statutes for 1916). That statute provides as follows:

"Interest shall be allowed on all judgments in *civil* causes, recovered in a Circuit or District Court," etc.

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Congress having undertaken to deal with the subject of interest upon judgments, and having expressly restricted the allowance of interest to judgments in civil causes, the implication is strong that judgments in criminal causes do not bear interest.

My conclusion, therefore, is that the government is not entitled to interest upon the judgment in the above-entitled cause.

GORHAM v. CUNARD S. S. CO., Limited.

(District Court, D. Maine. October 17, 1918.)

No. 478.

1. SHIPPING ⟹84(3)—LIABILITY OF SHIP—INJURY TO STEVEDORE.
A steamship company *held* liable for injury to an employé of contracting stevedores for coaling a ship, on the ground that its walking boss, co-operating in the loading as on former occasions in the course of his employment, furnished an unsafe rigging for use in delivering the coal at the hatchway.

2. CORPORATIONS ⟹423—LIABILITY FOR NEGLIGENCE OF AGENT.
A corporation may be held liable for negligence of its agents, where the act in question was performed in the course of the agent's employment in the business of the principal.

In Admiralty. Suit by Patrick F. Gorham against the Cunard Steamship Company, Limited. Decree for libelant.

Woodman & Whitehouse and Raymond S. Oakes, all of Portland, Me., for libelant.

Bradley & Linnell, of Portland, Me., for respondent.

HALE, District Judge. The libelant brings this suit for personal injuries alleged to have been received by him on January 4, 1918, while engaged as a stevedore in the service of Randall & McAllister, coal dealers, in loading bunker coal into the respondent's steamer Ascania, while lying at the dock alongside the Grand Trunk wharf in Portland Harbor. He says that his duties required him to guide heavy tubs of coal from the side of the ship to the hatchway; that the respondent was under the duty of exercising reasonable care in providing a safe place for him to work, and that this included the duty of seeing that any rigging or machinery which it undertook to provide should be reasonably safe; that the respondent failed in this duty; that by its walking boss, Covell, it put up a rigging which proved unsafe; and that thereby a block became unhooked from a guy wire, and was thrown, with violence, against libelant's head, causing injury.

The respondent denies that it was its duty to provide appliances to carry on the work of coaling, or that its agent constructed any temporary device for the purpose of dragging buckets of coal from the side of the ship to the hatchway, and says that this device was constructed by Randall & McAllister, under the direction of their foreman; that it gave no invitation for the libelant to render service on the ship, or to come upon the ship for any purpose; that it contracted with the libelant's employers, Randall & McAllister, to coal the ship,

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and did not undertake to provide any rigging for the purpose; that whatever Covell did in supplying the rigging was voluntary, and in the nature of a loan; and that it was not the act of the company.

The proofs show that the Ascania was to be supplied with coal for her bunkers, under a verbal contract between the respondent company and Randall & McAllister. Gorham was in the temporary employment of Randall & McAllister, and was acting as one of the stevedores in loading coal upon the ship. By reason of the construction of the vessel, and its height out of water, it was found impossible to load the coal with the usual appliances which Randall & McAllister had; the derrick on the lighter used by Randall & McAllister would not reach far enough on board to land the tubs of coal conveniently for dumping through the small center hatch on the ship. Covell, the head walking boss of the respondent company, obtained from the respondent company's shed a special rigging suitable for the required use, a rigging which the company had provided before in such cases. A so-called Warren lighter, having a tall derrick mast and heavy buckets, was brought alongside. It appears that Covell had rigged this vessel and other vessels in the same manner, and knew how to do it. The rigging consisted generally of a span leading from one of the funnels on the vessel to the deck; this span wire was extended from the smokestack, and carried forward to a ventilator across the hatch, lengthwise of the vessel; a block, called a Boston block, with an open hook, was placed on the span wire and hung over the hatch; the open hook of this Boston block had no shackle bolt to close its opening; a guy wire was attached to the block, and carried backwards to a point near the funnel, to hold the block from sliding down the slanting wire toward the ventilator; a cross guy wire was affixed to the slanting wire, and carried back to a point on the opposite side of the ship, to prevent the slanting wire from swinging too far toward the side of the vessel over which the coal came in; in order to hold the block on the wire, a mousing, or lashing, was wound around the neck of the hook; a rope attached to, and running from, the drum end, on the steam winch, forward near the ventilator, was passed through the block, and attached to a tub on the side of the vessel nearest the lighter. The pull from the tub on the slanting wire was at about right angles; and the pull from the rope to the steam winch drum was between the right angle and the direct line of the slanting wire, something less than a right angle. The tubs to which the rope was thus attached were dragged by this line, passing through the block, and by the turn of the steam winch, along the deck, and were dumped into the hatch. In the passageway of the tubs across the deck were two lifeboat stanchions, about 15 feet apart, with a rest in the center, between them, about 18 inches above the deck; this center rest tended to obstruct the tubs. Gorham was engaged in attempting to pull the tubs by the obstruction, and the tubs were found so heavy that it was necessary for the winchman to turn his drum in order to swing and surge the tubs, and thus lift them by the obstruction. This surging and rapid movement of the tubs caused the block to be brought back sharply against the span wire; in this way the mousing, or lashing, on the hook

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was chafed, so that the hook jumped off the span wire, and the block was thrown with force against the libelant's head.

The evidence shows that, when Randall & McAllister's crew came on board the Ascania on the morning of the injury, for the purpose of coaling the ship, their foreman, Mulkern, knew that the ship had to be loaded, no matter what was her position; it was evidence that she stood too high in the water for their trucks to swing the buckets over the hatch, and that a special rigging would have to be put up; the walking boss of the respondent was then consulted; Covell sent at once to the Cunard shed to get the rigging, and helped to put it up; he co-operated with Mulkern and instructed him; he had, before that, supervised the loading and unloading of the same vessel, and had superintended the putting in of coal by his own crew and others from the upper deck when the ship was light; he had used the extra hoist in the same way he was then using it; he knew he would have to use the same rigging as before, so that, when the coal and the men came, he was there, expecting to assist and to supply the rigging.

[1] I cannot sustain the contention of the respondent that, in furnishing the rigging and putting it up, Covell was acting only as a volunteer, and was merely loaning the rigging to the coal dealers. It was clear that the character of the ship and its position high out of the water required a special rigging; Randall & McAllister were not obliged by their contract to furnish it. When confronted with this situation, the walking boss of the ship furnished the rigging, and directed its erection and use. The testimony leads me to the conclusion that he was acting in the general course of his duties, and in furtherance of the business of the ship; those intrusted with the conduct of the ship must be bound by his action. Even though the ship was under no contractual obligation in the premises, it was under the duty of seeing that the instrumentalities, furnished by its walking boss, and superintended by him, under the circumstances shown by the proofs, were reasonably safe for the purpose for which they were intended. It is shown, too, that Covell stayed around the ship and saw the operation of the rigging, and that he had knowledge of the mousing on the hook; he knew that, when the hook repeatedly swung back, bringing the mousing against the span, this action would tend to wear off the mousing, and to cause the consequent fall of the block. It is in testimony, too, that after the injury he furnished a block not having an open hook, but provided with a shackle, because, as he says, "we thought it was safer." The evidence is convincing that he was a man of experience in his work; that he was acting in the course of the business of the ship; that he selected the special rigging and superintended its installing; that he saw it in operation with the heavy tubs; that he knew the difficulties and liability to injury resulting from its use. If he had stopped the work as soon as he perceived the danger, and had then procured from his shed a shackle block with an iron bolt, which could not have chafed, the injury would not have occurred. The libelant was engaged in performing a service in which the ship had an interest; those in charge of the ship were under the duty of exercising the care of a reasonably prudent man in providing a safe place for him to

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work; this must be held to include the duty of seeing that any instrumentalities which it undertook to provide should be reasonably safe. It is the duty of an employer, inviting workmen to use his structures, to exercise reasonable care and diligence to make them fit for use. The Rheola (C. C.) 19 Fed. 926; Pioneer S. S. Co. v. McCann, 170 Fed. 873, 96 C. C. A. 49; Hough v. Railway Co., 100 U. S. 214, 220, 25 L. Ed. 612.

I am constrained by the testimony to hold that the rigging was actually furnished by the ship, even though the ship was under no contract to provide such a structure. The action of Covell, the walking boss, was clearly an act of co-operation on the part of the ship in the work of loading the coal. In The Lisnacrieve (D. C.) 87 Fed. 570, 572, Judge Thomas, of the Eastern District of New York, held that, where the owners of a ship furnished a winchman to assist in unloading, they were liable to an employé of the stevedore, who was unloading the ship under a contract, for injuries caused by the negligence of the winchman, although they were under no contractual obligation to furnish the winchman, and although the winchman was working under the orders of the stevedore; that such an undertaking was not merely loaning a servant to a stevedore; it was co-operation on the part of the ship in the work of unloading the cargo.

In the case at bar, the walking boss of the respondent was clearly co-operating in the work of loading the coal, although he was under no contractual obligation to so co-operate. In so doing, it is clear that he was acting in furtherance of the business of his principal; that he was put forward by it as the man in general charge, in the course of the ship's business, of all matters pertaining to loading it and fitting it for sea. Under these circumstances, the respondent must be held to be bound by the action of Covell. I am satisfied, too, by the evidence, that the liability to injury from the use of the rigging in question could have been discovered by the exercise of the degree of care required under all the circumstances of the case, and that therefore the shipowner must be held to be liable for the libelant's injuries. In this respect The Bolton Castle, 250 Fed. 403, —— C. C. A. ——, is in point; that case was lately decided by the Court of Appeals in this Circuit, in an opinion sent down in April last.

[2] The law of the federal courts is clear that, in order to hold a corporation liable for the negligence of its agents, the act in question must be performed in the course of the agent's employment in the business of the principal. There must be evidence of some facts from which the authority of the agent to act upon the subject-matter involved may be fairly and legitimately inferred by the court; and this rule is applicable to the case of a corporation as in the case of an individual. Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176; Lake Shore, etc., Ry. Co. v. Prentice, 147 U. S. 101, 109, 13 Sup. Ct. 261, 37 L. Ed. 97; Washington Gaslight Co. v. Lansden, 172 U. S. 534, 544, 19 Sup. Ct. 296, 43 L. Ed. 543.

Such evidence as is referred to in the above cases is found in the case before me. I can have no doubt, from this evidence, that the respondent was bound by the act of its walking boss in co-operating

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with the employers of the libelant in loading the coal upon the ship, and in furnishing a rigging for that purpose. If Covell, who must be held to have been the agent of the respondent in the premises, had exercised the caution of a reasonably prudent man, as soon as he found that injury might result from the operation of his rigging, and had provided the shackle block with an iron bolt, as he did after the injury, the accident would not have occurred. I am satisfied that his negligence was the negligence of the ship, and was the primary cause of the injury.

No fault of the libelant is alleged by the answer or shown by the proofs.

The respondent must therefore be held to have been solely at fault.

Pursuant to this opinion, a decree should be rendered for the libelant in an amount that shall fairly compensate him for his injury. He lost his wages for 10 weeks; he suffered something from the reduction of his pay after he returned to work; he paid his medical expenses; he suffered some pain. A careful examination of the evidence leads me to the conclusion that the sum of $900 will be reasonably compensatory to the libelant. Let a decree, therefore, be entered for that sum, with costs.

STATE OF MARYLAND, to Use of BODDIE, v. BALTIMORE & O. R. CO. et al.

(District Court, D. Maryland. December 24, 1918.)

SHIPPING ⟸84(1)—ACTION FOR WRONGFUL DEATH—NEGLIGENCE.

A dredge, stationed in a slip and made fast to piers by two lines on each side, which allowed the second line to sag while a launch loaded with stevedores was passing out under them, by which a stevedore was swept off and drowned, *held* in fault and liable for the death; it appearing that the launch signaled her start, and that if the lines had been held taut, as customary, she could have passed under safely, but that through negligence of the lookout on the dredge she was neither heard nor seen.

In Admiralty. Suit by the State of Maryland, to the use of Louise Boddie, widow of William Boddie, deceased, against the Baltimore & Ohio Railroad Company, the Maryland Dredging & Contracting Company, the Patapsco Ship Ceiling & Stevedore Company, and the Empire Engineering Company, Incorporated. Decree for libelant against the Maryland Dredging & Contracting Company.

Benjamin H. McKindless and Charles W. Main, both of Baltimore, Md., for libelants.

Charles R. Webber and Duncan K. Brent, both of Baltimore, Md., for respondent Baltimore & O. R. Co.

Joseph N. Ulman and George Forbes, both of Baltimore, Md., for respondent Maryland Dredging & Contracting Co.

Marbury, Gosnell & Williams, Frank Gosnell, and Jesse Slingluff, all of Baltimore, Md., for respondent Patapsco Ship Ceiling & Stevedore Co.

William Fell Johnson, Jr., of Baltimore, Md., for respondent Empire Engineering Co., Inc.

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ROSE, District Judge. The equitable libelant seeks compensation for her husband's death. There is no dispute as to how he was killed, and upon the facts there can be none that it was the result of the negligence of some one other than himself. The controversy is as to whose carelessness it was. He was in the employ of the respondent the Patapsco Ship Ceiling & Stevedore Company, hereinafter called the "Stevedore Company." It had frequent occasion to move its workmen about the harbor, and for that purpose, it sometimes used launches of its own, and sometimes hired those of others. At the time of the fatal accident, the deceased was in one of the latter, upon which the gang, of which he was a member, had been ordered by the Stevedore Company. The launch attempted to pass under the lines which held fast to the pier a dredge which was owned and operated by the respondent the Maryland Dredging & Contracting Company, hereinafter called the "Dredging Company." One of these lines sagged down upon the launch, and swept the deceased off to his death by drowning.

The dredge had been working in the same slip for something over three weeks before the accident. The launch had passed in and out of the slip almost daily, and usually a number of times each day. During working hours, the dredge was made fast to the piers, on either side, by lines; there being two of them on each side. One of these the breast line, ran from amidship the dredge to the pier. It was about 80 feet long. The other extended from the dredge's quarter diagonally forward about 200 feet to the pier. When these lines were taut, there was ample room for a launch safely to pass under them. When the dredge was at work, as the result of the movements of its bucket, the lines were continually passing from taut to slack, and back again. About three-quarters of a minute elapsed from one slackening of the line until the next. The accident happened on an August morning. The launch started from the head of the slip; that is, from a point 200 or 300 feet from the dredge. The starboard side of the dredge was that upon which the launch should have gone, if upon any, and upon that side it attempted to pass. At the time it started, the dredge's starboard lines were both taut, and remained so until after the launch had passed under the first, presumably the breast line. Then the other line sagged down on the launch and swept the deceased off.

There are only two controverted questions of fact: (1) Did the launch sound its whistle as it left the wharf? and (2) was the dredge at work when the launch started towards it?

It is abundantly established that the whistle was at hand. There was no reason why it should not have been sounded, and every reason why it should. The master of the launch and two other persons swear positively that it was. Seven other persons who testified were, at the time, in a position in which it was physically possible for them to have heard the blast, if given. Of these, two do not remember whether the whistle was sounded or not. A third, a very intelligent man, states that, had it been blown before the launch started, his attention would hardly have been attracted to it. Of the remaining four, two were the master and engineer of the dredge. Their evidence that it was not sounded is of little worth.

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The captain is quite deaf, and says he has been increasingly so for the last 10 years. He claims that he can hear better when the dredge is vibrating than he can at other times. However that may be, his evidence that he did not hear the whistle proves nothing, in spite of the fact that he appeared to be, outside of the defect in his hearing, a competent and truthful man. He was in the pilot house looking forward at the time of the accident, and he did not rely on his own ears for knowledge as to signals which might be given by boats coming up from the rear of the dredge. In the absence of his mate, he had stationed his engineer on the stern, at a point from which all that went on aft his boat could have easily been seen, and from which there were ample facilities for communicating promptly with him. All these precautions were bound to prove useless, unless the engineer in fact did keep his eyes and his ears open. It never seems to have occurred to him that there was any reason why he should do either. Apparently he supposed that he had nothing whatever to do, except once in every 20 minutes or so, at which interval it was customary to move the dredge. He says he did not hear the whistle, but then he was equally deaf to the noise made by somewhere from 20 to 40 stevedores crowding upon the launch. He never saw the launch at all, until it was under the line which caused the disaster. From his whole manner on the stand, I concluded that he was either physically or mentally asleep for some while before the accident. When testifying, he was voluble in his criticisms of the actions of the launch on previous occasions, and as to the warnings given it by the dredge captain, and as to its speed at the time of the accident. A comparison between what he says on these matters and the testimony of the dredge master shows that many of his statements are gross and obvious exaggerations, to call them by no harsher term.

The remaining witnesses, who say that the whistle was not sounded, are a colored stevedore and a very intelligent launch captain, then in the employ of the Stevedore Company, but now in the government service. He was standing on a wharf near by at the time the launch put out. Both these witnesses made a favorable impression, and yet such negative testimony, even when given by honest and capable men, is not persuasive against the positive testimony of witnesses who appear also to be trying to tell the truth. Neither of these men was charged with any duty which depended upon his hearing the whistle. It might well have been sounded without its making the slightest impression on either of them. Under such circumstances, all of us have ears, but we hear not. It is, of course, not possible to be absolutely certain that the whistle was sounded; but I have little doubt that it was, and must so find. That being so, the dredge was clearly in fault. It could have suspended its operations long enough to allow the safe passage of the launch, as had been its habitual practice with reference to this and other launches. If, for any reason, it was at the moment impracticable to stop, the engineer could, as was also usual, have signaled the launch with his hands to wait. Neither was done, because for some reason the engineer was for the moment oblivious to all that was going on about him, and the captain of the dredge, handicapped

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by his defective hearing, relied on his engineer for information as to what was happening to the stern of his boat.

In view of this conclusion, it is unnecessary to determine the other point in controversy, namely: Was the dredge at work when the launch started towards it? There are many witnesses, and not all from one side, who are positive that it was, and had been for some hours before. Those who claim that it was not point out that every one agrees that the dredge's starboard lines were taut when the launch left the wharf, and remained so until after the launch had successfully passed under the first of them. The launch was not, even at the time of the accident, moving more than three knots an hour. It is argued that, had there not been some stoppage of the dredge, the lines would not have been taut so long. The calculation is a close one, but it is not necessary to make it.

It must be remembered that the owner of the launch is not a party to this cause. If he were, it would be necessary to give much consideration to the contention that the master of the launch was in fault for not making sure that his signal had been heard and understood by the dredge; but, if so much be granted, it would not exonerate the dredge, but it would merely inculpate the launch also. The libelant may hold either or both responsible. In point of fact, the launch owner was not sued, very possibly because the prospect of being able to collect a large sum of money from him was not thought to be hopeful. Any one of the respondents could have brought the launch owner in. No one of them has done so. If the Dredging Company thinks it worth while, it may, after paying the decree, seek contribution from him, unless the expiration of the period of limitation prescribed by the Maryland form of Lord Campbell's Act will prevent.

The Stevedore Company does not appear to be liable for the negligence of the master of the launch. It is true that its general foreman, who, under all the circumstances, bore to the deceased the relation of vice principal, and not fellow servant, ordered the men into the launch. It is possible, if the accident had been the result of overcrowding the boat, or of its unseaworthiness, the Stevedore Company might have been liable, because it had told its workmen to take passage in it; but it is certainly not answerable for unanticipated negligence in the management of a launch, which it did not own, and whose master was not selected by it. It follows that, as to the Stevedore Company, the libel must be dismissed.

The Baltimore & Ohio Railroad Company owns the piers on either side of the slip. It engaged the Empire Engineering Company to have the slip dredged out, and the latter employed the Dredging Company to do the actual work. The Railroad Company and the Engineering Company were sued, I suppose, upon the theory that the work to be done was of such a character, or was to be done in such a place, that the defense of independent contractor is not open to them as against the claim of one who has suffered injury in the course of its doing. It does not seem that, under the facts in evidence, the doctrine is applicable; but it will probably be unnecessary to pass upon that question. If they, or either of them, could be held liable, it would be be-

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cause, and only because, they, or one of them, was answerable for the negligence of the employés of the Dredging Company, and the latter would be bound to reimburse them for whatever they were called upon to pay in consequence of such negligence. Fortunately it is abundantly solvent, and the question of whether the Railroad Company or the Engineering Company is under any liability to libelant may be postponed until after the libelant has failed to collect its decree from the Dredging Company.

The deceased was a young man in good health, making at the time of his death from $22 to $25 a week. These wages are about double what, before the war, stevedores used to receive at this port; but, according to the official index numbers, prices have gone up on an average in about the same degree, or the purchasing power of a dollar is only one-half of what it was—whichever way you choose to put it. This state of facts may not be permanent; probably to its full extent it will not be. Taking all things into account, I think a reasonable award is $7,500, and for that amount a decree will be given against the Dredging Company, the question of the possible liability of the Railroad and the Engineering Company, respectively, being reserved.

GREGG et al. v. MEGARGEL.

(District Court, S. D. New York. October 28, 1918.)

1. JOINT ADVENTURES ⟸5(2)—ACTIONS—EVIDENCE.
   In suit by members of a syndicate against defendant, who organized the same and transferred to the syndicate certain corporate stock, evidence *held* to show that defendant did not intend, by means of a letter to those invited to become members of the syndicate, to deceive as to the price he paid for the stock.
2. JOINT ADVENTURES ⟸4(1)—MUTUAL RIGHTS AND LIABILITIES—DECEIT—WRITTEN INSTRUMENTS.
   Where defendant, who organized a syndicate, issued a letter inviting persons to join, ambiguities in the letter must be resolved against defendant, where it was asserted that he was guilty of fraud in misrepresenting to members of the syndicate the price he paid for the corporate stock delivered to the syndicate.
3. JOINT ADVENTURES ⟸4(1)—RELIANCE ON FRAUDULENT STATEMENT.
   Where persons who entered a syndicate formed by defendant knew at the time they joined the facts concerning defendant's purchase of stock which he transferred to the syndicate, they cannot recover on the theory that defendant, in letters inviting them to join the syndicate, misrepresented the price he paid for the stock.
4. JOINT ADVENTURES ⟸4(1)—RELIANCE ON FRAUDULENT STATEMENT.
   Where persons who joined the syndicate formed by defendant did not rely on his representations as to the price at which he acquired corporate stock which he delivered to the syndicate, they cannot recover for misrepresentations as to the matter.
5. JOINT ADVENTURES ⟸4(1)—MUTUAL RIGHTS AND LIABILITIES.
   Where defendant, who organized a syndicate to take over corporate stock, which he had already acquired, in conversations with one H., who became a member, induced H. to believe that defendant had paid for the stock the price received from the syndicate, *held*, that others who were induced by H. to join the syndicate could not rely on the misrepresentations made to H.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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6. JOINT ADVENTURES ⊂⇒5(2)—ACTIONS—BURDEN OF PROOF.
In an action for fraud upon members of a syndicate formed by defendant, *held*, that persons joining the syndicate had the burden of proving the fraudulent misrepresentations of defendant.

7. JOINT ADVENTURES ⊂⇒4(1)—MUTUAL RIGHTS AND LIABILITIES.
Where one who had joined the first syndicate organized by defendant, who transferred to the syndicate at $7 a share stock which he had bought for half that sum, learned of the true facts, *held*, that such person, having, without objection, joined a second syndicate organized to take over the stock, cannot recover, for that amounted to an affirmance of the first contract.

8. PRINCIPAL AND AGENT ⊂⇒111(1)—AUTHORITY OF AGENT—SUBSCRIPTION TO SYNDICATE.
An agency to subscribe to a syndicate organized to take over corporate stock does not continue, per se, as an agency to waive, relinquish, or condone misrepresentations made by the organizer of the syndicate.

9. JOINT ADVENTURES ⊂⇒5(2)—ACTIONS—EVIDENCE.
In a suit against defendant, the organizer of a syndicate, where it was contended defendant misrepresented the price at which he acquired stock delivered to the syndicate, and the written contract, embraced in letters to persons invited to join the syndicate, was ambiguous, *held*, that evidence as to defendant's conversations was admissible, as showing the construction plaintiffs were led to place upon the writing.

10. JOINT ADVENTURES ⊂⇒4(1)—MUTUAL RIGHTS.
Where defendant organized a syndicate to take over corporate stock, which he had already acquired, persons who joined the syndicate, relying on representations that the stock was turned over to the syndicate at the price defendant paid, may, without repudiating the whole agreement, require defendant to deliver them shares in the syndicate on the basis of the price he paid for the stock, but they cannot require defendant to account for the entire profits resulting from the transaction.

11. JOINT ADVENTURES ⊂⇒5(1)—ACTION FOR ACCOUNTING.
Where it did not appear that defendant, who organized a syndicate, had refused to fully and properly account, though there was a controversy as to whether he misrepresented to members the price which he paid for corporate stock delivered to the syndicate, *held* that, in a suit seeking relief on that basis, defendant should not be required to account as to the transactions of the syndicate.

In Equity. Suit by Nathan Gregg, Charles B. Whitehead, and George O. Wolf, copartners doing business under the firm name of Gregg, Whitehead & Co., and others, against Roy C. Megargel, doing business under the firm name and style of R. C. Megargel & Co. Bill dismissed as to some of plaintiffs, and as to others part only of the relief granted.

See, also, 248 Fed. 960.

White & Case, of New York City (George O. Redington and Vermont Hatch, both of New York City, of counsel), for plaintiffs Gregg and others.

George L. Ingraham, of New York City, for plaintiffs Gates and Eccles.

Wollman & Wollman, of New York City (Henry Wollman, of New York City, Clarence Alexander, of Yonkers, N. Y., and Herbert Haase, of Chicago, Ill., of counsel), for intervening plaintiffs.

Powell, Wynne, Lowrie & Ruch, of New York City (Herbert C. Smyth and Frederick J. Powell, both of New York City, of counsel), for defendant.

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MAYER, District Judge. Though in form one lawsuit, the trial really involved the consideration of a series of cases, because of the fact that the various plaintiffs and interveners entered into transactions with defendants under varying circumstances, and each case, to the extent not governed by certain propositions common to all, must be disposed of on its own facts.

The complaint of plaintiffs, so far as it relates to Gregg, will serve to typify the theory of plaintiffs. Gregg alleges that in August, 1917, Megargel made a proposition, contained in a letter dated August 17, 1917, which was accepted by Gregg and the other plaintiffs, and "thereupon constituted a separate agreement on the part of each of the plaintiffs with the defendant; that said letter * * * constitutes the entire agreement between the parties," except, of course, the number of shares of stock subscribed for by each plaintiff; that Gregg et al. subscribed in certain amounts, and paid certain amounts on account of their stock subscriptions; and—

"Seventh. That the said agreements were obtained from the plaintiffs by the defendant through fraud and misrepresentation, in that both by the wording of the agreements and by statements made to the plaintiffs by the defendant, with the intent to deceive and defraud the plaintiffs, and to induce them to enter into the agreements, the defendant represented that he had paid, or was to pay, $7 per share for all of the 100,000 shares of stock embraced within the agreements; whereas, on information and belief, the plaintiffs allege that at the time of making such representations the defendant, unknown to the plaintiffs, had an option for, or already had acquired, the said stock at a price of $3.50 per share.

"Eighth. That plaintiffs relied upon the said representations made by the defendant and were induced thereby to enter into the said agreements.

"Ninth. That the defendant, in acquiring said stock at $3.50 per share, was acting as the agent or representative of the plaintiffs and each of them.

"Tenth. That the plaintiffs have tendered and do now tender to the defendant payment for their nonwithdrawn stock on the basis of $3.50 per share, in addition to such reasonable commission and brokerages for sales or purchases effected by the defendant, and all necessary expenses incurred by the defendant in the acquisition and marketing of the syndicate stock, and other necessary expenses incurred by him as syndicate manager; and plaintiffs have demanded and do now demand of the defendant the delivery to the respective plaintiffs of the number of shares of nonwithdrawn stock of their subscription, but that the defendant has refused and still refuses to accept said payment as payment in full and to deliver said nonwithdrawn stock to the plaintiffs."

The complaint then refers to transactions of the syndicate as such and after its formation. Relief is asked for as follows:

"(1) That the defendant render to the plaintiffs a true and full account setting forth the following items and particulars:

"(a) The amount defendant paid per share for the 100,000 shares of syndicate stock, referred to in Exhibit A, together with the date or dates when defendant acquired said stock.

"(b) An itemized account of the purchases and sales of the syndicate stock. * * *

"(c) An itemized expense account of the disbursements. * * *

"(d) The amount of cash received from participants on account of the 80,670 shares of nonwithdrawn participation stock, and the amount receivable.

"(e) An itemized account of all other receipts and expenditures of the said syndicate.

"(2) That pending a full * * * accounting the defendant be enjoined from disposing of * * * any of the stock of the syndicate which the plain-

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tiffs claim, and that defendant be enjoined from disposing of any of the property, money, interests or effects of the syndicate.

"(3) That a receiver of the syndicate stock, money, and property * * * be appointed, with the usual powers and duties.

"And plaintiffs demand final judgment against the defendant as follows:

"(4) That upon payment to the defendant by each or any of the plaintiffs of the balance due on their subscriptions for nonwithdrawn stock, at the rate of $3.50 per share, plus their pro rata share of the commissions and expenses, referred to in paragraph or subdivision 10 of this bill of complaint, the defendant be required to deliver forthwith to each of the plaintiffs making such payment, the entire number of shares of their subscriptions for said nonwithdrawn stock. * * *

"(7) That the plaintiffs have such other and further relief in the premises as may be just and proper."

Defendants deny liability, and counterclaim for the difference between $7 per share and the amount paid by respective plaintiffs on their subscriptions to which plaintiffs interpose their reply in accordance with New York Code practice, denying liability for the difference so claimed by defendants.

It will be noted at the outset that plaintiffs have not brought an action at law to recover damages for fraud or deceit, nor do they seek in equity for a rescission and the return of their money. They proceed on the theory that Megargel was their agent in purchasing the stock, and as such must account for the difference between $3.50, the price he paid for the stock, and any amount over $3.50 which he may have received from any of the persons who became members of the syndicate. To put the matter in their own way, plaintiffs affirm the contract and seek to compel one who they assert was their agent fiduciary to account for all his profits. Defendant insists that he was not acting as an agent to purchase, but was a vendor to the respective individuals who became syndicate members, and as such was not under any obligation to disclose the price at which he was buying the stock.

Plaintiffs may be divided preliminarily into two general classes: (1) Those who relied on the letter alone; and (2) those who also relied on oral representations or statements by defendant or others—the legal effect of which will be discussed later. The syndicate letter is annexed,[1] the paragraphs being numbered for convenient reference.

[1-4] It is but just to defendant to state that I am satisfied, on the evidence, that there was no intent to deceive by means of the letter. The letter was prepared by attorneys of unquestioned integrity, and, if there was ambiguity, it was not deliberate, but was due to the elusive character of language. Megargel and his lawyers undoubtedly supposed that they had made clear that he was a vendor to the syndicate, selling the stock for $7, without any representation as to what he paid or was to pay for it, and from that point of view it was nobody's business what he paid or was obligated to pay for it. There is no doubt that Megargel did not disclose, nor intend to disclose, the price he was paying. Such a course, he may have thought, might interfere with the sale, because it sometimes happens—at least in certain kinds of syn-

[1] See note at end of case.

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dicate transactions—that possible subscribers hold off if they think the vendor is making too much of a profit.

But the failure to disclose does not import fraud nor misrepresentation, if the relation is one of vendor and vendee at arm's length. Another fact which indicates the lack of intentional fraud is that the letter was not distributed broadcast to the public, but was sent to a limited clientele. Indeed, all the plaintiffs knew their way about, and most, if not all, of them, for one reason or another, sought to be permitted to subscribe.

But, whatever may be the purpose or the mental conception of the writer of a letter, he is held to the language employed, as that language may impress the reader of ordinary intelligence. The test is not the intent of the writer but the meaning to the reader. When, therefore, such a writing as this syndicate letter invites money subscriptions, the writer must make his meaning clear, and any ambiguity must be resolved against the author.

Counsel for both sides have elaborately analyzed the letter, but the true approach is to obtain the impression created by the first reading of the letter. A fine analysis, word by word, is often responsible for a wrong conclusion. Much has been said (a) to the effect that Megargel clearly represents himself as an agent and (b) per contra that he clearly represents himself as a vendor. The fact is that there is great difficulty in determining the true construction. The letter deals with two propositions: (1) The forming of a syndicate by buying from Megargel; and (2) the conduct of the syndicate after formation. The important paragraphs to be considered are Nos. 2, 4, 6, and 9.

The impression created upon the mind of the reader, colloquially put, might readily be as follows:

"We are negotiating for the purchase of some Glenrock stock, which we have not obtained as yet, and we are forming a syndicate to take from us, out of this stock not yet obtained, an amount not to exceed 100,000 shares, if we succeed in getting the stock, as we expect, for $7 a share. (Par. 2.) In that event, you can come into a syndicate participation at $7 per share. (Par. 9.) We will not charge the syndicate for acting as syndicate managers other than reasonable commissions and the usual brokerages, because, so far as the purchases of the stock for the syndicate are concerned, we have been otherwise (satisfactorily) compensated, or, in other words, so far as these 100,000 shares are concerned, we have received pay for services rendered. We are to be managers of the syndicate, notwithstanding we are vendors thereto; i. e., notwithstanding that we are acting as the conduit through which the stock goes at $7 per share from its present owner to the subscriber via us."

Of course, a different construction might follow if paragraph 2 were construed so as to give emphasis to the comma after the word "us" and before the word "at," or if the phrase "at a price of $7 per share" had been differently placed, and other changes had been made, so as to read, for instance:

"To acquire from us at a price of $7 per share a portion of said stock to the extent of not exceeding 100,000 shares when, as and if said shares are acquired by us."

Then, again, in paragraph 6, if, instead of "compensated" ("to make suitable return to or for, as for services, loss, etc.; * * * remuner-

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ate; as, to compensate one for his services; to compensate one's services"—Standard Dictionary), some language had been used to indicate a profit, as, for instance:

"We shall make no charge in view of our profit in our purchases and sales of said stock."

But, whatever may have been litigation-proof language, the result is that the letter is so worded that an intelligent man might well conclude that Megargel was negotiating to buy Glenrock stock at $7 per share, 100,000 shares of which he would put into the syndicate at $7 per share, and take his compensation, so far as the subscribers were concerned, out of the usual commissions and brokerages accorded to a syndicate manager, which, in an active syndicate, might result in a tidy sum. In point of fact, at that time Megargel, by virtue of an agreement with one Collins, dated August 10, 1917 (Exhibit 5), had contracted to buy 100,000 shares at $3.50 per, and that contract was carried out, so that the 100,000 shares of stock stood Megargel $3.50 per share.

Whatever may be the result of the representations made in the circular or (in addition) to some of the plaintiffs orally, there can be no recovery if, prior to subscribing, a plaintiff knew the fact that Megargel was paying $3.50; nor can there be recovery, unless a plaintiff relied upon the representations made. Certainly, if a plaintiff did not read the syndicate letter, or subscribed on representations made, without authority, by others than defendant or his agents, and the syndicate letter was a matter of indifference to such subscriber, it cannot be said that the letter or defendant's oral representations were an inducing cause; and, as alleged, in effect, in paragraph second of the complaint, each acceptance constituted a separate agreement individual to the particular plaintiff. There is no reason why the rule in this regard should be any different from rescission. The effect of going into the syndicate dehors the representations in the letter is that the subscriber did not care what the defendant made, and thus subscribed to the syndicate solely because he was satisfied to pay the price for what he considered a good investment.

In reviewing this branch of the case, it is impracticable to set forth at length an analysis of the testimony as it was developed, either by deposition or by witnesses orally on the stand. The depositions are voluminous and considerably interspersed with what seem to me to be irrelevant inquiries. The conclusions arrived at in some instances, and the impressions created by the witnesses, will be briefly (and, in a sense, summarily) stated.

Plaintiffs urged that one Taylor, who had full knowledge of the facts, was defendant's agent, and defendant, likewise, sought to characterize Taylor as the agent of some of the plaintiffs, but the testimony does not bear out either contention. What may be called the Taylor group subscribed largely on Taylor's representations, and, in one form or another, paid no attention to the syndicate letter. In this group are Bingenheimer, Clarkson, and Lathrop, and the bill is dismissed in favor of defendant as against these plaintiffs.

Manbeck went in because Hagens principally, and Sullivan also, thought the syndicate was a good thing. He did not remember whether

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he received, or where he saw, the syndicate letter, but remembered seeing it, although he could not say that he took a good look at it. The bill is dismissed as against him.

Dailey undoubtedly relied on what one Kelly told him. In his case we have the extraordinary fact that, until his deposition was taken in this suit, he did not know that Megargel had paid $3.50 a share for the stock, and was surprised to find that the lawsuit, started in his behalf, contained such an allegation, and an allegation that he knew this fact. The bill is dismissed as to him.

Green (to whom the syndicate letter was shown by Kelly, and not sent by Megargel) merely read the letter in a "casual way," and really went in on "the information I could get from men that I thought knew more about it than I did"—i. e., Taylor, Wall and Kelly. The bill is dismissed as to him.

[5] As to E. A. Howard, I am satisfied that Megargel's conversations with him led him fairly to infer that he was buying the stock at $7 per share. I think that Megargel did not so state in so many words, but in his desire not to disclose that he was making a profit on the sale to the syndicate—and particularly in view of the conversation about the financing of the Norbeck and Nicholson property—he left Howard in a position to conclude that Megargel was selling the stock at the price it cost him, and thus to rely upon that interpretation of the syndicate letter, even though Howard may not have read the letter very carefully. The stipulation as to E. *P.* Howard's testimony is not impressive.

The E. A. Howard Group.—All of these men came in on the recommendation of E. A. Howard. Howard was not Megargel's agent, and his representations cannot bind Megargel, even though Howard, especially because of talk with Megargel, was justified in construing the syndicate letter as he did. The point is that the Howard group went in for reasons other than their reliance on the syndicate letter. The talk of Megargel with Howard cannot reach from Howard to the men who subscribed, relying on Howard's statements or judgment. The result seems anomalous, but it is the necessary consequence of the proposition that a plaintiff in this suit cannot have any recovery unless it is clear that he relied upon the representations of defendant.

Spratlen read the syndicate letter, but did not study it very carefully, and came in because, inter alia, he had been told by Howard that Megargel was to acquire the stock at $7 and "we would be on the same basis that he acquired it." Benedict never read the syndicate letter. Byram "left the whole thing to Col. Howard," and did not "know that I ever did learn" the price Megargel paid, and "did not understand much about the whole transaction."

Newton had determined to go in before he received the syndicate letter. In this group the only close case is that of Burnham; but he relied "a good deal on Mr. Howard's judgment in matters of that kind," and, in all the circumstances, I am satisfied he did not rely on any alleged false representations in the letter. The bill as to all this group is dismissed.

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Lamson Bros. & Co. went in entirely on the faith of defendant's telegram of August 15th, and not on the faith of the letter. The telegram of August 15th is clear, and is lacking either in ambiguity or misrepresentation. The bill is dismissed as to them.

The situation as to Nicholson is very much like that of E. A. Howard. There is considerable dispute as to the details of the conversations between Nicholson and Megargel (see testimony of Nicholson, Megargel, Ruch, and E. A. Howard), but enough was said to justify Nicholson in concluding that the ambiguous letter represented Megargel as buying, as well as selling, the stock for $7.

[6] Haase is an attorney, practicing in Chicago. He had been called in early in the matter, to wit, on August 8, 1917, in connection with the acquisition of certain properties known as the Norbeck and Nicholson properties, the details of which it is unnecessary to recite. Suffice it to say that on August 8, 1917, Haase left Chicago for Denver, and, after certain conferences, started back for Chicago on the night of August 10, meeting Megargel, Ruch, his attorney, and one E. A. Howard (the man who had brought the Glenrock proposition to Megargel's attention) on the train. As the result of a suggestion of Howard, Megargel stated that he was agreeable to letting Haase into the syndicate. Megargel showed Haase a typewritten draft of the proposed syndicate letter, which Haase read over carefully. There is a conflict in the testimony of Haase and Megargel as to whether at this time Haase made certain important observations. I do not doubt, for a moment, the good faith of Haase in placing the date of this vital conversation in which these observations were made at a time subsequent to the train trip on August 10; but the memory of the most scrupulous men is not always reliable, and I am satisfied that Haase is in error in denying, and Megargel is right in insisting, that the conversation took place on the train on August 10. The surrounding circumstances bear out Megargel. Haase is an experienced lawyer. He read the letter carefully, and an experienced lawyer might well, thereupon, say, as Haase did, that the paper was weak, because it made Megargel act in several capacities. A great deal of testimony (direct and cross) was taken on the point, but it comes down to this: That Haase must have understood that Megargel made clear that he was a vendor. That he so did seems clear, and the only real question is whether it was on the train on August 10, or later in the fall. In any event, whether, in point of fact, Haase or Megargel is right as to dates, the burden of proof is on Haase. Where, as here, the best that can be said is that the testimony on the question of dates is evenly balanced, the plaintiff, under fundamental rules, must fail. In such circumstances, the bill must be dismissed as against Haase.

Hubert E. Howard clearly relied on the representations of the syndicate letter, and, on the evidence, Haase was not H. E. Howard's agent, in the sense that Haase's knowledge, if any, bound him.

As to Wyland, there is no evidence to contradict his reliance on the syndicate letter. The fact that he came in through Taylor, and joined with Pelton and others in a circular letter, does not impute knowledge

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to him. It is also clear that Parker and Brooks relied solely on the letter.

I was very favorably impressed with Gregg, and, while Megargel may not have used all of the expressions assigned to him by Gregg, I am satisfied that Gregg was justified by his talk with Megargel in concluding that the buying and selling price was $7, and in so construing the letter. Whitehead's testimony satisfactorily corroborates Gregg. Cranmer similarly impressed me, and I think is in the same position in this respect as Gregg.

Gates was concededly the agent of Eccles, and the position of one is that of the other. A careful analysis of the testimony of Gates will show that there were no misleading oral misrepresentations by Megargel. If there is any doubt, I accept Megargel's testimony as the more impressive. Gates, however (and therefore Eccles), had the right to rely on the syndicate letter representations, as also did Keeler Bros., for whom at this juncture Gates was likewise acting as agent.

To me, one of the most puzzling cases is that of Kelly, rendered additionally difficult because his testimony was taken by deposition. I disregard the oral representations alleged to have been made by Megargel, but I see nothing to controvert the fact that he relied on the syndicate letter.

From the foregoing, it will be seen that up to this point, Wyland, Parker, Brooks, Kelly, Gregg, Whitehead & Co., Keeler Bros., Wilson, Cranmer & Co., Nicholson, E. A. Howard, and Hubert E. Howard, Gates, and Eccles, are entitled to such relief as the law may accord.

[7] An additional question arises in the case of Keeler Bros., and still another question in the cases of Kelly, Gates, and Eccles. After Gates had learned that Megargel had paid only $3.50 for the stock, he signed an acceptance of the syndicate letter of November 1, 1917, for 3,000 shares, and an acceptance of the syndicate letter of November 14, 1917. He had read the letter of November 1, 1917, in Casper, and noticed that it was substantially similar to the letter of August 17. Before signing an acceptance of the second syndicate letter, he related to his attorney, Mr. Ridgley, in Cheyenne, all the matters that he knew or had heard about the Glenrock affair. He also helped to get proposed subscribers to the second syndicate. In reply to the second call, he wrote to Megargel, under date of December 4, stating, among other things:

"I realize, however, that you have been up against a hard game, and profit of any amount cannot be expected from the syndicate at this time. * * * It seems to me that from a standpoint of fairness and equity that you should not insist on your $3.50 per share profit out of the syndicate under the circumstances. In other words, if the stock goes to the syndicate members at a substantial reduction below the $7 mark, they will feel that, while they have something which they cannot sell, yet their investment will be of some substantial merit."

Numerous cases are cited by counsel as to the effect of waiver, and on the proposition that, in effect, no ratification can be had when a principal, who discovers a fraud, accepts the contract and affirms, instead of disaffirms. But it seems to me that equity requires, in such

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case, the same rule as is applied at law, and as is thus stated in 14 Am. & Eng. Enc. 171:

"The rule that affirmance of a contract with knowledge of fraud does not bar an action for damages is subject to the limitations that the party defrauded must stand towards the other party at arm's length, must comply with the terms of the contract on his part, must not ask favors of the other party, or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it. If he does so, he waives the fraud."

The law does not favor speculating on results. If Gates had refused to do more than pay $3.50, he might have been met by the insistence of Megargel that he was out of the syndicate, and if Megargel had been right in that stand, if the syndicate had been successful, Gates ran the risk of losing his $3.50 as well as his profits from the syndicate operation. But Gates was taking no chances on a quarrel or a lawsuit, and signed up for the second syndicate, which is but another way of stating that he condoned what he now claims was a fraud. Brown v. Lead, etc., Co., 231 Mo. 166, 132 S. W. 693, 140 Am. St. Rep. 509; Kingman & Co. v. Stoddard et al., 85 Fed. 740, 29 C. C. A. 413; Simon v. Goodyear Metallic Rubber Shoe Co., 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745. The fact that the second syndicate was not consummated is immaterial. It is the act of Gates which counts. For these reasons, the bill must be dismissed as against Gates and Eccles.

The bill must also be dismissed as against Kelly. The fact that Kelly had not paid $3.50 in all is immaterial. He ran the same risk for what he put in as did Gates. The same result would follow in the case of Keeler Bros., if Gates was their agent when he signed an acceptance of the second syndicate letter of November 14. The bill would also be dismissed on this ground as against Haase, in addition to the ground heretofore stated.

[8] As to Keeler Bros., it appears from the evidence that Gates was not, at the time of what defendant calls the "ratification," the agent of Keeler Bros. as matter of fact; nor, on the facts, was there any agency by estoppel. An agency to subscribe does not continue per se as an agency to waive, relinquish, or condone.

[9, 10] Before concluding this part of the case, it may be well to state that the theory upon which antecedent conversations as to representations were received is that, where false representations are alleged and the written contract is ambiguous, the conversations are admissible as showing the construction of the writing which defendant's oral statements led plaintiffs to place upon it. If plaintiffs had sued at law or in equity for a rescission, there would be no difficulty in according appropriate relief. It is rare that a plaintiff affirms the contract, because, ordinarily, the plaintiff is only too glad to get his money back and to be restored to his original position. In this case, however, it is perfectly plain that, while many of the plaintiffs, in view of the vagaries of the market, saw very little profit, if any, out of the syndicate itself, they did see a possible very comfortable share of the profits which Megargel made in selling the stock to the syndicate. Therefore plaintiffs proceed on the theory which, in effect, is that the syndicate started

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at once with the purchase of the stock by Megargel in accordance with his option, and thus it is that, when the question of remedy is considered, plaintiffs seem to think that "affirming" the contract means that defendant must account for the profit he made in the separate transactions whereby he sold shares of stock to various persons at presumably $3.50 gross profit per share. That defendant must account for the operations of the syndicate, as such, and that in such respect he was the agent of each and every subscriber, nobody disputes.

That he was the agent of those who became subscribers, to purchase 100,000 shares for their joint benefit, is negatived both by the syndicate letter and the conduct of the parties. The furthest his agency went in this regard was to purchase a definite number of shares for the particular person subscribing for those shares, and, when so purchased, such subscriber became a member of a syndicate, which, in the conduct of the syndicate business, might make or lose money. In nearly every well-known cited case (as above suggested), the person who alleges fraud seeks to recover back his money or other property, and the syndicate relation springs up from the start. Brewster v. Hatch, 122 N. Y. 349, 25 N. E. 505, 19 Am. St. Rep. 498 (which took the form finally of a suit to recover personal damages); Heckscher v. Edenborn, 203 N. Y. 210, 96 N. E. 441; Sim v. Edenborn, 242 U. S. 131, 37 Sup. Ct. 36, 61 L. Ed. 199.

The principles stated in these cases, and many analogous with them, are well enough known; but the case at bar does not present any such situation as was developed in any of these cases. The furthest to which the facts in this case lead is to prevent defendant from making a profit out of those plaintiffs who relied, and were justified in relying, on the representation that defendant was getting the stock for a figure other than he really paid. This is but another way of stating that those plaintiffs are entitled to the stock at the price which Megargel paid for it, and that, to that extent, he acted as their agent, and must be regarded as having bought the stock for these plaintiffs at $3.50 per share, and in so deciding I have not overlooked Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005.

Therefore there may be a decree in favor of plaintiffs Wyland, Parker, Brooks, Gregg et al., Wilson, Cranmer et al., Keeler Bros., Nicholson, E. A. Howard, and H. E. Howard, substantially in accordance with paragraph 4 of the relief asked for in the complaint. The decree, however, is to be worded so as not to include any accounting for or payment over to a given plaintiff of the difference between $7 and $3.50 in sales to other plaintiffs or persons. Nicholson will have the relief referred to in paragraph 5 of his demand for judgment.

The decree will provide that defendant will be enjoined from disposing, etc., of the nonwithdrawn stock necessary to cover the amounts deliverable to the various plaintiffs entitled to the same, as above provided. In those cases where the bill is dismissed, defendant may have a decree for his counterclaim.

[11] As to the accounting of the syndicate itself: This, it seems to me, is premature, and cannot be asked for until this decree (or any modification thereof) is carried out. I am unable to find any refusal

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on the part of defendant fully and properly to account as the manager of the syndicate itself. On the contrary, the preliminary statement of account, furnished by defendant, does not show any intention to fail to account, and to undertake an accounting now would not only be premature, but result in an unnecessary expense. It is altogether likely that, at the proper time, defendant will furnish a full account.

The bill in this regard will be dismissed, without prejudice to any of the plaintiffs to the bringing of a new suit for that purpose if so advised. No costs.

NOTE.

Private and Confidential.

R. C. Megargel & Co., 27 Pine Street, New York City.

August 17, 1917.

The Glenrock Oil Company (Incorporated).

Capital Stock Syndicate.

To ————:

Dear Sirs: 1. The Glenrock Oil Company (Incorporated) has been recently incorporated under the laws of the state of Virginia with a total authorized capital stock of $10,000,000, divided into 1,000,000 shares of the par value of $10 each. The corporation was organized for the purpose of acquiring by direct purchase, or through controlling interests in other corporations, producing and prospective oil properties located in the state of Wyoming and elsewhere.

2. We are negotiating for the purchase of certain shares of the capital stock of this corporation, and are forming a syndicate to acquire from us a portion of said stock to the extent of not exceeding 100,000 shares, when, as and if acquired by us, at a price of $7.00 per share.

3. The syndicate will terminate on October 15, 1917, subject to our right to dissolve it at an earlier date and to our right to extend it from time to time beyond said date for an aggregate period not to exceed sixty days.

4. We are to be managers of the syndicate and may be members thereof, notwithstanding our relations as vendors thereto and managers thereof, and as such managers we shall have full power to determine, within the limit above stated, the amount of stock to be purchased from us by the syndicate, and with full power to sell, purchase, resell and repurchase, for account of the syndicate, at public or private sale, any shares of stock at such prices and on such terms as we may deem fit; to pay the usual brokerages, as well as such commissions for effecting sales or purchases for account of the syndicate as we may deem proper; to charge the syndicate reasonable commissions and the usual brokerages for sales or purchases effected by us; to make advances to the syndicate, charging interest thereon; to make or procure loans and secure the same by pledge of syndicate stock or otherwise, to such amounts and in such manner as from time to time we may deem expedient; and generally to act in all respects as in our opinion may be to the interest of the syndicate. We shall not be liable under any of the provisions of this letter or for any matter connected therewith, except for want of good faith, and no obligation not herein expressly assumed by us shall be deemed to be implied.

5. The syndicate managers may purchase, sell or otherwise dispose of, or be interested in the purchase, sale or other disposition of, any stock or other securities of said corporation or its subsidiary companies, or contract in any respect with it or them, without restriction and without responsibility therefor to the syndicate.

6. All expenses incurred in the acquisition of such stock for the syndicate, in the marketing of the same, and all other expenses incurred by us as syndicate managers shall be charged against the syndicate. We shall make no charge to the syndicate for acting as syndicate managers, other than reason-

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able commissions and the usual brokerages for sales or purchases effected by us, being otherwise compensated in our purchases of said stock.

7. Your total obligation shall not in any event exceed the amount of your participation as herein stated, but the failure of any participant to perform any part of his obligation hereunder shall not release any other participant. Nothing herein contained shall constitute the participants partners with the syndicate managers or with one another. Syndicate participations are not transferable except with the written consent of the syndicate managers. The syndicate managers reserve the right to cancel the participation of any member violating the syndicate provisions, and to hold him liable for any losses sustained by such violation. The firm constituting the syndicate managers acts as a copartnership and all rights and powers hereunder of said firm shall vest in any copartnership which shall be the sole successor of said firm without further act or assignment.

8. We, as syndicate managers, may grant to, or withhold from, any syndicate participants the privilege of withdrawing their respective allotments of stock, or any part thereof, for investment. No participant withdrawing stock shall be entitled in respect thereof to share in any profits of the syndicate. Applications to make such withdrawals, in whole or in part, must be made to us upon written acceptances of participation within the period below provided, and any such application may be refused or granted by us in such cases and to such extent as we may, in our discretion, determine. In respect of your participation, or any part thereof, so withdrawn, you will be required to pay at the time and in the manner hereinafter provided an additional sum of one dollar per share on the number of shares so withdrawn to cover the proportion of the syndicate expenses attributable to such withdrawn participation. Upon the completion of all payments in respect of such withdrawn stock, you will be entitled to receive an appropriate certificate, issued by or on behalf of the syndicate managers, reciting that you are the owner of the number of shares specified therein and will be entitled to receive the same upon the termination of the syndicate. No stock so withdrawn from sale by any participant shall be delivered to him until the termination of the syndicate.

9. *We have reserved for you, subject to the acquisition by us of such stock and to the reduction of such participation in case of oversubscription as hereinafter provided, a participation in the syndicate of ——— shares of such stock, which, at the syndicate price of $7.00, amounts to $———.*

10. Should you desire to accept such participation, please confirm your assent to the conditions as herein stated by signing the enclosed acceptance and return the same to us at No. 27 Pine street, New York City, on or before August 23, 1917, after which time all offers of participation not so accepted will be deemed refused and canceled. This letter and your acceptance will thereupon constitute the contract between us.

11. All acceptances, in whole or in part, are subject to our approval, and in case of an oversubscription the syndicate managers shall have the right to allot to you such less amount of participation in the syndicate than the amount reserved as above stated, as they in their uncontrolled discretion may determine.

12. You will be required to make payment in New York funds in respect of your obligation hereunder to the syndicate managers at their office, No. 27 Pine street, New York City, on three days' previous notice stating the amount of participation in the syndicate allotted to you by the syndicate managers as above stated, mailed or telegraphed to you by us, against delivery to you at said office of subscription receipts representing your payment. Such call may, in our discretion, be for full payment or for payment in installments.

Yours truly, ————, Syndicate Managers.

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MANNERS v. MOROSCO.

(District Court, S. D. New York. November 29, 1918.)

1. COPYRIGHTS ⟸50—CONTRACT—RIGHT TO PRODUCE PLAY—CONSTRUCTION.
Contract by which the author of a play granted to a manager the exclusive right to produce it, and the manager agreed to give it at least 75 performances each theatrical season for five years, otherwise the contract to terminate, *held* not limited to a term of five years, but to continue in force so long as the manager desired and paid the stipulated royalty.

2. COPYRIGHTS ⟸50—GRANT—RIGHT TO "PRODUCE" PLAY—MOTION PICTURE RIGHTS.
A contract granting the exclusive right to "produce" a play *held* to include the right to present it in motion pictures.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Produce.]

In Equity. Suit by J. Hartley Manners against Oliver Morosco. Decree for defendant.

For convenience of counsel interested in this class of case, the essential features of the two contracts between the parties are here set forth. For brevity, they will be referred to as the first and second contracts.

First Contract.

"Whereas, the party of the first part is the sole and exclusive author and owner of a certain dramatic composition at present entitled 'Peg O' My Heart'; and

"Whereas, the party of the second part wishes to obtain the exclusive right and license to produce, perform, and represent the said play in the United States of America and the Dominion of Canada:

"Now, therefore, in consideration of the premises * * * it is hereby understood, covenanted, and agreed by and among the parties to the agreement as follows:

"First. The party of the first part hereby grants, and by these presents hereby does grant, to the party of the second part, subject to the terms, conditions, and limitations hereinafter expressed, the sole and exclusive license and liberty to produce, perform, and represent the said play in the United States of America and the Dominion of Canada.

"Second. The party of the second part, in consideration of such grant, hereby agrees to pay to the party of the first part the sum of five hundred ($500.00) dollars upon the signing and execution of this agreement * * * in advance of the royalties to accrue to the party of the first part under this agreement. * * *

"Third. The party of the second part agrees to produce the play not later than January 1, 1913, and to continue the said play for at least 75 performances during the season of 1913–1914, and for each theatrical season thereafter for a period of five years.

"Fourth. The party of the second part further agrees to pay to the party of the first part * * * further sums as royalties, as follows:

"Five per cent. (5%) of the first four thousand five hundred ($4,500) dollars gross weekly receipts; seven and one half (7½) per cent. on the next two thousand ($2,000) dollars gross weekly receipts; and ten (10%) per cent. on all sums over that amount of six thousand five hundred ($6,500) dollars gross weekly receipts—which said sum of money, together with certified box office statements, the party of the second part agrees to send to the party of the first part.

"Fifth. The said party of the second part further agrees that if during any one theatrical year, such year to begin on the 1st day of October, said

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play has not been produced or presented for 75 performances, then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part.

"Sixth. It is further agreed that the said party of the second part shall present the said play in first-class theaters with a competent company, the said company to be mutually satisfactory to both the parties to this agreement, and with Miss Laurette Taylor in the title role of 'Peg O' My Heart,' and that the play will have a production in New York City, and will be continued on the road with Miss Taylor in the part of 'Peg,' for at least one season, or longer, if considered advisable by both parties to this agreement.

"Seventh. No alterations, eliminations, or additions to be made in the play without the approval of the author.

"Eighth. The rehearsals and production of the play to be under the direction of the author.

"Ninth. The name of the author to appear on all advertising, reading, and printed matter used in connection with the play.

"Tenth. The author to have the right to print and publish the play, but this right is not to be exercised by the author within six months after the production of said play in New York City, unless the written consent of the manager has first been obtained.

"Eleventh. Said manager does hereby agree that he will not lease, sublet, assign, transfer, or sell to any person or persons, firm or corporation, any of his aforesaid rights in and to the said dramatic composition or play, without the written consent of said author has first been obtained. Should the play fail in New York City and on the road, it is agreed between both parties it shall be released for stock.

"Twelfth. Whenever the play is released for stock, the royalties received from the stock theaters to be divided equally between the party of the first part and the party of the second part.

"Thirteenth. This agreement is binding upon the parties hereto, upon their heirs, executors, assigns, administrators, and successors. * * *"

To this agreement there was an addendum as follows:

"It is further agreed that after Miss Taylor shall have finished her season in 'Peg O' My Heart,' as provided for in this contract, her successor in the rôle of 'Peg' for any subsequent tours shall be mutually agreeable to both parties to this contract.

J. Hartley Manners.
"Oliver Morosco."

Second Contract.

"Whereas, J. Hartley Manners, of the city, county, and state of New York, party of the first part hereto, and Oliver Morosco, of Los Angeles, California, party of the second part hereto, have heretofore entered into an agreement, dated January 19, 1912 (hereinafter called 'original agreement'), a copy of which is hereto attached, and by express reference thereto made a part hereof, and controversies have arisen and now exist between the parties hereto with reference to the meaning of said original agreement, and the parties hereto desire to settle and adjust said controversies, and to change said original agreement as hereinafter set forth:

"Now, therefore, in consideration of the premises * * * the parties hereto do hereby enter into this supplemental agreement:

"First. The parties hereto do hereby settle and adjust all of said controversies.

"Second. Said original agreement, except as by this supplemental agreement changed, is hereby in all respects ratified, confirmed, and approved.

"Third. Paragraphs 'Sixth' and 'Eighth' of said original agreement, and also the addendum or postscript to said original agreement (which addendum or postscript bears the signatures of said Manners and said Morosco), are each and all hereby canceled and eliminated from said original agreement.

"Fourth. There shall be and there is hereby added to said original agreement the following, to be designated as new paragraph 'Sixth' thereof:

" 'Said Morosco may, contemporaneously, and from time to time, as long as this contract is in force, produce, perform, and represent said play "Peg O' My Heart," with or in as many companies in the United States and Canada

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as he, the said Morosco, may, in his sole discretion, deem proper; and it is further agreed that Laurette Taylor (Laurette Taylor Manners) need not be engaged to appear, and need not appear, in the title rôle, or star or principal part, or any other part in any of said companies, and that the said Morosco need in no way consult or confer with the said J. Hartley Manners respecting the star, the cast, the featured member or members of the cast, the rehearsals, or production of said play by any of said companies—of all of which the said Morosco shall have, and is hereby given, sole and exclusive charge and control.'

"Fifth. There shall be, and there is hereby, added to said original agreement, to be known as new paragraph 'Sixth-a,' the following:

" 'Said Morosco shall use reasonable efforts to direct that all advertising matter in the United States and Canada shall contain a reference to the fact that said Laurette Taylor was the creator of the rôle of "Peg" in said play; it being the intention of this provision that said Morosco shall use reasonable endeavors to have said Laurette Taylor's name featured in the manner above indicated, but it being expressly understood and agreed that said Morosco shall have the unlimited right and privilege to feature, star, and advertise any other person or persons appearing or to appear in any of said companies, in any manner that he, said Morosco, shall deem fit or proper.'

"Sixth. There shall be, and there is hereby, added to paragraph 'Fourth' of said original agreement the following provision:

" 'The royalties herein specified shall be paid to the said Manners by said Morosco at the rate herein set forth, for every company performing the said play of "Peg O' My Heart" in the United States or Canada, under the management of said Morosco, under said original agreement or this supplemental agreement.'

"Seventh. It is further agreed that paragraph 'Eleventh' of said original agreement shall be, and the same is hereby, amended so as to read as follows:

" 'Eleventh. Said Morosco is hereby expressly authorized to lease, sublet, assign, transfer, or sell to any person or persons, firm or corporation, whatsoever, any of his rights acquired under said original agreement or this supplemental agreement; it being expressly understood and agreed that no such leasing, subletting, assignment, transfer, or sale shall in any way release or discharge said Morosco from his personal liability to pay to said J. Hartley Manners the royalties in amounts, manner, and at the time as specified in said original agreement and in this supplemental agreement.'

"Eighth. It is further agreed that paragraph 'Twelfth' of said original agreement shall be and the same is hereby amended, so as to read as follows:

" 'Twelfth. Said play "Peg O' My Heart" may be released for stock, in the United States and Canada, during the time that this contract is in force, whenever the net amount realized from all the companies producing the play in any one theatrical season shall yield a net profit of less than two thousand ($2,000) dollars. Whenever the said play is released for stock company or companies, the royalties received from the stock theaters shall be divided equally between the said J. Hartley Manners and said Morosco as and when received by said Morosco.'

"Ninth. It is further agreed that, during the period of four years from and after the date hereof, neither party hereto shall or will, without the written consent of the other party hereto first had and obtained, directly or indirectly produce, represent, or exhibit, or permit, allow, or suffer to be produced, represented, or exhibited, or sell, lease, give, or transfer, any permission, privilege, or right to produce, represent, or exhibit the said play by cinematograph or motion or moving pictures in the United States or Canada. It is further expressly understood and agreed that, after the expiration of said four-year period, the rights, whatever they may be, of either said Morosco or said J. Hartley Manners, to directly or indirectly produce, represent, or exhibit, or permit, allow, or suffer to be produced, represented, or exhibited, or sell, lease, give, or transfer any permission, privilege, or right to produce, represent, or exhibit, the said play by cinematograph or motion or moving pictures in the United States or Canada, shall be such as said Morosco and said J. Hartley Manners shall respectively be legally entitled to under and pursuant to the terms of said original agreement, to the said extent and

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with the same effect as though this supplemental agreement had not been entered into. This provision is not to be construed as a recognition by either party hereto that the other had under the original agreement, or has under this agreement, the right to give or authorize the giving of cinematograph or motion or moving pictures of said play.

"Tenth. The said J. Hartley Manners and the said Morosco hereby forever mutually release the one the other from any and all claims and demands which either one now has or asserts, or might have or assert, against the other, for or on account of any alleged violation of said original agreement, on the part of either of the parties hereto, prior to the execution of this supplemental agreement. * * *"

Walter C. Noyes and David Gerber, both of New York City, for plaintiff.

Charles H. Tuttle and William Klein, both of New York City, for defendant.

MAYER, District Judge (after stating the facts as above). The suit is brought, in effect, to restrain defendant (1) from playing, producing, or controlling in any manner the dramatic composition "Peg O' My Heart," and (2) from manufacturing or presenting any motion picture based upon "Peg O' My Heart." The case requires only the construction of the two contracts; testimony in respect of customs and conversations antecedent to the contracts having been excluded.

[1] 1. Plaintiff urges that the first contract amounts only to a license, revocable at his option, except as to the interest of defendant for the period referred to in paragraph "Third" of the first contract, and that time, according to plaintiff, expired in June, 1918; a "theatrical season" concededly meaning from October to June.

Applying fundamental principles to the construction of this contract, it is entirely clear that the parties intended that defendant should have all the rights mentioned for all time and that paragraph "Third" (particularly when illuminated by paragraph "Fifth"), as aptly put by counsel for defendant, is a statement of the least that defendant is to do, not of the most he is to have. Had the parties otherwise intended, they could readily have fixed a time limit in paragraph "First" by the addition of words such as "for ——— years from" or "until" a stated date. The provision in paragraph "Eleventh" merely expressed, inter alia, the natural precaution of the playwright in preventing the disposition of the play to persons or corporations who might be distasteful or otherwise not satisfactory to the playwright. Whatever may be said as to paragraphs "Eleventh" and "Sixth," and the addendum, is now academic, in view of paragraphs "Third," "Fourth," and "Eleventh" of the second contract.

Indeed, the first contract in this respect was an entirely normal arrangement, which contemplated full right to defendant to produce the play as long as he deemed proper, provided that he would, in any event, give the play a fair trial and the opportunity for success which the minimum of 75 performances during the theatrical seasons covered by paragraph "Third" would develop.

[2] 2. I now come to what is the real controversy between the parties, viz. the motion picture rights. On this branch of the case, the question, simply stated, is whether the case at bar falls under Froh-

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man v. Fitch, 164 App. Div. 231, 149 N. Y. Supp. 633, or Klein v. Beach (D. C.) 232 Fed. 240, and 239 Fed. 109, 151 C. C. A. 282. In the former case the contract recited: "Whereas," Frohman "desires the exclusive right to produce or to have produced the said play," and provided that Fitch "does sell" to Frohman "the exclusive right to produce the said play." In the case at bar, the contract recites: "Whereas," Morosco "wishes to obtain the exclusive right and license to produce, perform, and represent the said play," and provides that Manners "does grant" to Morosco "the sole and exclusive license and liberty to produce, perform, and represent said play."

It will thus be noted that the word "produce" occurs in both contracts; i. e., in Frohman-Fitch and in Manners-Morosco. When used alone, that word has a definite meaning, by virtue of Kalem Co. v. Harper, 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285, and Frohman v. Fitch, supra, as was pointed out by Judge Learned Hand in Klein v. Beach, supra. In other words, "produce" includes the presentation in or by way of motion pictures. The scope of the word, as thus judicially defined, can be narrowed only by some other language, employed by contracting parties to express a different intent. Thus it was that the question in Klein v. Beach, supra, was whether the additional words "for presentation on the stage" and "on the stage," construed with their context, meant the spoken play.

Of course, it is often possible to find in the opinions of courts some sentence or phrase which, if isolated from its context, may convey a meaning different from what the writer intended. Opinions, however, must be read as a whole, and illustrative observations must be understood as applying only to the question and facts under consideration. Thus read, it will be found that the opinion of each court in Klein v. Beach, supra, simply held that the particular contract there considered contemplated the spoken play only.

In the case at bar, however, the decision need not rest solely upon particular words found in particular paragraphs. The whole structure of the contract demonstrates plainly the strength of defendant's position.

When the first contract was executed, motion pictures, as the parties agree and as the testimony shows, were well known. It is not controverted in this case that a motion picture of "Peg O' My Heart" would seriously damage, from a financial standpoint, the production of the spoken play. It is difficult to suppose that Morosco, as a producing manager, would risk the money necessary to produce the play at least 75 times each year for several years and leave the motion picture rights outstanding in Manners. In such a situation Manners might, at any time, for some reason satisfactory to himself, sell the motion picture rights and destroy the financial value of the spoken play. Indeed, the second contract discloses that controversies arose between the parties.

It might very well have happened that the play, instead of turning out a great success, might have had a run of short duration, with consequent lean royalties. Yet the production might have been salable for motion pictures at a price in excess of any royalties which failure as a

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spoken play would indicate. In such circumstances, Manners could not lose. He would have, for himself, the proceeds resulting from his ownership of the motion picture rights, while Morosco would be compelled to pay him the stipulated per cent. of gross (not net) receipts derived from the compulsory performances required by paragraph "Third," and contemporaneously the financial results to Morosco might be gravely affected by the contemporaneous motion picture. In other words, Manners could not lose and Morosco was sure to lose, and practically the same result would follow if the play were released for stock. Courts are not astute to construe contracts with such a result, unless the language and intent clearly so require.

Per contra, if Morosco, by the contract, gained the motion picture rights, it is hardly conceivable that, while the spoken play was a success, he would destroy its financial future and possibilities by producing motion pictures contemporaneously, and thus destructively compete with himself.

Finally, that it was not intended to limit the scope of the production to any field of presentation is well evidenced by paragraph "Tenth" of the first contract. The express exclusion of the right to print and publish the play is clearly expressive of the intent to include all rights except those specifically excluded or reserved. The suggestion that paragraph "Seventh" has any bearing upon the question of motion picture rights is not persuasive, in view of the Kalem and Frohman v. Fitch Cases.

The bill is dismissed, with costs.

In re CALEDONIA COAL CO.

(District Court, E. D. Michigan, N. D. October, 1918.)

No. 835.

1. BANKRUPTCY ⊂⊃342—CLAIMS—PETITION FOR RE-EXAMINATION.
Where a petition of a trustee for re-examination of claims previously allowed was filed about a year after the filing of the claims, but no motion to dismiss the petition as improperly filed was made, and the reasons for delay were explained, *held*, that the petition will be treated as authorized under the bankruptcy rules for the district, which require the filing of petitions for re-examination within 60 days, unless the time therefor shall be extended.

2. BANKRUPTCY ⊂⊃342—CLAIMS—RE-EXAMINATION—LACHES.
In view of Bankruptcy Act, § 57k (Comp. St. § 9641), providing that claims which have been allowed may be re-examined and rejected at any time before the estate has been closed, a year's delay by the trustee in filing a petition to expunge claims previously allowed will not be deemed laches, where the claimants were not injured, for mere delay is not laches.

3. BANKRUPTCY ⊂⊃342—CLAIMS—PETITION TO RE-EXAMINE.
Under General Order in Bankruptcy No. 21 (89 Fed. x, 32 C. C. A. x) it is unnecessary that copies of a petition to re-examine claims previously allowed be sent to each of the claimants, and it is permissible to join all of the claimants in the single petition.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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4. BANKRUPTCY ⊂⇒342½—REFEREES—FINDINGS.
Findings of fact of a referee in bankruptcy upon disputed questions of fact will not be set aside by the court, unless manifestly erroneous.

5. CORPORATIONS ⊂⇒228—STOCKHOLDERS—LIABILITY OF.
A stockholder, who owns stock for which payment has not been made to the corporation, and who is not a bona fide holder thereof, is liable to the corporate creditors for the unpaid balance of the par value of such stock.

6. JOINT-STOCK COMPANIES ⊂⇒15(1)—PARTNERSHIP ASSOCIATIONS—STOCKHOLDERS.
The rule that a stockholder, who owns stock for which payment has not been made to the corporation, and is not a bona fide holder thereof, is liable to corporate creditors, etc., is applicable to stockholders in a partnership association.

7. BANKRUPTCY ⊂⇒308—CLAIMS—RECOVERY.
Where a stockholder in a partnership association, who had not fully paid for his stock, presents a claim against the association in bankruptcy, he cannot recover thereon, as against other creditors, until he has first paid the amounts due and payable upon his stock.

8. JOINT-STOCK COMPANIES ⊂⇒6—STOCK—PAYMENT IN FULL.
Though stockholders who had fully paid for their stock performed voluntary labor for a partnership association, and the value of the assets of the association increased, so that at one time it exceeded the amount of the total authorized capital stock, and no dividends were paid to stockholders, such stock cannot be treated as having been paid in full, for that would disregard the difference between the capital of the association and its capital stock.

9. BANKRUPTCY ⊂⇒348—ASSOCIATIONS—WAGE CLAIMS.
Where stockholders in a partnership association engaged in mining consented that part of their wages for services rendered the association should be withheld and loaned to the association, such stockholders are not, on the bankruptcy of the association, entitled to priority upon such claims, on the theory that they were wage claims.

10. BANKRUPTCY ⊂⇒348—CLAIMS—PRIORITY.
Bankruptcy Act, § 64b, subd. 5 (Comp. St. § 9648), does not make applicable the state statutes giving priority to wage claims for longer periods than three months; the restriction to three months in subdivision 4 being controlling.

In Bankruptcy. In the matter of the Caledonia Coal Company, bankrupt. Petition to review an order of the referee disallowing certain claims against the estate, and denying priority to other claims. Petition denied, and cause remanded to referee.

Harry L. Stearns and E. L. Beach, both of Saginaw, Mich., for trustee.

George C. Ryan, of East Saginaw, Mich., for claimants.

TUTTLE, District Judge. This is a petition to review an order of the referee disallowing certain claims against the estate and denying priority to certain other claims.

The Caledonia Coal Company, the bankrupt, was a Michigan partnership association, organized under the statute governing such associations, being Act 191 of the Public Acts of 1877, as amended by Pub. Acts 1881, No. 216. It was engaged in the mining of coal on a co-operative plan. Under this plan each stockholder worked as a miner in the mines owned by the company, for which he received wages

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on a certain scale. The capital stock of the company consisted of 5,000 shares, of the par value of $10 each. After operating in Michigan for several years with varying degrees of success, the company was finally, in the latter part of May, 1916, compelled to file a voluntary petition in bankruptcy. Thereupon the claims involved in this proceeding were filed by over 70 of the stockholders, who claimed various sums as wages earned by them in working in the mines of the company. These claims were filed about a month after the adjudication in bankruptcy, and, upon their being filed, were allowed as a matter of course; no objections to them having been presented. The administration of the bankrupt estate was then suspended for about a year, while an attempt was made to resume the operation of the company. After about a year, however, the trustee abandoned the attempt and proceeded with the administration of the estate.

In July, 1917, the trustee filed a petition asking that the claims of these stockholders be re-examined and expunged. He alleged two grounds for the rejection of such claims: First, that the amounts claimed to be due as wages had been advanced by the claimants to the company out of their unpaid wages, for the purpose of furthering the common enterprise in which they were engaged and from which they expected to reap a profit; and, second, that the claimants were indebted to the company, on account of unpaid subscriptions for their stock, for sums at least equal to the amounts claimed to be due them. A time was fixed for the hearing on this petition, and notice thereof was duly given to the claimants. Testimony was taken before the referee. The latter then entered an order disallowing a number of the claims, and holding that the balance of such claims should be allowed merely as general unsecured claims, without any priority. This petition is filed to review such order.

[1] Certain questions raised concerning the practice followed by the trustee and referee may be first considered. Complaint is made that the petition for the re-examination of these claims was not seasonably filed, in view of the provisions of rule 32 of the Bankruptcy rules for this district. This rule provides that—

> "Petition for re-examination of claims shall be filed within sixty days after the filing thereof, unless the time therefor shall be extended by the court upon cause shown and after such notice to the claimant of the hearing of the said application as the court may direct."

As already stated, the petition of the trustee was filed about a year after the filing of the claims in question, and it does not appear that there has been any formal compliance with the rule just quoted. In view, however, of the fact that due notice was sent to all of the claimants of the hearing on such petition, and as one of the questions raised by claimants and argued by both parties here is whether the petition of the trustee can be filed after the lapse of the time mentioned, I am disposed to consider this petition as if it included an application for the extension of time contemplated by the rule referred to. No motion to dismiss the petition as improperly filed was made, and the merits of the case have been fully argued. Reasons for the delay have been explained by the attorney for the trustee and are now before

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the court, so that no good purpose would be served by insisting upon the presentation of a formal application for an extension of time. Treating the petition, then, as involving such an application, I am of the opinion that the delay of the trustee has been satisfactorily explained, and that sufficient cause has been shown for the necessary extension of time.

[2] It is further urged that the trustee has been guilty of such laches in filing his petition as to bar his right to do so. Delay alone does not constitute laches; the essential element being prejudice to another person by reason of the delay complained of. It does not appear that the delay in this case has resulted in any injury or prejudice to the claimants which would now make it inequitable to allow the trustee to file his objections to these claims. Section 57k of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 560 [Comp. St. § 9641]) provides that—

"Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before, but not after, the estate has been closed."

Under the circumstances it cannot be held that the trustee has been guilty of laches. In re Globe Laundry (D. C.) 198 Fed. 365.

[3] Complaint is made because copies of the petition to re-examine were not sent to the claimants, and also because all of these claimants were joined in one petition. No statute, rule, or authority is brought to the attention of the court in support of these objections, which seem clearly without merit. General Order 21 (89 Fed. x, 32 C. C. A. x), which governs the practice in such a case, provides in paragraph 6 as follows:

"When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witness that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly."

It will be noted that there is nothing in this rule requiring the service of a copy of the petition upon the claimant or requiring a separate petition containing the necessary allegations, and due notice of the hearing thereon was sent to each of the claimants. I am satisfied that the proper practice has been followed, and the contention to the contrary must be overruled.

Coming, then, to the merits of the case, did the referee err in the disallowance of these claims? The referee found, as a matter of fact, that the stock owned by a number of the claimants, a list of whose names is given in his findings, was not paid in full, and, furthermore, that such claimants were not bona fide purchasers of such stock.

[4] It is well settled that the findings of fact of a referee in bankruptcy upon disputed questions of fact will not be set aside by the court unless manifestly erroneous. I have carefully examined the transcript of the testimony attached to the report of the referee, and am satis-

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fied that there was ample evidence in the record in support of the findings referred to. Such findings, therefore, will not be disturbed.

[5] It is elementary that stockholders, who own stock for which payment has not been made to the corporation, and who are not bona fide holders thereof, are liable to creditors of the corporation for the unpaid balance of the par value of such stock, so far as may be necessary to pay such creditors, notwithstanding the fact that the stock may be fully paid and nonassessable as between the corporation and its stockholders. Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227.

[6] The same rule is applicable to a partnership association such as the bankrupt company. Rouse, Hazard & Co. v. Detroit Cycle Co., 111 Mich. 251, 69 N. W. 511, 38 L. R. A. 794; Wood v. Sloman, 150 Mich. 177, 114 N. W. 317.

[7] When, therefore, such a stockholder presents a claim against his company in bankruptcy, he is not entitled to recover thereon, as against other creditors, until he has first paid the amount so due and payable upon his stock, for which he is so liable. Kiskadden v. Steinle, 203 Fed. 375, 121 C. C. A. 559; In re Wiener & Goodman Shoe Co. (D. C.) 96 Fed. 949.

[8] It is urged, however, that even if payment has not been expressly made upon this stock, yet because, after the stock was issued, the stockholders performed certain voluntary labor for the company, and the value of the assets of the company increased, so that at times it exceeded the amount of the total authorized capital stock, and no dividends were paid to stockholders, therefore, such stock should be treated as having been paid in full. This argument overlooks the difference between the capital of the company and its capital stock. The former consists of the property owned by the company, and varies in extent and value with the changes in the quantity and value of the property owned by the company from time to time. The capital stock, however, is the trust fund contributed by the stockholders for the benefit, not only of the company, but also of its creditors, who have a right to rely upon its payment by the stockholders to the full amount of its par value. The fact that the capital of the company increases in value after its organization does not operate as a payment by the stockholders on their stock, any more than a decrease in value of such capital would reduce the amount to which the stockholders are entitled to credit for payments on their stock subscriptions. Scoville v. Thayer, 105 U. S. 143, 26 L. Ed. 968. This contention is plainly without merit.

[9] It is claimed, also, that the referee erred in denying priority to any of these claims. It appears that at certain meetings of the stockholders and of the board of managers of the company, held about four months prior to the filing of the petition in bankruptcy, the financial condition of the company was considered, and resolutions were passed declaring that part of the wages of the men should be withheld on each pay day for the purpose of providing necessary funds to meet running expenses. It appears, also, that from time to time thereafter a part of the wages of these claimants was retained by the company for the purpose mentioned. It was the claim of the trustee, which

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was adopted by the referee, that as to the sums thus withheld out of the wages earned by these claimants their claims should be considered as brought for the recovery of money loaned, and not for wages, and that, therefore, such claims were not entitled to the priority accorded to labor claims. It is, in my opinion, clear that to the extent that these stockholders permitted the company to retain and use money due them as wages they must be held to have loaned this money to the company.

In so far as they consented, or failed to object, to the action of the company in deducting these sums from their pay and crediting them with the amounts on the books of the company as loans made by them, they cannot now be heard to deny that they in reality made such loans. While the record before me is not very definite or positive as to the course of dealing in regard to this matter, it does appear from the pay roll book of the company that transfers were regularly made from the labor accounts to special loan accounts with the miners. Of course, the mere arbitrary withholding of money due the men as wages, if done without their consent, express or implied, would not be sufficient to change the character of these claims from unpaid wages to unpaid loans. Where, however, it appears that an amount was so withheld and so charged upon the books, and that the claimant accepted the balance of his wages without objection, I am satisfied that the proper inference to be drawn is that the claimant understood and consented that the sum not paid to him was retained by the company as a loan. As to such loans, claimants are not entitled to priority, as for labor claims.

The actual claims as filed have not been shown to me, and I am unable to determine whether the claimants are seeking to recover only the amounts retained from their wages as loans, or whether they are claiming that, not only such loans, but also wages earned in addition thereto, are due and unpaid. Nor am I certain, from the record before me, whether, when the wages earned became due and payable, all of such wages were withheld or only a portion thereof. The referee, however, will doubtless have no difficulty in properly applying the principles which I have stated to the facts in each particular case.

[10] Finally, it is urged by the claimants that under the law of Michigan all claims for sums due for work and labor are entitled to priority, and not merely claims for wages earned during the three months prior to the date of the filing of the petition in bankruptcy, as provided by the Bankruptcy Act. The contention is that the fourth subdivision of section 64b of the Bankruptcy Act (section 9648), providing for the priority of wage claims earned within the three months mentioned, is enlarged by the fifth subdivision of said section, which gives priority to "debts owing to any person who by the laws of the states or the United States is entitled to priority"; so that by virtue of the Michigan statute, giving priority to all wage claims against insolvent corporations without limitation as to time, these claimants are entitled to priority without such limitation.

This contention cannot be sustained. The clause of the Bankruptcy Act just quoted, relating to debts entitled to priority by the state laws, must be read in connection with the preceding clause, which indicates the intention of Congress to provide a fixed and certain preference for

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wage claims as such, without regard to the varying degrees of priority accorded to such claims by the laws of the different states. This provision, therefore, supersedes the state laws on the same subject; the authority of Congress over this subject being, to the extent to which it is exercised, exclusive. In re Rouse, Hazard & Co., 91 Fed. 96, 33 C. C. A. 356; In re Slomka, 122 Fed. 630, 58 C. C. A. 322.

The cause will be remanded to the referee for proceedings not inconsistent with the terms of this opinion.

HARNICK v. PENNSYLVANIA R. CO.

(District Court, S. D. New York. June 12, 1918.)

No. 229.

ACTION ⟸68—STAY—ACTIONS AGAINST RAILROADS—ORDER OF DIRECTOR GENERAL.

Order No. 26 of the Director General of Railroads, dated May 23, 1918, providing that "upon a showing by the defendant carrier that the just interests of the government would be prejudiced by a present trial of any suit against a carrier under federal control * * * the suit shall not be tried during the period of federal control" is within the powers conferred by Congress and the President, but an application for a stay is addressed to the discretion of the court and the burden rests on defendant to show that interests of the government would be substantially prejudiced by a present trial.

At Law. Action by Charlie Harnick against the Pennsylvania Railroad Company. On application by plaintiff for preference. Granted.

S. A. Machcinski, of New York City, for plaintiff.

Burlingham, Veeder, Masten & Fearey, of New York City (Samuel C. Coleman, of New York City, of counsel), for defendant.

MANTON, Circuit Judge. Plaintiff sues for personal injuries which have permanently crippled him. The action is at issue on the calendar and is awaiting its turn for trial. While holding the common-law term of this court on May 20, 1918, an application was made before me for a preference. When the motion was called, the plaintiff defaulted. Thereafter, and on May 25, 1918, an order to show cause was obtained asking to open the default and hear the motion upon the merits. This will be granted.

Plaintiff makes out a case sufficiently strong to warrant the granting of a preference and the obtaining of a speedy trial. This for the reason that his serious injuries and financial condition demand the relief he asks. The only obstacle is whether or not this case should be stayed under order of the Director General of Railroads of May 23, 1918, known as Order No. 26, which provides:

"That upon a showing by the defendant carrier that the just interests of the government would be prejudiced by a present trial of any suit against any carrier under federal control, which suit is not covered by General Order No. 18 and which is now pending in any county or district other than where the cause of action arose, or other than in which the person alleged to have been

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injured or damaged at that time resided, the suit shall not be tried during the period of federal control: Provided, if no suit on the same cause of action is now pending in the county or district where the cause of action arose, or where the person injured or damaged at that time resided, a new suit may, upon proper service, be instituted therein; and if such suit is now barred by the statute of limitations, or will be barred before October 1, 1918, then the stay directed by this order shall not apply unless the defendant carrier shall stipulate in open court to waive the defense of the statute of limitations in any such suit which may be brought before October 1, 1918.

"This order is declared to be necessary in the present war emergency. In the event of unnecessary hardship in any case either party may apply to the Director General for relief, and he will make such order therein as the circumstances may require consistent with the public interest.

"This order is not intended in any way to impair or affect General Order No. 18 as amended by General Order 18a."

The cause of action arose at Keiser, Pa. The plaintiff, at the commencement of this action, resided in Westchester county, New York state, and instituted a suit in the Supreme Court of that county. The defendant removed it to this court. By acquiescence of the defendant the court has jurisdiction.

On August 29, 1916, Congress passed an act, entitled "An act making appropriation for the support of the army for the fiscal year ending June 30, 1917, and for other purposes" (Act Aug. 29, 1916, c. 418, 39 Stat. 645 [Comp. St. § 1974A]), which provides as follows:

"The President, in time of war, is empowered through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Under this authority, on December 26, 1917, by a proclamation of the President, the government took possession and assumed control, on the 28th of December, 1917, of each and every system of transportation and appurtenances thereof, located wholly or in part within the boundaries of the continental United States. This proclamation directed:

"That the possession, control, operation and utilization of such transportation systems hereby by me undertaken shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads."

By Act Cong. March 21, 1918, c. 25 (Comp. St. 1918, §§ 3115¾a–3115¾p), the President was authorized and given "such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred." The President's proclamation of December 26, 1917, provided:

"Until and except so far as said Director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of the regulating commissions of the various states in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said Director, shall have paramount authority and be obeyed as such."

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Section 10 of the Act of March 21, 1918, provides:

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law. * * * But no process, mesne or final, shall be levied against any property under such federal control." Comp. St. 1918, § 3115¾j.

The jurisdiction of the District Court is limited, and depends upon the statutory enactments of Congress. Its jurisdiction may therefore be limited by the same power which creates it. Congress has given authority to the Director General, and the President's proclamation provides, that any orders, general or specific, made by the Director, shall have paramount authority and be obeyed as such. Likewise it is provided that actions at law or suits in equity may be brought by or against such carriers and judgments rendered as now provided by law. This indicates clear intent to permit actions pending to be tried and actions to be instituted thereafter. The right to pursue a remedy in a particular court is not a vested right and may be removed while an action is pending. Railroad Co. v. Grant, 98 U. S. 398, 25 L. Ed. 231. The right to stay an action pending, under Order No. 26, however, is dependent upon whether the interest of the government be prejudiced by a present trial of a pending suit, and there must be a showing of prejudice by reason of a present trial.

Therefore the intention of Order 26 is to address the discretion of the court as to its application in each particular case. Since the plaintiff's case warrants a preference, a grave injustice would be imposed upon him who has sought his proper forum (except for the rule) to now require the suspension of his trial and compel him to sue in the courts of Pennsylvania. There can only be read from the act an intention to divest this court of jurisdiction upon good cause being shown on the part of the railroad company defendant. Indeed, the defendant here alleges, in opposing affidavits, that they do not ask at this time for a stay but urge Order 26 as a defense to the motion for a preference. There is no showing here as to the number of witnesses or what inconvenience the defendant would be put to by its witnesses coming to this jurisdiction to try the case when reached. There is no showing, from the papers, the number of men employed by the defendant, or the nature or quality of the work engaged in at the present time. Indeed, the men so employed by the defendant, who are necessary witnesses in the defense of the action, could easily be replaced by men who could perform their work during their absent period. There is no position requiring particular skill which could not be so filled. To say that the difference of a few hours in point of time required in railroad travel would result in serious consequence or prejudice to the defendant, is stretching credulity.

The application for a preference will therefore be granted and the case set down for trial for June 20, 1918.

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THE MERCER.

THE EL CHICO.

(District Court, E. D. New York. November 1, 1918.)

COLLISION ⇐105—VESSEL LYING IN SLIP AND BARGE IN TOW—FAULT OF TUG.

A collision between a barge alongside of a tug and a steam lighter lying in a slip *held*, on the evidence, due solely to the fault of the tug, and not to the interference of another tug, which was backing out of the slip.

In Admiralty. Suit for collision by the Clyde Lighterage Company, Incorporated, owner of the steam lighter Henry C. Rowe, against the Pennsylvania Railroad Company, owner of the steam tug Mercer, with the Southern Pacific Company, owner of the steam tug El Chico, impleaded. Decree for libelant against the Pennsylvania Railroad Company.

Foley & Martin, of New York City, for libelant.

Burlingham, Veeder, Masten & Fearey and C. I. Clark, all of New York City, for the Mercer.

Kirlin, Woolsey & Hickox and Mr. Maclay, all of New York City, for the El Chico.

GARVIN, District Judge. The steam tug Mercer, with a barge on either side, brought the corner of her port barge into the stern of the steam lighter Henry C. Rowe, owned by the libelant, on September 26, 1917. The lighter was lying in the slip on the south side of Pier 49, North River, and was not at fault.

It is claimed on behalf of the Mercer that the accident occurred because the steam tug El Chico, in backing out of this slip, did not check her sternway, but allowed it to come in contact with the other barge of the Mercer, as a result of which the Mercer's whole tow swung so that her port barge collided with the Henry C. Rowe. It is claimed on behalf of the El Chico that she did not approach the tow of the Mercer. A preponderance of the evidence fully substantiates this contention. Both Tyson, manager of the Clyde Lighterage Company, owner of the Henry C. Rowe, and Anderson, her master, corroborate the testimony of the captain and mate of the El Chico. It has not been established, therefore, that the El Chico was operated in a negligent manner. The Mercer, according to the testimony, was backing and filling at the entrance to the slip, and had brought her tow within a few feet of the Henry C. Rowe.

I am of the opinion that the collision occurred as the result of negligence in the operation of the Mercer. Decree accordingly.

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THE OREGON.

(District Court, E. D. New York. November 2, 1918.)

SEAMEN ⊂=19—DISCHARGE BY ORDER OF CONSUL—LIABILITY OF SHIP FOR WAGES.

A vessel *held* not liable for wages and transportation to a seaman discharged in a foreign port by order of the United States consul, after hearing on a complaint made by libelant without the knowledge of the captain, and where he was paid all wages then due him.

In Admiralty. Suit by Joseph C. Peed against the steamship Oregon. Decree for respondent.

Silas B. Axtell, of New York City, for libelant.
Alfred H. Strickland, of New York City, for claimant.

GARVIN, District Judge. Joseph C. Peed sues to recover wages, maintenance, and cost of transportation, aggregating $517. In January, 1917, he shipped as cook and steward on the steamship Oregon for a voyage to the Atlantic Coast and West Indies, the regular shipping articles signed to extend over a period of six calendar months. The Oregon sailed, continuing her voyage, and reached Kingston, Jamaica, early in May, 1917. There was some trouble between the libelant, Peed, and the chief engineer of the vessel, as a result of which Peed lodged a complaint with the United States consul at Kingston, Jamaica, when the Oregon arrived at that port. Peed did not bring the matter to the captain of the ship before making this complaint to the consul.

An investigation was instituted by the vice consul (then acting consul), a hearing had, and by the direction of the vice consul Peed was discharged after having paid him the wages due him up to that time. The consular certificate shows that Peed committed forgery in his complaint, that Peed was of a disposition to instigate quarrels, to the destruction of the discipline of the crew, and sets forth that the vice consul found that good and substantial reasons existed for his discharge.

Libelant urges that this consular certificate is only prima facie evidence of the facts stated therein. Even if this be so, inasmuch as the certificate of the consul is prima facie evidence of the discharge, the libelant must offer proof sufficient to overcome the prima facie case. I do not find that he has offered such proof. I consider that his own testimony, which is that of a self-confessed forger (according to the consular certificate), should be received with great caution.

In the various cases which have had to do with claims for wages and maintenance arising out of the discharge of a seaman by order of the consul, my attention has been directed to no case which has rendered the vessel liable for such discharge, where the complaint was made by the seaman himself without the knowledge of the captain, and with no alternative to the captain but to obey the direction of the consul. That is the exact situation here, and I am of the opinion that the boat should not be held responsible.

The libel is dismissed.

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CROSBYTON INDEPENDENT SCHOOL DIST. v. C. B. LIVE STOCK CO.

(Circuit Court of Appeals, Fifth Circuit. December 20, 1918. Rehearing Denied February 1, 1919.)

No. 3223.

SCHOOLS AND SCHOOL DISTRICTS ⇐70—CONTRACTS—VALIDITY.

A contract by a school district for the purchase of a school building *held* invalid, on the ground that the building purchased did not conform to the requirements of the state law as to light, ventilation, and safety, and was not susceptible of changes which would meet such requirements.

Appeal from the District Court of the United States for the Northern District of Texas; George W. Jack, Judge.

Suit in equity by the Crosbyton Independent School District against the C. B. Live Stock Company. Decree for defendant, and plaintiff appeals. Reversed and remanded.

W. H. Kimbrough, R. E. Underwood, and M. J. R. Jackson, all of Amarillo, Tex., for appellant.

J. W. Burton, of Crosbyton, Tex., for appellee.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. The C. B. Live Stock Company, owning a large body of land in Crosby county, Tex., sold it out in small tracts to actual settlers. Through a subsidiary company, the town of Crosbyton was established. In 1909 an independent school district was formed under the general laws of Texas, with the maximum territory. It was impracticable, with the taxable values and under the taxing power of the district, to construct a satisfactory school building, and 39 of the citizens executed a note for $10,000 to secure funds for the erection of such building. It was the understanding that the Legislature would be asked to create, by special act, an independent school district with an enlarged area, and that the district would discharge the debt. The note was sold to the C. B. Live Stock Company. A building was constructed; the construction being in the hands of trustees selected by the signers of the note. The $10,000 provided, in part used for other school purposes, was insufficient, and an additional sum was borrowed to complete the building and meet debts contracted in the operation of the school. The trustees for the note signers made a contract with the trustees of the independent school district, by which the latter agreed to pay (if possible) the interest on the $10,000 note as rent for the school property. The lot upon which the building was erected was furnished by the C. B. Live Stock Company, with the understanding that it was to ultimately become the property of the school district. A special act was passed in 1913 (Acts 33d Leg. c. 20), creating the independent district, to include within its area about 120 sections, and in other respects giving to it the powers of a school district under the general law.

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After the formation of the district under the special act, a petition was filed by the requisite number of taxpaying citizens for an election, to determine whether or not bonds should be issued to "provide funds to be expended for the purpose of purchasing a school building of concrete material," and "to determine whether the trustees of said district shall be authorized to levy, assess, and collect annually" a tax, etc. On September 24, 1913, the board passed a resolution in the following language:

"On motion, the board ordered an election to be held November 1st, for the purpose of voting on the issuance of eighteen thousand dollars bonds to buy the school building and grounds. Bonds to be 40-year bonds, with 5 per cent. interest, with the privilege of redeeming after 10 years."

On November 22d an order was made to this effect:

"On motion, it was ordered the election returns were examined on the school bond election held November 1, 1913, and found to be 47 votes for the issuance of the bonds and 34 against it, with 13 majority in favor of the bonds, and so declared."

Subsequent to the election, an election order was adopted and submitted to the Attorney General as a part of the record, wherein an election was ordered to determine if bonds to the amount of $18,000 should be issued "to provide funds to be expended in the payment of accounts legally contracted in the purchasing of a building of concrete material, to be used as a public school building, and to determine whether the trustees of the district shall be authorized to levy," etc., a tax. At the same time, and after the entry of the order actually adopted declaring the result of the election, an order was prepared canvassing the return, and declaring the result of the election, and declaring that 47 votes had been cast for the bonds and 37 against, and in addition declaring that 47 votes had been cast for the tax, and 34 against. It was certified that these orders had been passed on September 12, 1913, and November 20, 1913, respectively. The record thus prepared was submitted to the Attorney General, and the bonds were approved. On April 8, 1914, a resolution was passed to the effect that all the bonds be delivered to the C. B. Live Stock Company as the purchase price of the school building, equipment, and grounds; but it was provided that, if the C. B. Live Stock Company could sell the bonds at par to the state, it would retain of the proceeds $17,932.27 only, and return the balance to the school board. A contract to the same effect was signed by the parties. The bonds, however, were sold direct to the state, and the treasury warrants received in payment were turned over to the C. B. Live Stock Company.

The $17,932.27 was made up of the following items: Note, $10,000; interest, $2,890; note of August 3, 1911, $3,991.61; interest, $778.66; insurance premiums, $272. The note for $3,991.61 was given to cover items for material used in the construction and for money to cover deficits in the operating expenses of the school.

At the time the resolution was adopted by which the building was to be purchased, and as the result of which the notes were to be delivered to the makers, six members of the board were present, three

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of whom were signers of the notes, and another of whom was an employé of the C. B. Live Stock Company.

Parol evidence was admitted to the effect that the understanding of the voters at the bond and tax election was that the school building and grounds were to be acquired with the bonds and that the citizens who had signed the notes were to thereby be released from their personal obligations.

Appellant contends that, because of the personal interest of members of the school board, the action by which the C. B. Live Stock Company acquired the proceeds of the bonds was void.

Appellee answers that the action of the school board was in response to the will of the people; that the trustees had, with reference to the issuance of the bonds and the purchase of the building, no discretion; and, exercising ministerial functions only, their action was not invalidated by the interests of members adverse to the interests of the school district.

To the answer of appellee, appellant rejoins:

(1) That whatever the wishes of the voters, it could not have been the duty, nor within the power of the board, to issue the bonds or purchase the building, because: (a) The building purchased could not be legally acquired because not constructed to meet the requirements of the law with reference to light, ventilation and safety; (b) bonds may not be constitutionally issued by an independent school district to purchase a building; (c) the constitutional taxing power had already been appropriated, and no provision could be made to provide for payment of interest, and to create a sinking fund to discharge the bonds at maturity; (d) the voters did not vote for the necessary tax.

(2) That no action could be taken by the voters that would relieve the trustees of the duties imposed upon them by law, and render that ministerial which is by law placed within their discretion.

(1a) The building purchased was not constructed in accordance with the requirements of the Texas law. No provision was made by the bond issue, by the contract, or otherwise, for making changes to meet the requirements of the law. The building was not susceptible of changes which would meet these requirements, and there was nothing in the evidence to indicate that changes of any kind were contemplated. My associates agree with the conclusion reached that these facts would invalidate the purchase and furnish a sufficient basis for the judgment hereinafter rendered. The discussion of the other issues is an expression of the views of the writer alone. I prefer to base my action upon what are to me definite and well-established principles, rather than upon a proposition which is, I think, correct, but which has not heretofore been announced by a court.

Appellee insists that, while a school board cannot erect a building without complying with the requirements of the law, a defective building can be purchased. And it is said that inasmuch as there were, when the law was passed authorizing the purchase of buildings, no buildings which complied with the law, to apply the requirements to purchased buildings would nullify the law authorizing purchase. The law has a continuing effect. It applies to buildings in being at the time

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of the passage of the act, and to buildings to be thereafter erected. By the terms of the specific act, or any other act dealing with the matter, the character of the building to be purchased may be indicated. It is immaterial which act was passed first. The acts are not in conflict, and to hold that a building may not be erected unless it meets the requirements of the law, but that one may be purchased without reference to the requirements, is to render a salutary law nugatory by a conclusion not logically warranted.

(1b) Article 7, § 3, of the Constitution of Texas, provides:

"That the Legislature may authorize an additional ad valorem tax to be * * * collected within all school districts * * * for the further maintenance of public free schools, and the erection and equipment of school buildings therein."

It is contended that authority to tax for the "erection and equipment of school buildings" does not include authority to tax to purchase school buildings. The Legislature of Texas has given the provision a more liberal construction. The Texas courts appear not to have passed upon the matter, and, since this case can be disposed of upon other grounds, their decision will not be anticipated.

(1c) The taxing power of an independent school district is limited by the Constitution of Texas to 50 cents on the $100. At the time the enlarged district was established there was a vote in favor of a tax of 50 cents on each $100 valuation of taxable property, to be levied for the year 1913, and each succeeding year, "to supplement the state and county apportionment of said district." It is not clear that a vote of the maximum tax to supplement the other revenues of the district precludes a subsequent vote appropriating a part of the tax to the acquisition of necessary buildings and equipment.

(1d) Under the Constitution of Texas, municipal bonds cannot be legally issued, unless at the time of issuance provision is made by taxation to pay interest and create a sinking fund to discharge the bonds at maturity. Action by trustees in a school district to make such provision must be preceded by a vote of the people in favor of the tax.

The minutes of the school board already quoted, providing for the bond election, do not refer to a tax election. The minutes already quoted, declaring the result of the election, make no reference to votes cast for or against taxation. The order certified to the Attorney General as the election order was not prepared until after the election. The order certified to the Attorney General as declaring the result of the election supplemented the result primarily declared by adding the result of a tax election. The order for the election is the basis for the election, and all subsequent proceedings. There is no evidence, other than the certificate, that the election order certified to the Attorney General was passed before the election; and there is no evidence, other than the certificate, that a tax election was held at any time. The verity of the certificates is attacked by the person who made them. Minutes may be amended to speak the facts, but the evidence in this case rather suggests anxiety to "get up the proper minutes for the Attorney General" than to make the record veracious.

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Appellee insists that the question of whether or not the certificates speak the truth "is foreign to this case," upon the ground that the bonds belong to the state of Texas, and their validity cannot be impeached. Both parties seem to acquiesce in the proposition that approval by the Attorney General and purchase by the state preclude attacks upon the bonds. Assuming this to be true, the inquiry is not an improper one, for it could not have been the duty, nor within the authority, of the board to issue bonds to purchase a building, or for any other purpose, if the necessary tax was not authorized. That cannot be a ministerial duty, or a duty of any character, which is a violation of law.

(2) The effect of the contract made by the school board with the C. B. Live Stock Company in the form of a purchase of the building and grounds was to release (or was intended and assumed to release) three of the members voting for the measure from personal financial obligations. Six members only were present when the resolution authorizing the contract was adopted. The action of the board was void, unless the effect of the election was to make the action of the trustees merely ministerial, and to take away from them entirely any character of discretion. It is not possible to give the language of the law under which the school trustees were acting a construction that would authorize or enable the voters to relieve the school board of the duties and obligations thereby imposed. Article 2857, Rev. St. Tex. 1911, provides that the trustees of a school district shall have the power—

"to levy and collect an annual ad valorem tax not to exceed fifty cents on the one hundred dollars valuation of taxable property of the district, for the maintenance of schools therein, and a tax (within the fifty cents) not to exceed twenty-five cents on the one hundred dollars for the purchase of sites and the purchasing, construction, repairing or equipping public free school buildings within the limits of such districts."

A number of provisos or limitations are placed upon this power, among them being:

"No such tax shall be levied, and no such bonds issued until an election shall have been held, wherein a majority of the taxpaying voters voting at said election shall have voted in favor of the levying of said tax and the issuance of said bonds, or both, as the case may be: Provided that the specific rate of taxes need not be determined in the election."

The exercise of the power of taxation is in the trustees, and not in the voters. Before the power can be exercised by the trustees, the voters must indicate their willingness that it be exercised. The purpose of the law is to limit the taxing power in any event, and not to permit its exercise without the concurrence of the qualified voters. But, under the terms of the law, the discretion is in the board. The authority which they are given by the law and the action of the voters need not be exercised, and, if exercised, the limit of the authority need not be reached. Under the Constitution the total amount of the tax can never exceed 50 cents on the $100, and the building tax cannot exceed 25 cents on the $100. It may be practicable to so reduce the building tax that a considerable part of the maximum of 25 cents may be available for the maintenance of the schools, or the conditions may be such that the maximum tax of 50 cents need not all be utilized.

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When, therefore, the people of the district registered their willingness that bonds should be issued, and that a tax should be levied providing for their payment (if they did), and making the issuance possible, this action did not take away from the trustees the duty and obligation to determine whether bonds should be issued, and to what amount, and whether a bond tax should be levied, and the amount required.

Nor did it take away the duty to administer the property of the district to the best advantage. There is nothing in the language of the act to indicate that the general power of management by the trustees is limited by a right of the voters to name some specific building to be purchased, or to specify some particular plan for the erection of the building. Nor is there anything in the act which would suggest that a certain price must be paid for a building, if one is to be purchased, or that a building to be erected should reach a certain cost. The voters place a maximum to be expended, and the duty remains in the board to do the best possible for the district, without exceeding this maximum. When in this case the people registered a willingness to issue bonds for a school building, and pay taxes to liquidate the bonds, they expressed themselves as far as the law will permit. If by their vote they undertook to do more, the effort was entirely without effect.

It is argued that the views here expressed are in conflict with Grayson County v. Harrell (Tex. Civ. App.) 202 S. W. 160. This case involved the duty of the commissioners' court, when an issue of bonds was voted by a county for road purposes. The difference between that act and the one under consideration is that the commissioners' court of the county is, with reference to the particular matter, without discretion. The voters of a county having voted bonds for the construction of roads, the law specifically, distinctly, and in mandatory language indicates what shall be done by the commissioners' court. All of the cases cited to sustain appellee's proposition deal with laws distinguishable from the law under which the trustees in this case acted, by the fact that, instead of removing a limitation upon the authority of the board, the election imposed, in terms, mandatory duties. There is, of course, no discretion upon the part of a governing body, when the discretion is, in terms, taken away by the law.

Parol evidence was introduced as to the purpose and understanding of the voters. The people acting at the polls (the only manner in which they may indicate their wishes under the laws of Texas) can express themselves only in the terms of the law. No amount of parol evidence can add to or take away from the results of the election. The parol evidence was specific as to a very limited number only of the electors, and if the intentions or understanding of the voters, or a majority, were a material matter, it would be properly held that the evidence was insufficient. If the good faith of the trustees were properly an issue, the evidence admitted would authorize the conclusion that each of them believed that a majority of the voters believed that the district should relieve the note signers of their liability, and voted to accomplish that end. While it may be true, and, indeed, is doubtless the case, that in voting upon the issuance of bonds the voters in the Crosbyton school district expected and intended that the bonds

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should be used in discharging their fellow citizens from obligations which they had incurred for the general benefit, yet this action on their part could not have such effect, and could not place upon the school board any duty they did not theretofore have, and could not furnish an excuse for the school board if, acting upon this assumed authority, it did that which the law did not authorize.

All of the members of the school board testify that at the time the schoolhouse was purchased it did not have value equal to the bonds. There was, indeed, no effort made to determine its value, and the sum agreed upon as the purchase price included items having no relation to its value. The building was in bad condition, and has since been abandoned. It was constructed of cement building blocks made by the C. B. Live Stock Company, and most of the lumber and hardware was furnished by the company. The concrete foundation was not properly put in, the roof was not properly designed, and the cement blocks do not appear to be a satisfactory material. There is, however, nothing in the record to indicate that the C. B. Live Stock Company, or any of the persons who signed the note, have been guilty of any character of fraud or graft, and the evidence indicates that that which was done was by all the parties intended to be for the common benefit.

At the election a number of the citizens felt that there was a moral obligation to discharge the indebtedness. Another considerable number, signers of the note, not only recognized this moral obligation, but realized that, if the community did not discharge its moral obligations, they would be under the necessity of discharging the legal obligations of the note. These considerations in no sense change the law. If the citizens of the independent school district feel sufficiently the moral obligation to discharge this debt, the law does not prevent them from doing so. School districts, however, are not organized for the purpose of discharging moral obligations; and the law does not authorize all of the voters to relieve some of the voters of the consequences of handling in a way not authorized by law the affairs which they have undertaken for the public. An independent school district is a governmental unit, devised by the state for locally discharging a governmental duty. Its powers are strictly defined by the law, and strictly limited by the law. Everything which may be done is, in terms, defined, and nothing may be done for which direct and express authority is lacking. It gets all its authority from the state of Texas. Its taxing power is not even within the control of the Legislature.

All taxing power within the state is immediately and directly indicated by the Constitution. The limit of every tax is defined, and the purpose for which it may be levied is specified. The debt-making power is likewise defined and limited by the Constitution. No school district has a right to make a debt, except as the power is given by the Constitution. No school district has a right to levy a tax, except as the power is given by the Constitution. No school district may make a debt allowed by the Constitution, unless provision is made to discharge it by the tax authorized by the Constitution.

The district may incur a debt only for a building and equipment. The debt which the appellee has gotten the benefit of was incurred

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only in part for a building, and this part had no relation to the value of the building. More than $3,000 of the amount is interest, at a rate not authorized to be paid by a school district, on obligations which the school district had not incurred, and which it had no right to incur. Another considerable item going to make up the total amount was to meet deficiencies in the current operations of the school. The law does not authorize the issuance of interest-bearing bonds to meet obligations of this character, and does not authorize the incurring of such obligations.

The proposition is made that, however invalid the action of the board might otherwise have been, it was directly authorized and affirmed by the voters. To sustain this proposition, appeals are made to the principles of law applied to private corporations. It is manifest that if, by concerted and unanimous action, the voters in any municipal corporation could impose upon themselves obligations which the law did not permit, they would be able to substantially and effectively repeal all limitations upon their taxing power or their debt-making power, and all limitations upon any other power which the Legislature or the Constitution makers may have thought proper to impose. Private corporations are made by individuals for their individual ends. When those individuals act, they are bound, even if they go further than they expected to go when they limited themselves by the powers given to the corporation. They are the source of authority, and the authority given may be enlarged, or an unauthorized act may be ratified. The voters of a school district are not the source of power of the district. The source of power is in all the people of Texas, who, through their Constitution and laws, give a strictly limited agency to the voters of the district.

In this matter it is not even suggested that liability has been imposed by unanimous action of the persons affected. Of the persons who voted, 37 voted against the levy of the tax (if a vote was had upon that proposition) and 34 voted against the issuance of the bonds. The majority of 13 in favor of the bonds was not equal in number to the persons who had an immediate and direct interest in their issuance, and the evidence is that many of these interested persons were active in their efforts to carry the election. It is not shown that a majority of the disinterested voters favored the bond issue. But, if all the voters had voted in favor of the bond issue and the taxation, there would still be many interested persons affected by the taxation and the bonds who cannot be said to have given their concurrence. The tax to be levied was made applicable to 120 sections of land, together with all personal property within that area. The area to be affected was nearly five times as large as is ordinarily thought proper to put within a school district. It is more than probable that many taxpayers within the district were without a right to vote. It is very probable that the owners of much of the property resided outside of the district. The women within the district, greatly interested in the prosperity of the schools, had nothing to say about whether or not a useless piece of property should be purchased. The children of the dis-

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trict, more interested than any one else, were without a voice in the decision that would affect their own children.

The testimony is to the effect that within the town of Crosbyton there were 800 or 900 people. If the insistence of the appellee is to be effective, 47 of the number are to bind all of the 800 or 900, and all that are to follow them for 40 years, although many of the 47 are adversely interested to the general good. It is indeed true that this small minority may, to the extent authorized by law, speak for all the citizens. They can remove one of the limitations imposed upon the board. But the power which they exercise is not inherent. It does not come from the school district, but from the Constitution, made by all the people of Texas, and the laws made by the representatives of all the people. This minority, being a majority of the taxpaying citizens, may, with reference to the bonding and taxing power, do all that may be done by unanimous action. But neither a minority, nor a majority, nor all the people of the district, can change the laws of Texas—substitute a new plan for effecting the education of the children of the state, or in any degree increase the powers or diminish the duties of the trustees selected in accordance with law to represent, not alone the district, but all the state.

The school board was charged with the duty of determining how the $18,000 in bonds voted by the majority of the taxpayers should be expended. It was the duty of those of the members of the board who had interests adverse to the district to abstain from voting; and, there not being a quorum of persons who could exercise the free, independent, unbiased judgment which the law requires, it was not possible for this particular board to make the contract which they undertook to make with the C. B. Live Stock Company. Efforts upon the part of city and county officials to deal with themselves are denounced by the penal statutes of Texas. While the penal provision is not specifically applicable to school trustees, the absence of the penalty does not prevent the inherent illegal character of the transaction. It is not necessary to determine whether such a transaction is void, or merely one which may be voided. It is fundamentally and definitely opposed to public policy, and should, perhaps, be looked upon as having no character or standing—as being void. But, if the contract is merely voidable, the result is the same. This is, in effect, a direct action to set aside the transaction and restore the parties to the status which they had prior to the illegal contract.

For the respective reasons indicated, the contract with the C. B. Live Stock Company is held invalid, and judgment is reversed and the cause remanded, with directions that judgment be rendered for the Crosbyton independent school district against that company for the amount sued for, with interest and costs.

Reversed and remanded.

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THE KANAWHA.

THE CAMINO.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 24.

1. SALVAGE ⟸38—RIGHT UNDER CHARTER PARTY.
Provisions of a charter of a vessel *held* to make a charterer a joint adventurer with the owner in any salvage service undertaken by the master, and to require the charterer to pay for coal and charter hire while it was being rendered.

2. SALVAGE ⟸51—AWARDS—APPEAL.
The appellate court can reduce or increase salvage awards of the trial court; but, as they are matters of discretion, practice is not to interfere when trial judge has correctly found facts, even if the appellate court disagrees with him as to amount, unless it be such as to indicate abuse of discretion.

3. SALVAGE ⟸26—AMOUNT AWARDED—EXPENSES.
Expenses may be included in a salvage award, or added to the award, as the court sees fit; these being matters of discretion, depending upon the circumstances of each case.

4. SALVAGE ⟸26—AMOUNT AWARDED—EXPENSES.
Where, under the charter party, the charterer was a joint adventurer with the owner in any salvage service undertaken by the master, and bound to pay for coal and charter hire while it was being rendered, *held*, that the cost of the time employed in the salvage service was an expense, the same as the coal, and, being a direct expense to the charterer, should be added to the salvage award, as was the expense for coal.

5. SALVAGE ⟸26—AMOUNT AWARDED—EXPENSES.
A charterer of a vessel, which performed salvage service, *held* not entitled to recover the cost of feeding a cargo of horses during the time they were awaiting the arrival of the vessel which was to transport them; such expense being too remote.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by Furness, Withy & Co., Limited, owner, and R. Laurence Smith, Incorporated, charterer, of the steamship Kanawha, against the steamship Camino, her cargo and freight, claimed by the Western Steam Navigation Company. From the decree, libelants appeal. Remanded, with instructions to modify the decree.

Harrington, Bigham & Englar, of New York City (D. Roger Englar and T. Catesby Jones, both of New York City, of counsel), for appellant Furness, Withy & Co., Limited.

Austin, McLanahan & Merritt, of New York City (Willard U. Taylor and Alfred H. Strickland, both of New York City, of counsel), for appellant R. Laurence Smith, Inc.

Kirlin, Woolsey & Hickox, of New York City (J. Parker Kirlin and Mark W. Maclay, Jr., both of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. January 14, 1915, about 4 p. m., the American steamer Camino, built of steel, bound with cargo to Rotterdam as

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a Belgian relief ship, met a violent storm, which disabled her rudder and put her entirely out of control. The port side of the forward end of her amidships house was smashed, and a strongback running fore and aft on top of the tarpaulins on each hatch, No. 1 and No. 2, was carried away, but the cargo was substantially undamaged, and the steamer was thereafter sound and water-tight, except for one or two slight leaks in the forward peak.

January 15, about noon, the steamer Ocean Monarch hove in sight, and the Camino hoisted her flag upside down as a signal of distress. January 16 the Ocean Monarch, which had no towing hawser, took on board the Camino's manilla hawser, 120 fathoms long, which parted at the middle after towing about 15 minutes. The Ocean Monarch stayed by and subsequently signaled that she would proceed on her voyage unless the master and crew would abandon the Camino, but at the request of the master of the Camino continued to stand by until the next morning. In the meantime the Camino had got into wireless communication with the British steamer Kanawha, bound in ballast to New York, which promised to come to her aid. The Ocean Monarch proceeded on her voyage.

January 17, about 6 a. m., the Kanawha arrived. She was owned by the libelant Furness, Withy & Co., Limited, and was chartered to the libelant R. Laurence Smith, Incorporated. She was the second vessel to come to the relief of the Camino, and stood by through the whole proceeding. Her master undertook to tow the Camino to Halifax, about 385 miles northwest of the point at which he picked her up. The great difficulty of towing was that the Camino was deep in the water, whereas the Kanawha was very high out of the water, and so was blown further to leeward and unable to keep in line. This gave a bad lead of the hawser and great strain on it. After two attempts, the master of the Kanawha succeeded in passing her own 4-inch steel hawser to the Camino; but it parted immediately and seems to have been in bad condition.

January 18 the Kanawha took on board the Camino's 12-inch manilla hawser, which parted in a very short time.

January 19 the small steamer Lady Laurier, belonging to the Dominion of Canada, arrived and passed a hawser to the Camino's stern, so that she could act as a rudder. After the Kanawha had towed for eight hours, the hawser parted again.

January 20 the United States revenue cutter Androscoggin, a small steamer, arrived and passed her hawser to the Kanawha, which was taken aboard the Camino and parted on the 21st at 1 p. m.

January 21, at 5 p. m., the Androscoggin took the Camino in tow until January 23 at 8 p. m. when she left on account of the weather, and the Camino drifted.

January 24 the Kanawha towed from 9:20 p. m. to 9 a. m. of January 25, when the hawser parted. The Lady Laurier then towed until 4 p. m. when the hawser parted. The Camino anchored about six or seven miles from the entrance to Halifax harbor. On the morning of January 26 the Camino was towed into the harbor by several tugs.

The weather was very bad on January 17, and also on the night of

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the 24th; the Camino's boilers being out of commission for five hours on that day. The rest of the time the weather was moderate. There was no great danger to the Camino, and very little to the Kanawha. The master of the Kanawha rendered the services promptly and skillfully, and the officers and crew performed them heartily, with some danger and a good deal of exposure.

The foregoing is an outline of the services rendered by all the vessels, omitting many details. All the salvors seem to have been necessary to the result. The Ocean Monarch and the tugs have been paid, either in pursuance of a judgment of the court in Nova Scotia or by compromise, to an aggregate sum of $4,650. The Lady Laurier and Androscoggin being government property, no claim was made for their services, and what they did is to be considered only for the purpose of fixing the value of the entire service.

The District Judge found $34,650 to be the proper compensation for the whole service; the unpaid balance of $30,000 to be apportioned, $9,000 to the Androscoggin, $3,000 to the Lady Laurier, and $18,000 to the Kanawha, $4,500 thereof to go to the master and crew.

[1] The charter of the Kanawha was not a demise, and it contained the following articles:

"2. That the charterers shall provide and pay for all the coals except as otherwise agreed. * * *

"15. That in the event of the loss of time from deficiency of men or stores, fire, breakdown, or damages to hull, machinery, or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost; and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery, or equipment, the time so lost, and the cost of any extra coal consumed in consequence thereof, and all extra expenses shall be deducted from the hire. * * *

"19. That all derelicts and salvage shall be for owners' and charterers' equal benefit, after deducting owners' and charterers' expenses and crew's proportion. * * *

"31. Except for loss of time arising as provided in article 15, hire shall continue hereunder notwithstanding any detention of said vessel by reason of restraints of princes, rulers or peoples, the act of God, enemies, fire, or any other cause whatsoever."

The effect of these provisions was to make the charterer a joint adventurer in any salvage service undertaken by the master of the Kanawha, and bound to pay for coal and charter hire while it was being rendered. The District Judge held that both these items were expenses which the charterer was entitled to recover, but awarded the value of the coal to it in addition to the salvage award, while he deducted the charter hire from the award.

[2-4] There can be no doubt whatever of our right either to reduce or increase salvage awards of the District Court; but, as they are matters of discretion, our practice has been not to do so when the District Judge has correctly found the facts, even if we disagree with him as to the amount, unless it be such as to indicate an abuse of discretion. We cannot say so in this case.

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The value of the Camino, deducting the cost of repairs at Halifax, $25,823.46, was	$289,376.54
Of the cargo	248,492.00
Aggregating	$537,858.54

The value of the Kanawha was $250,000.

The parties have recognized the right of the charterer to intervene as a party pro interesse suo, and the court has allowed it a recovery for the coal and charter hire. Expenses may be included in the award or added to the award, as the court sees fit. These are all matters of discretion, depending upon the circumstances of each case. In this particular case the District Judge allowed both the cost of the coal and the cost of the time employed in the service. We see no difference between them. Both were expenses which would not have been incurred, but for the delay of 10 days occupied in performing the salvage services. Therefore in this particular case, while adopting the items and amounts as found by the District Judge, we will allow the item of charter hire as a direct expense, like the item of coal payable to the charterer, and add it to, instead of deducting it from, the salvage award.

Let the decree be as follows:

Salvage		$18,000.00
Owner's expenses		1,960.47
Charterer's expenses		7,257.35
Costs		379.45
Total		$27,597.27
Deducting from this amount—		
For the master and the crew	$4,500.00	
For the owner's expenses	1,960.47	
For the charterer's expenses	7,257.35	
For costs	379.45	
		14,097.27
The balance of		$13,500.00

—to be equally divided between the owner and the charterer.

[5] The charterer also claimed to be entitled to recover $6,600, the cost of feeding a cargo of horses for 10 days awaiting the arrival of the Kanawha, to be transported to Bordeaux. The District Judge regarded this as too remote, and we think he wisely exercised his discretion in rejecting it. If it were a real loss to the charterer, it was not such a direct contribution by it to the salvage operation as required it to be treated as a recoverable expense.

The cause is remanded to the court below, with instructions to modify the decree in accordance herewith; costs of this court to the appellants.

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THE M. MORAN.

THE COLERAINE.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

Nos. 52, 53.

1. COLLISION ⇐107—STARBOARD HAND RULE—SPECIAL CIRCUMSTANCES.
The starboard hand rule does not apply to a steamer backing out of a slip before she gets on her definite course; but the special circumstance rule (article 27 [Comp. St. § 7901]) applies to steamers maneuvering to get on their course.

2. COLLISION ⇐102—RIVERS—FAULT OF BOTH VESSELS.
Where a tug, backing from a slip between piers in the North River, came into collision with the port side of a tug bound down the river, *held*, that both were at fault and that the damage should be divided; the tug proceeding down the river being at fault for coming at a high speed close in to the ends of the piers, etc., and the tug backing out being at fault for failure to blow the usual slip whistle, etc.

Appeals from the District Court of the United States for the Eastern District of New York.

Libel by Thomas Tracy against the steam tug M. Moran, her engines, etc., claimed by the Moran Towing & Transportation Company, together with a libel by the Moran Towing & Transportation Company against the steam tug Coleraine, her engines, etc., claimed by Thomas Tracy. From a decree for the libelant in the first cause, and for the claimant in the latter (238 Fed. 636), the claimant in the first cause and libelant in the second appeals. Reversed and remanded, with directions.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for appellant.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is an appeal from a decree of the District Court of the United States for the Eastern District of New York in favor of the owner of the tug Coleraine against the steam tug M. Moran and dismissing the cross-libel of the owner of the M. Moran.

August 29, 1915, on a dark night, good for seeing lights, at about 1:30 a. m. the tide being ebb along the piers and flood in the middle of the river, the tug Moran, backing out from the slip between the piers at the foot of Ninety-Fifth and Ninety-Sixth streets, North River, came into collision with the port side of the tug Coleraine, bound down the river to Fiftieth street, injuring her so that she was beached near Ninety-First street.

[1] The District Judge fell into the same error as to the sailing and steering rules in this case as he did in the case of Flannery v.

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Tug Bouker No. 2, 254 Fed. 579, — C. C. A. —, our opinion in which is handed down herewith. He said:

"The Moran had the Coleraine on her starboard hand, and, as the collision must have occurred some distance outside the piers, the failure of the lookout and the neglect to give whistle signals would further fix liability upon the Moran."

The starboard hand rule does not apply to a steamer backing before she gets on her definite course. The special circumstance rule (article 27, Act June 7, 1897, 30 Stat. 102, c. 4 [Comp. St. § 7901]) applies to steamers maneuvering to get on their definite courses, The Servia and Noordland, 149 U. S. 144, 156, 13 Sup. Ct. 877, 37 L. Ed. 681; our own decisions in the The John Rugge, 234 Fed. 861, 148 C. C. A. 459, and The William A. Jamison, 241 Fed. 950, 154 C. C. A. 586. The decisions of this court, on which the District Judge relied—The Reliable, 183 Fed. 116, 105 C. C. A. 406, and The Columbia, 205 Fed. 898, 124 C. C. A. 230—were cases of steamers going ahead; the former falling within the reasoning of The Breakwater, 155 U. S. 252, 263, 264, 15 Sup. Ct. 99, 39 L. Ed. 139, and the latter being decided on its special circumstances.

[2] The District Judge also found the Moran at fault for not blowing the usual slip whistle and for not having a lookout. Upon the first point we agree with him, but think the second immaterial, because in the view we take of the situation the absence of a lookout did not contribute to the collision. If it were a fault, the Coleraine was as much to blame as the Moran, because her lookout was sitting on the bitts forward with his back to New York, smoking a cigarette, and did not see the Moran until the Coleraine blew her whistle, when he looked around.

We are quite satisfied that when the vessels first saw each other the Moran was backing slowly, with her stern to port, clearing the end of the covered pier at the foot of Ninety-Sixth street. The Coleraine blew one whistle and an alarm, rang an extra jingle, because as her master said, there was no time to reverse, and hard-aported, while the Moran immediately went full speed ahead, yet the vessels came together. This convinces us that the collision was unavoidable when the vessels first began to navigate with reference to each other and must have happened close to the pierhead. The District Judge made no finding as to the location.

The Coleraine was at fault for coming down the river at high speed close in to the ends of the piers between Ninety-Fifth and Ninety-Seventh streets. If we were to adopt the account of her witnesses that the collision took place some 300 feet out in the river, she would have been clearly at fault, because she could have easily avoided the Moran by porting with her steam steering gear.

The decree is reversed, with costs, and the cause remanded to the District Court, with instructions to enter the usual decree for half damages.

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CHAPMAN v. HUNT.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 39.

1. BANKRUPTCY ⟹161(2)—PREFERENCES—TRANSFER.
Where a corporation, solvent at the time a stockholder and director severed his connection, agreed to assign outstanding accounts receivable to secure him against loss by virtue of his accommodation indorsement of notes of the corporation, *held*, though the corporation became insolvent nearly a year later, and the holder and accommodation indorser, when the agreement was performed, had reasonable cause to believe the corporation insolvent, the agreement was not invalid, nor was the performance of it obnoxious to the Bankruptcy Act.

2. BANKRUPTCY ⟹161(2)—PREFERENCES—WHAT ARE.
Where a corporation, while solvent, agreed to protect a stockholder, who severed his connection therewith, against loss by virtue of his accommodation indorsement of corporate notes, by assigning accounts to him and to execute further papers for that purpose, and corporation, after it became insolvent and within a month of bankruptcy, paid notes, so indorsed, with funds largely advanced by the indorser, and deposited new accounts as security, *held*, the transaction must be deemed a consummation of the earlier agreement, and not an independent transaction, open to attack under Bankruptcy Act, §§ 60, 67 (Comp. St. §§ 9644, 9651), as preferential, or as working fraud on creditors.

Appeal from the District Court of the United States for the Northern District of New York.

Suit by George D. Chapman, as trustee in bankruptcy of the Syracuse Candy Works, Incorporated, against Edward A. Hunt. From a decree for complainant (248 Fed. 160), defendant appeals. Reversed and remanded, with directions.

Levi S. Chapman, of Syracuse, N. Y. (Chapman, Newell & Crane, of Syracuse, N. Y., of counsel), for appellant.

Lee & Brewster, of Syracuse, N. Y., for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. George D. Chapman, trustee in bankruptcy of the Syracuse Candy Works, Incorporated, filed a bill in equity against Edward A. Hunt, praying that he be decreed to hold in trust for the complainant certain moneys collected by him upon accounts receivable assigned to him by the Candy Works.

January 13, 1915, Hunt, who had been an incorporator, director, and stockholder of the Candy Works, ceased all connection therewith and was given a written agreement with the Candy Works, which was then entirely solvent as follows:

The Candy Works assigned to Hunt good outstanding accounts receivable to the amount of $6,000 to secure Hunt against loss by virtue of his accommodation indorsement of its notes held by the City Bank of Syracuse for $9,100 and any renewals thereof. It was further agreed that this should be a continuing collateral security, and that to such end the treasurer of the Candy Works should collect the

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assigned accounts for Hunt and turn over the proceeds to the Candy Works for use in its business, upon assigning to Hunt an equal amount of new accounts, so that he should always be secured in the sum of $6,000. A list of assigned accounts was to be furnished him monthly, stamped as follows:

"For value received the undersigned, Syracuse Candy Works, Incorporated, does hereby sell, assign, and transfer the within mentioned accounts to Edward A. Hunt in accordance with the terms and conditions of our agreement with said Hunt, bearing date January 13, 1915.

"Syracuse Candy Works, Inc.,
"By G. F. Rowe, President.
"Thelma M. Smith, Treasurer."

The Candy Works finally covenanted for additional assurance as follows:

"We do also agree that we will execute any other or further papers or agreements that may be necessary to carry this assignment or the assignments of any other accounts substituted for these accounts or substituted for any accounts that may be substituted for these accounts."

This agreement was carried out until April 16, 1916, when Hunt was given a list of accounts receivable aggregating $3,369.74.

[1] The Candy Works had been insolvent since December, 1915, and both Hunt and the City Bank had reasonable cause to believe it to be so throughout the month of April, 1916. This, however, did not make the agreement of January 13, 1915, invalid, or the performance of it by the Candy Works obnoxious to the requirements of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544). Sexton v. Kessler, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995. And so the District Judge held.

[2] April 18, 1916, when only one of the Candy Works' notes held by the City Bank was due, an arrangement was made between it, Hunt, and the Candy Works that all the notes should be taken up. To this end Hunt gave the Candy Works his check for $8,600, with which funds and others in the hands of the Candy Works all the outstanding notes indorsed by Hunt, then aggregating $9,100, were taken up; the Candy Works giving Hunt its own demand note for $8,600, and under a written agreement of that date assigning to him accounts theretofore assigned to the amount of $1,003.56 under the agreement of January 13, 1915, together with new accounts amounting to $1,998.62, or $3,002.18 in all, as collateral security for its demand note to him of $8,600.

May 13, 1916, an involuntary petition in bankruptcy was filed against the Candy Works and an adjudication followed. The District Judge held that the transaction of April 18, 1916, was an entirely new and independent one, constituting a transfer within four months of the filing of the petition to Hunt, a creditor by virtue of his indorsement, who knew the Candy Works was insolvent, voidable by the trustee as a preference under section 60b (Comp. St. § 9644), and also void as a fraud upon creditors under section 67e of the Bankruptcy Act (Comp. St. § 9651). We cannot so regard it. It was, indeed, a new writing of a new date, but more in pursuance of the Candy Works' covenant of further assurance than as a new and independ-

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ent contract. Hunt, because of his liability as indorser, took up the Candy Works' notes, not directly from the bank, but to the extent of $8,600 through the Candy Works. Its demand note to him for $8,600 was only the measure and evidence of the loss he sustained by virtue of his accommodation indorsements. The security he received was the same as he had been entitled to since January 13, 1915. He could perfectly well have acted without any further writing at all, and we think he should not be deprived of his security because of this wholly unnecessary circuity of action. The writing should be read in the light of the foregoing history and of all the circumstances. The intention of the parties is to be discovered. It cannot be supposed that they intended to make any substantial change in their relations.

The decree of the District Court must be modified in the following respects: Hunt is entitled to retain the proceeds of all the accounts assigned to him under the writing of April 18, 1916, which he has received, and to recover from the trustee the proceeds of such accounts as he has not received, which can be traced into the funds in the hands of the trustee, and, when these amounts have been ascertained, to be permitted to file his claim for the balance due him.

The decree is reversed, and the cause is remanded to the District Court, with instructions to enter a decree in accordance herewith.

In re A. BOLOGNESI & CO.

Petition of GILBERT et al.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 15.

1. BANKRUPTCY ⊂⊃446—PETITION TO REVISE—SCOPE.
   On petition to revise, the appellate court takes the facts as found below; its power being limited to correction in matters of law.

2. BANKRUPTCY ⊂⊃140(3)—CREDITORS—RIGHTS OF.
   Claimants, who deposited funds with a bankrupt, who was engaged in the banking business, for investment in a particular manner, are entitled to subject to their claims a deposit in the name of the bankrupt, where they could trace their funds into such deposit; it appearing the bankrupt, though he assumed toward claimants a fiduciary relation, did not carry out his undertaking.

3. BANKRUPTCY ⊂⊃140(3)—CREDITORS—RIGHTS OF.
   Claimants, who bought from the bankrupt, who was engaged in the banking business, drafts which they used to send funds abroad, cannot assert a claim against a deposit to the account of the bankrupt, because the drafts were not paid; it appearing that claimants obtained the drafts which they bargained for, and no circumstances of active fraud or deception being shown.

4. BANKRUPTCY ⊂⊃140(3)—CLAIMS—SPECIFIC FUND.
   Where claimants asserted that by reason of the bankrupt's breach of fiduciary relation they were entitled to trace their funds into a deposit to the account of the bankrupt, it is necessary, in order to identify the money, to trace it into the specific fund.

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5. BANKRUPTCY ⊂⇒140(3)—TRUST FUNDS—RIGHT OF BENEFICIARIES.
Where several claimed a fluctuating deposit to the account of the bankrupt, on the theory that their funds, which had been impressed with a trust because of his breach of fiduciary relations, were commingled therewith, the several claimants are equitably entitled to an allowable preference in the inverse order of the times of their respective payments into the fund.

6. BANKRUPTCY ⊂⇒140(3)—FUNDS—TRUST FUND—RIGHT TO.
Where a number of claimants delivered moneys to the bankrupt for particular investment, and he failed to make the investment, thus violating the fiduciary relations, and deposited the funds to his own account, claimants are entitled to assert the trust against the deposit only to the extent of the smallest amount such deposit contained subsequent to the commingling.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of A. Bolognesi & Co., bankrupts. Petition of Francis Gilbert and others, trustees in bankruptcy, to revise an order of the District Court distributing a fund among special claimants. Order reversed, and matter remanded for further proceedings.

See, also, 223 Fed. 711, 139 C. C. A. 351.

Bolognesi was a banker doing business largely with Italians, who in divers ways wished to transmit funds to Italy. He made a general assignment on February 11, 1914, and subsequently became bankrupt. The moneys received by him from customers and depositors he placed in his own bank accounts with sundry chartered banks and trust companies. On the day of assignment he had on deposit in the Central Trust Company $11,469.67, composed of his own moneys, as well as those of his customers for deposit. Certain persons, who had deposited funds with Bolognesi for the specific purpose of purchasing drafts and money orders payable in Italy, succeeded in tracing their funds into Bolognesi's said account with the Central Trust Company, and demanded from the trustee in bankruptcy preferential payment in whole or in part out of the moneys so as aforesaid in said trust company and turned over to the trustee.

Thereupon the trustee brought this proceeding, wherein all parties making any claim against the Central Trust Company fund were required to appear and make proof before a special master. Numerous claimants appeared, who (so far as they were successful below) are divisible into two classes: (1) Those who handed their moneys to Bolognesi for a specific purpose, with which the bankrupt never complied; i. e., he never bought any drafts or money orders as directed: and (2) those who did the same thing, but who obtained, prior to failure, drafts or the like, which, however, when presented in Italy, were not paid.

The special master, having found these facts, held that as to both classes of claimants Bolognesi occupied a "quasi trust relationship," and ordered (the whole amount of claims proven being in excess of the Central Trust Company account) the whole of that fund to be distributed pro rata among all the claimants who had traced their moneys into said fund. Thereupon the trustee in bankruptcy took this petition.

Olcott, Bonynge, McManus & Ernst, of New York City (Irving L. Ernst, of New York City, of counsel), for petitioner.

Sporborg & Connolly, of Port Chester, N. Y., for claimant Scranton Trust Co.

Maurice W. Monheimer, of New York City, for claimant Rescigno.

Daly, Hoyt & Mason, of New York City (Ralph Atkins, of New York City, of counsel), for claimant Lagnese.

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Isidore E. Green, of New York City, for claimant Verrili.
Samuel Hoffman, of New York City, for claimant Gualtiere.
Daniel E. Delavan, of New York City, for claimant Lazzari.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] This being a petition to revise, we take the facts as found below. Our power is limited to correction in matters of law. Therefore we do not consider the suggestion that some at least of the sums claimed were received by Bolognesi during insolvency and under circumstances raising a trust ex maleficio. The master has found the evidence the other way, and we cannot say that such finding amounted to error of law upon the testimony.

[2] In so far as any claimant gave money to the bankrupt for investment in a specified manner, the bankrupt undoubtedly, by accepting the deposit, undertook to act in the interest of the depositor claimant, and thereby assumed toward him a fiduciary relation (Johnson v. Brooks, 93 N. Y. at page 342); and in so far as such claimants traced their funds into the Central Trust Company account they stand in the position recognized and enforced in Re Hallett, 13 Ch. D. 696, followed in National Bank v. Insurance Co., 104 U. S. at page 68, 26 L. Ed. 693. It follows, under the findings, that the Scranton Trust Company, Lagnese (to the admitted extent of $1,687.06), Gualtiere, Verrili, and Rescigno (to the extent of $550.70), were prima facie entitled to share in the fund, because Bolognesi had not fulfilled his duty as a fiduciary in respect of them.

[3] But those claimants who came to the bankrupt to buy drafts and the like, and got what they bargained for, cannot claim against the fund, for their bargains were completed; they got what they asked for, and, in the absence of any circumstances of active fraud or deception, the fact that the commercial paper issued to them remains unpaid does not change their status as general creditors. Strohmeyer v. Guaranty Trust Co., 172 App. Div. at page 20, 157 N. Y. Supp. 955. It was therefore error to allow Lazzari, Rescigno (in respect of his deposit of $288.31), and Lagnese (in respect of all his deposits exceeding $1,687.06) to participate in the fund at all.

[4-6] From the time when these claimants began placing with the bankrupt the deposits which are the subject of this litigation (approximately January 20, 1914) down to the date of assignment, the Central Trust Company fund fluctuated considerably, and down to the date of the last deposit with Bolognesi traceable into said fund was never higher than about $8,000, and fell as low as about $4,400, while the amounts traceable into the fund, and flowing from the claimants whom we have held entitled to share, greatly exceed $8,000. Yet the entire trust company account, which was swollen by more than $5,000 of deposits put in on the day of assignment, and consisting, so far as this record shows, of Bolognesi's own money, has been awarded to the claimants pro rata.

The record is extremely imperfect in matters of detail. It is impossible therefrom to adjust all the rights of the parties, and we can do no more than indicate the method that should be pursued.

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The holding of the lower court is based on the theory that the entire trust company account is to be treated as were unallocated certificates of stock in Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047, and Duel v. Hollins, 241 U. S. 523, 36 Sup. Ct. 615, 60 L. Ed. 1143. The cases have no application to the tracing of earmarked money or money's worth through a bank account. It is necessary, in order to identify money, to trace it into some specific fund or property. In re See, 209 Fed. at page 174, 126 C. C. A. 120; In re Brown, 193 Fed. 24, 113 C. C. A. 348; affirmed as Schuyler v. Littlefield, 232 U. S. 707, 34 Sup. Ct. 466, 58 L. Ed. 806. We have recently reviewed these cases in Re Matthews, 238 Fed. 785, 151 C. C. A. 635, and pointed out that a replenishing of a depleted trust account cannot (per se) be considered as restoring the trust; and it follows that when it appears that the moneys impressed with a trust have been "mingled with the [trustee's] general account, and a certain amount remains in the account at the end of the period, and the account has not been, in the interval, depleted below the trust amount or final amount, that final amount will be presumed to include the trust money." Southern Cotton Oil Co. v. Elliotte, 218 Fed. 571, 134 C. C. A. 299. But, where such commingled fund comes into the hands of a receiver, trustee in bankruptcy, or the like, what is responsible for the claims of the cestuis que trustent is the remainder so coming into the hands of the officer of the court, "not exceeding the smallest amount the fund contained subsequent to the commingling." Empire, etc., Co. v. Carroll County, 194 Fed. at page 605, 114 C. C. A. 447, and cases cited. See, also, our own decision in Re Berry, 147 Fed. at page 211, 77 C. C. A. 434.

The unusual feature of this case is that there are several claimant depositors who put in money at different times, which money has been traced into a fluctuating account. Among such claimants the rule (prima facie) is not a pro rata equality. As stated in Empire, etc., Co. v. Carroll County, supra, the separate "cestuis que trustent are equitably entitled to any allowable preference in the inverse order of the times of their respective payments into the fund." This is the rule of In re Hallett, supra, supplementing Clayton's Case, 1 Meri. 572.

The operation of these principles may be illustrated from this record, imperfect as it is. It would appear to be true that on the day when the Central Trust Company account was lowest (January 27th) there was $4,414.57 in it, and on or before that day moneys of these claimants went into the account to the extent of $4,457.85. This was the first day when the account was smaller than the trust moneys shown to have been placed there. If the transaction stopped there, the various claimants should be awarded the fund on the theory summarized in the quotation from the Empire Company's Case, supra.

But thereafter, at dates and in amounts as to which we cannot be certain, the claimants furnished to Bolognesi other moneys, which he put into the trust company account and never applied to the purposes of his fiduciary undertaking; and this continued until February 10th, when the last of the claimants' moneys went into the fund and the fund itself was $6,519.04, or $2,104.47 more than the low tide of January

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27th. In the meantime the account on February 3d was no more than $5,082.61. But we cannot ascertain from this record exactly when the various claimants' moneys went into this fund after January 27th.

Therefore the account must be stated, and the various priorities awarded, beginning on the first day when the fund was less than the trust money, and then on the next day when the new deposits in the fund were insufficient to cover the new trust money, and so on.

The order under review is reversed, and the matter remanded for further proceedings not inconsistent with this opinion. The trustee will recover the costs of this petition against so much of the fund as is found to be awardable to the claimants recognized in this opinion.

OEHRING et al. v. FOX TYPEWRITER CO.

(Circuit Court of Appeals, Second Circuit. October 23, 1918.)

No. 179.

APPEAL AND ERROR ⊂⊃833(3)—PETITION FOR REHEARING—TIME OF FILING.

Where petition for rehearing was filed with the clerk of the Circuit Court of Appeals and noticed for hearing before the expiration of the term at which decision was handed down, *held*, that the filing was within time, although, as the court had no session practically between June and October, the petition could not be heard until the next term.

Appeal from the District Court of the United States for the Southern District of New York.

On petition for rehearing, together with motion for leave to court below to reopen. Petition and motions denied.

For former opinion, see 251 Fed. 584, — C. C. A. —.

Fred L. Chappell, of Kalamazoo, Mich., and Phillips, Sawyer, Rice & Kennedy, for defendant.

Before WARD and MANTON, Circuit Judges.

PER CURIAM. These motions have been heretofore made and denied on the same papers. They were served, filed with the clerk, and noticed for hearing before the expiration of the term, and, as the court has no session practically between June and October, could not have been heard before the next term. We think this filing was in time; otherwise, such motions could only be made during the first eight months of the term. The Supreme Court has expressed a similar view as to applications for certiorari by amending its rule 37, § 4 (37 Sup. Ct. v).

The question in this case is not one of damages recoverable by the complainant, but one of a credit to defendant. The master allowed the same proportion of the salesmen's alleged expenses as he allowed of the investment. The evidence was vague and meager, but in our opinion justified the master's findings.

The motions are denied.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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In re SAMUELS.

Petition of COHEN.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)
No. 1.

1. BANKRUPTCY ⟸143(12)—LIFE POLICIES—"SURRENDER VALUE."
Life policies, which allowed the insured bankrupt to change the beneficiary at his option, and which severally provided that on default the insured, on surrender of the policy, might receive its cash value, or that, in event the policy should lapse on nonpayment of premiums, the insured might at his option obtain paid-up insurance or the cash value, have a "surrender value," within Bankruptcy Act, § 70 (Comp. St. § 9654), although at the time of the bankruptcy premiums were fully paid to date, so that there was no default.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Surrender Value.]

2. BANKRUPTCY ⟸143(12)—LIFE POLICIES—RIGHT OF BENEFICIARY.
The wife of a bankrupt, who was named beneficiary in policies on his life, cannot claim the same as an exemption recognized by Bankruptcy Act, § 6 (Comp. St. § 9590), for, as the beneficiary could be changed by the bankrupt in invitum, she was not the owner of the policy, within Domestic Relations Law N. Y. § 52, declaring the same exempt.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of Jacob W. Samuels, bankrupt. Petition by Samuel C. Cohen, as trustee, to revise an order denying the application of the trustee for an order requiring the bankrupt either to pay him the value of certain life policies or to turn over the policies. Order reversed, and matter remanded.

On the day when Samuels' petition in bankruptcy was filed he was the insured under five life policies, in three insurance companies. By all the contracts he had absolute right to name the beneficiary and change such designation as often as he chose, without the co-operation or consent of any beneficiary or any one else.

One of the policies provided for a surrender value by that name; two of them contained the clause that "in case of default" the insured may "surrender the policy, and with the written assent of the person to whom it is made payable receive in cash its value at the time of default"; and the two remaining policies provided that "this policy shall lapse * * * on the nonpayment of any premium * * * except that" the assured can at his option obtain therefor either paid-up insurance or "the cash value" of the policy.

At date of bankruptcy Samuels' wife or daughter was the beneficiary named in every policy, and all premiums had been paid by the bankrupt, so that no policy could "lapse for nonpayment of premium" or be "in default" until varying lengths of time after adjudication. Every policy, however, conferred the right on the insured at any time to borrow on the policy as collateral up to the "loan value" thereof, and value for loan or for surrender or "cash value" all meant the same thing—i. e., the present worth of the contract on actuarial principles accepted by the insurer.

The trustee applied for an order requiring the bankrupt either to pay him said value or turn over the policies. The referee found in substance the foregoing facts, and denied the application. His order was affirmed by the District Judge, whereupon the trustee brought this proceeding.

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Lawrence B. Cohen, of New York City (Adolph Boskowitz and Jacob Shientag, both of New York City, on the brief), for petitioner.

Samuel Sturtz, of New York City, for bankrupt.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] This record raises nearly the same questions as were disposed of in the case of this bankrupt's brother (In re Samuels, 237 Fed. 796, 151 C. C. A. 38, reversed in Cohen v. Samuels, 245 U. S. 50, 38 Sup. Ct. 36, 62 L. Ed. 143), and in so far as "surrender value" is shown in any of the policies in question, the ruling of the Supreme Court suffices.

While admitting that under Hiscock v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, that phrase, as used in section 70 of the Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 565 (Comp. St. § 9654), has a very wide signification, this respondent still contends that not all these policies had any surrender value at date of adjudication, because they were not then "in default" and had not "lapsed" for nonpayment of premiums.

The point is without substance for several reasons: (1) It was in effect urged in the Hiscock Case, supra, and disposed of with the remark that "this is tantamount to saying that no policy can ever have a surrender value"—meaning no live active policy; (2) it appears by the proof here that if the insured wished either to sell his policy to the insurer or borrow upon it he could always do so at any time, and get the value at the last premium date; and (3) the test of "surrender value" under the act is whether the policy has a present cash value available to the insured bankrupt in accordance with fixed method, and by the exercise of his own unassisted will. In re Gannon, 247 Fed. 932, 160 C. C. A. 122.

This is, we believe, the result of the most recent ruling decisions, and in so far, as Re Hammel, 221 Fed. 66, 137 C. C. A. 80, conflicts therewith, it must be regarded as overruled.

[2] Respondent further urges that policies inuring to the bankrupt's wife at date of adjudication are exempt under section 6 of the act (Comp. St. § 9590), recognizing the state exemption contained in section 52 of the Domestic Relations Law of New York (Consol. Laws, c. 14).

The claim would have been good, had the wife been the owner of the policies; but she was not. No beneficiary removable by the insured in invitum could be. The matter is one of state law, and we followed rulings of the state courts in so interpreting the New York statute in Re White, 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A. (N. S.) 451. The more recent case of Grems v. Traver, 87 Misc. Rep. 644, 148 N. Y. Supp. 200, affirmed 164 App. Div. 968, 149 N. Y. Supp. 1085, is not in conflict. There as between husband and wife the latter was proved the absolute owner.

The trustee in bankruptcy is entitled to whatever cash value the policies in question had on the day of adjudication. Therefore the order under review is reversed, with costs, and the matter remanded for further proceedings not inconsistent with this opinion.

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ROESSLER & HASSLACHER CHEMICAL CO. v. STANDARD SILK DYEING CO.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 4.

1. COURTS ⇐356—FEDERAL COURT—FINDING OF FACT—WAIVER OF JURY.
Under Rev. St. § 649 (Comp. St. § 1587), where the parties waived a jury, the appellate court, on writ of error, is limited to the inquiry whether the findings of the referee, as altered and amended by the District Judge, justify his conclusions of law.

2. APPEAL AND ERROR ⇐842(8)—REVIEW—QUESTIONS PRESENTED.
In an action tried to the court without a jury, a question as to the construction of a provision in a written contract is one of law.

3. SALES ⇐172—PERFORMANCE BY SELLERS—EXCUSES.
Where a contract for the sale of prussiate of soda, a German product, providing that the sellers should not be liable for causes beyond their control, including war, was made after declaration of war between Germany and Great Britain, performance was excused by the British order in council which in effect placed an embargo on shipments from Germany, for such provision cannot be deemed applicable only to embargoes or restraints in some future war to which the United States should be a party.

In Error to the District Court of the United States for the Southern District of New York.

Action by the Standard Silk Dyeing Company against the Roessler & Hasslacher Chemical Company. There was a judgment for plaintiff (244 Fed. 250), and defendant brings error. Reversed, and new trial ordered.

Creevey & Rogers, of New York City (George C. Holt, Garrard Glenn, William B. Walsh, and William S. Creevey, all of New York City, of counsel), for plaintiff in error.

Hugh Gordon Miller, of New York City, for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is a writ of error to a judgment in favor of the plaintiff in an action at law for breach of a contract by the defendant to deliver 30,000–35,000 pounds of imported German prussiate of soda to the plaintiff in equal installments over the year 1915. A jury was waived in writing and an order of reference agreed to directing the referee to make special findings of fact and conclusions of law and incorporate the same in his report. The referee recommended a judgment in favor of the plaintiff for $175.60, but upon exceptions to his report the District Judge filed an opinion, stating his conclusions of law, and entered a judgment in favor of the plaintiff for $12,042.09, to which the defendant took this writ of error.

[1] We are limited to the inquiry whether the findings of the referee as altered or amended by the District Judge justify his conclusions of law. Rev. Stat. U. S. § 649 (Comp. St. § 1587), provides:

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"Issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

See Milwaukee & St. Paul Ry. Co. v. Clark, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. Ed. 1099.

January 13, 1915, the Rossler Company, defendant below, entered into contract with the Standard Silk Company, plaintiff below, the material provisions of which were as follows:

"Sold to: The Standard Silk Dyeing Co., Paterson, N. J.

"Through: Mr. E. Schwarzenbek,

"Article: Imported German prime yellow prussiate of soda (standard technical quality).

"Quantity: Thirty thousand (30,000) to thirty-five thousand (35,000) pounds.

"Price: Ten and one-quarter cents (10¼¢) per pound freight paid Paterson, N. J.

"The price is based on prevailing usual import charges (transportation and marine insurance, etc.). Any increase or decrease of such charges on all deliveries so affected for buyer's account. An additional charge for all rail shipments if water or rail and water transportation be closed from European works to seaport. War risks extra. All deliveries under this contract are subject to any alteration of U. S. tariff and revenue laws, as also any correction of value assessment by the U. S. appraisers.

"Terms: Net thirty (30) days or less one-half of one per cent. (½ of 1%) for cash in ten (10) days.

"Delivery: In equal installments over the year 1915.

"Payments in gold or its equivalent in current funds with exchange on New York. Deliveries, unless otherwise specified, in equal quantities at approximately uniform intervals during the contract period; each proportionate delivery as due, if not called for, sellers' option to postpone or cancel without tender on their part to buyers. Each delivery to stand as a separate sale; the irregularity of any delivery not to vitiate the contract as to the remaining installments. The usual leeway of fifteen (15) days for each delivery. Seller's liability ceases on making delivery to carrier at shipping point in good condition. Carrier acts as buyers' agent. Sellers not liable for nonarrival of any shipment lost in transit at sea or on land, or for losses or damage or delays due to causes beyond their control, including in such causes strikes, lockouts, floods, fires, accidents to work where the goods are manufactured, war, or insurrection. In addition to these causes, should sellers be delayed or cut off in whole or in part from their supply of raw materials by any other cause or reason, they shall not be liable to buyers for failure to deliver, or delay in delivery of the whole or any part of said merchandise. Suspended deliveries resumed after the cause of such suspension has been removed, at the same rate and at like intervals assigned under the contract, or canceled, at seller's option."

The District Judge found that the defendant was, among other things, an importer of chemical products from Germany, and was known to the trade as importing prussiate of soda from Germany for sale in this country; that it had March 30, 1915, outstanding contracts for importation of 815,702 pounds of prime yellow prussiate of soda (standard technical quality), and had made 12 contracts, including the plaintiff's, for delivery here during the year 1915 of 366,872 pounds of such prussiate of soda; this product the defendant continued to import from Germany in sufficient quantities to enable it to fulfill accruing installments under its outstanding contracts until on or about March 30th, when it had notice of an order in coun-

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cil dated March 15th of the British government requiring its land and naval forces to prevent any goods whatever reaching Germany from other countries or reaching other countries from Germany; that this order was enforced against the protests of the government of the United States, with the result that there were no general importations of prussiate of soda after that date; that after March 30th the defendant had not enough prussiate of soda to fulfill its 12 outstanding contracts, each of which contained the same exception which the plaintiff's contained; that the subject-matter of the contract was prussiate of soda to be imported by the defendant from Germany; that it did not make any effort to obtain German prussiate of soda from any other place than Germany during the year 1915; that it appropriated all the prussiate of soda it then had ratably among the 12 outstanding contracts and performed its contract with the plaintiff down to the month of May; that from the month of May, and for each succeeding month covered by the contract, the defendant refused to honor the plaintiff's requisitions; that the only exception the defendant made in this appropriation of its stock on hand was the sale of 7,457 pounds to noncontract customers.

The referee found that the defendant's failure to deliver from May on was due to war conditions excepted in the contract except as to this 7,457 pounds, the plaintiff's ratable proportion of which was 9½ per cent. Accordingly he awarded damages in the sum of $175.60, being the difference between the contract price, 10¼ cents per pound, and 35 cents per pound, the price as of May 31, 1915.

Upon exceptions to the report of the referee, the District Judge declined to pass upon the questions whether war conditions were the proximate cause of the defendant's failure to deliver, or whether any apportionment of the defendant's stock on hand was made, and, if so, whether it was properly made, holding that the exception in question did not apply at all. Accordingly he directed judgment to be entered in favor of the plaintiff for $10,716.20, being the difference between the contract price, 10¼ cents per pound, and the market price, for each of the plaintiff's monthly requisitions thereafter, together with interest from January 1, 1916, and costs, aggregating $12,042.09.

[2, 3] The exceptions contained in the contract divide naturally into two categories, as follows:

"Sellers not liable for nonarrival of any shipment (1) lost in transit at sea or on land or (2) for losses or damage or delays due to causes beyond their control including in such causes strikes, lockouts, floods, fires, accidents to works where the goods are manufactured, war, or insurrection."

The first category does not apply at all, because no shipment was lost, nor do any of the exceptions in the second category relating to manufacture. This leaves for consideration only the exception of war.

The question involved is one of law, viz. whether the facts found by the District Judge sustain his conclusion of law, which was that the exception of losses due to war does not apply at all. His view was that, as the war between Germany and England existed when the contract was made, the parties must have intended relief in some

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future war in which the United States should be involved. We cannot agree to this. The exception was not of war, but of losses or damage or delays due to war. Embargoes or restraints coming from the United States would be a defense, whether excepted or not. In our opinion the exception applied as much to the existing war between Germany and England as to any war which might subsequently arise and cause such damage, losses, or delays, whether the United States was a party to it or not. It was evidently more important and appropriate to the existing war than to wars that might subsequently arise. This particular war had continued for over five months when the contract was made, and for all that time and for three months later the defendant had been importing enough prussiate of soda from Germany to satisfy its outstanding contracts as they accrued. Both parties, of course, must be held to have had notice of the possibility of embargoes and restraints, and the exception was intended to cover just such possibilities. No one could have anticipated that this British order in council would be proclaimed, and it was this change of condition that caused the loss.

Many cases cited by the plaintiff do not contain an exception of war conditions and are therefore inapplicable. There is, of course, no doubt that a foreign war is no defense to a party who does not carry out his contract, unless there is an exception to that effect in his favor. The only federal case relied upon by the court below is Balfour Co. v. Steamship Co. (D. C.) 167 Fed. 1010, which is clearly distinguishable. In it the steamship company, during the Russo-Japanese war, had agreed in writing to reserve space in one of its steamers for a shipment of flour to Japan; all parties then knowing that flour had been declared contraband by Russia. The carrier's bill of lading, which would have been issued, had the flour been carried, contained the usual exception of restraints of princes, rulers, or peoples; but the court held that, the carrier having agreed to carry such contraband flour, which was a perfectly legal contract, this exception would be held to apply only to actual restraints or seizures, and would not excuse the carrier from refusing to carry because of possible seizures.

The judgment is reversed, and a new trial ordered.

AMERICAN TRUST & SAVINGS BANK v. DUNCAN.

In re LUM.

(Circuit Court of Appeals, Fifth Circuit. December 16, 1918.)

No. 3252.

BANKRUPTCY ⇐=142—CREDITORS—RIGHTS OF.

Where, years before bankruptcy, the bankrupt conveyed property to his wife, though he was then indebted, and after bankruptcy the trustee, suing under Bankruptcy Act, § 70e (Comp. St. § 9654), recovered a judgment or decree against the wife to the amount of a debt incurred prior to the conveyance and still existing, *held*, in view of the difference between section 70e and section 67f (section 9651), the creditor whose debt ante-

⇐=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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dated the conveyance was entitled to receive from the trustee the amount of the recovery, and such sum should not go into the general estate.

Appeal from the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

In the matter of the bankruptcy of George E. Lum. Petition by the American Trust & Savings Bank against Charles K. Duncan, trustee in bankruptcy of George E. Lum, praying that the trustee be directed to pay over to the petitioner the sum of $1,000, recovered by the trustee in an action against the bankrupt's wife. From a decree dismissing a petition for the review of the referee's order dismissing the original petition, petitioner appeals. Reversed.

Forney Johnston, W. R. C. Cocke, and Victor Smith, all of Birmingham, Ala., for appellant.

Claude D. Ritter, of Birmingham, Ala., for appellee.

Before WALKER, Circuit Judge, and EVANS, District Judge.

WALKER, Circuit Judge. The appellee, as trustee in bankruptcy of George E. Lum, filed a bill in the chancery court of Jefferson county, Ala., against the bankrupt and his wife, Carrie E. Lum, alleging that about nine years prior to the bankruptcy certain described real estate was conveyed to the bankrupt's wife, part of the purchase money for which and part of the cost of valuable improvements thereon were paid with the bankrupt's money, as a mere gift to his wife, while he was indebted to the American Trust & Savings Bank (hereinafter referred to as the appellant) in a considerable sum, $1,000 of which remained unpaid when the bill was filed. The bill prayed that the real estate mentioned, with the improvements thereon, be subjected to the payment of the debts of the bankrupt, that the real estate and improvements be sold for that purpose, and the proceeds thereof be paid to the trustee in bankruptcy, and for general relief. That suit resulted in the rendition of a judgment or decree of the Supreme Court of Alabama which adjudged that the real estate mentioned be subjected to the satisfaction of the claim of the appellant to the extent of $1,000 and accrued interest, declaring and establishing a lien upon said real estate to said extent, and that unless said amount is paid into court within sixty days said real estate be advertised and sold for the satisfaction of said indebtedness. Pursuant to that decree the sum of $1,000, with accrued interest, was paid to the trustee in bankruptcy. Thereafter the appellant filed in the bankruptcy proceedings its petition, alleging the facts above set out, and that the petitioner was the only creditor of the bankrupt whose debt was in existence at the time the bankrupt made the alleged gifts to his wife, and praying that the trustee be ordered and directed to pay over to the petitioner the said sum of $1,000 and accrued interest, less the costs and expenses of said suit and of the court in which the petition was filed. The referee made an order denying the prayer of the petition, "but without in any manner affecting the proof and allowance of the claim of the said petitioner, American Trust & Savings Bank, filed and allowed in this proceeding as an unsecured claim not entitled to preference or priority

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of payment." The appellant's petition for the review of the referee's order was dismissed by the District Court. The appeal is from the decree to that effect.

The right of the trustee to bring and maintain the above-mentioned suit existed by virtue of the following provision of the Bankruptcy Act:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." Bankruptcy Act July 1, 1898, c. 541, § 70e, 30 Stat. 565 (Comp. St. § 9654).

The decree rendered enforced the right of the sole remaining creditor whose debt was in existence at the time the debtor made the donation of money to his wife, or for her benefit, to have that money treated as received by the donee in trust for such creditor, and to have the amount of the donation, or so much thereof as was required to satisfy the demand of such creditor, charged against the property of the donee in which it was invested. Lockard v. Nash, Adm'r, 64 Ala. 385; Cartwright v. West, 185 Ala. 41, 64 South. 293. The questioned transaction was binding as between the debtor and his donee, the former retaining no right to the money he gave and acquiring no interest in the property into which it went, but was voidable as against creditors whose debts were in existence when the gift was made. An effect of the statute is to give the debtor's trustee in bankruptcy the right to assert and enforce the right of such creditors. The appellant's petition raised the question whether the amount recovered by the trustee, less costs incurred, belonged to the creditor whose right was enforced by the decree, or was received and held by the trustee as part of the bankrupt's estate for the common benefit of his creditors. Other creditors would be benefited by the trustee's recovery, though the net amount recovered is applied on the appellant's demand alone, as a result of such application is the extinguishment of a claim which, but for such recovery, would share in the part of the bankrupt's estate which is available for general distribution among his creditors. Nothing contained in the above-quoted provision of the Bankruptcy Act forbids the application of an amount so recovered by the trustee to the satisfaction of the one debt of the bankrupt which was in existence when the transaction brought into question by the trustee's suit occurred. That suit being the assertion by the trustee of a right possessed by only one of the bankrupt's creditors, other creditors have no right to share in the amount so recovered, unless that right is given by some provision of the Bankruptcy Act. In behalf of the appellee it is contended that the decision in the case of Globe Bank v. Martin, 236 U. S. 288, 35 Sup. Ct. 377, 59 L. Ed. 583, shows that the amount recovered by the trustee was held by him as a part of the bankrupt's estate to which the appellant has no prior right.

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The fund which was in question in the case just mentioned was acquired by the trustee in bankruptcy under the following circumstances: Some time prior to the debtor's bankruptcy, and while he owed debts to the Globe Bank and others, he made voluntary conveyances to his son. Within four months prior to the bankruptcy, creditors whose debts existed at the time such conveyances were made brought suits to subject the conveyed property to their demands and had attachments levied on that property. After the debtor was adjudged bankrupt, the bankruptcy court entered an order that the attachment lien be preserved for the benefit of the bankrupt estate, and that the trustee intervene in the suits in which the attachments issued. This the trustee did by petition, and it was adjudged that enough of the attached property be sold to realize the amount of the debts in existence when the attacked conveyances were made. The trustee received the proceeds of such sale. It was held that the fund so obtained should be distributed between all the creditors as a general asset of the bankrupt estate, and not between those creditors who alone would have shared in the fund, had their attachment been obtained more than four months prior to the filing of the petition in bankruptcy. The opinion rendered makes it plain that the conclusion reached was the result of applying the provisions of section 67f of the Bankruptcy Act to the facts disclosed. In the course of the opinion it was said:

"That section distinctly provides that all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, within four months of the filing of the petition in bankruptcy, shall be deemed null and void, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, as was done in this case, order that the right under the levy, judgment, attachment or other lien be preserved for the benefit of the estate in which event the same shall pass to and be preserved by the trustee for the benefit of the estate. Except for the attachments, the appellant banks had no specific lien upon the estate." Globe Bank v. Martin, 236 U. S. 288, 298, 35 Sup. Ct. 377, 381 (59 L. Ed. 583).

The ruling was to the effect that, where a judicial lien obtained against an insolvent debtor within four months prior to the filing of the petition in bankruptcy against him is preserved and enforced for the benefit of the estate, as authorized by section 67f of the Bankruptcy Act, the fund coming into the possession of the trustee as the result of such action belongs to the bankrupt estate, and not to those creditors only in whose behalf the lien originally was obtained. That decision was the result of applying the provision mentioned to a state of facts to which it was held to be applicable.

Section 70e of the Bankruptcy Act differs from section 67f of that act, in that the former does not contain any provision to the effect that property, or its value, recovered by the trustee in a suit which that section authorizes him to bring when he elects to avoid a transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, shall "pass to the trustee as part of the estate of the bankrupt." It may be that property or its value so recovered by his trustee might have been made a part of the bankrupt's estate, not

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subject to any priority in favor of the creditor or creditors who alone had had the right to avoid the transfer brought into question. But it is significant that the statute does not so provide, while it does provide for the passing to the trustee, as a part of the estate of the bankrupt, of property, or its value, acquired by him as a result of the preservation and enforcement of a lien obtained through legal proceedings against an insolvent within four months prior to the filing of a petition in bankruptcy against him, without making any exception based upon the circumstance that the lien so preserved and enforced was obtained by a creditor or creditors who alone had the right to obtain it; the right being one not possessed by other creditors. The statute gives notice to any one obtaining a lien by legal proceedings against an insolvent person that, if the insolvent's bankruptcy occurs within four months after the lien is obtained, it may be preserved and enforced for the benefit of the bankrupt's estate, the proceeds of such enforcement to pass to the trustee as part of the estate of the bankrupt. The provision having this effect deals with "levies, judgments, attachments, or other liens" obtained through legal proceedings against an insolvent within four months prior to his bankruptcy, and with property affected by a lien so obtained. It does not deal with the rights of creditors who have not so obtained a lien.

Under the circumstances disclosed in the instant case the appellant alone had the right to subject to the satisfaction of its demand against the bankrupt the property of the bankrupt's donee in which the sum donated was invested. The appellant had not obtained any lien through legal proceedings instituted for the enforcement of such right. There has not been called to our attention, and we have not discovered, any provision of the Bankruptcy Act indicating an intention to treat as a general asset of the bankrupt's estate an amount recovered by the trustee in a suit brought by him, as authorized by section 70e of that act, for the enforcement of the right possessed by a creditor situated as the appellant was. As above pointed out, it does not follow from the fact that the trustee was authorized to bring and maintain such a suit that the recovery in it is to be distributed between all the creditors as a general asset of the bankrupt's estate, as other creditors may be benefited by the recovery—though it belongs to the one creditor whose right the trustee asserted—having the effect of extinguishing a claim against the general assets of the bankrupt's estate, thereby increasing the pro rata shares of other creditors in the assets to be distributed between them.

In view of the differences above pointed out between section 67f and section 70e of the Bankruptcy Act, and of the absence of anything indicating that the lawmakers intended that a debtor's bankruptcy should have the effect of impairing rights possessed by one or some only of his creditors who had not, prior to the bankruptcy, obtained any lien through legal proceedings, we conclude that the decision last above cited does not foreclose the question raised by the facts of the instant case; that the proceeds realized from the suit brought to enforce the demand of the appellant against property not liable to be subjected to the demands of any other existing creditor of the bank-

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rupt did not pass to the trustee as a part of the estate of the bankrupt, though the recovery was in a suit brought by the trustee under the authority conferred by section 70e of the Bankruptcy Act; and that the appellant was entitled to the net amount of the fund so realized.

It follows that the decree appealed from was erroneous. That decree is reversed.

ST. TAMMANY BANK & TRUST CO. OF COVINGTON, LA., v. WINFIELD.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1918.)*

No. 3228.

1. Escrows ⟸14(1)—Wrongful Delivery of Bill of Sale—Petition.
A petition setting up that plaintiff delivered mules to a third person under a contract requiring such person to pay $60 per head, and to give a chattel mortgage, which averred that the defendant bank to which the bill of sale had been delivered wrongfully delivered it to the third person, etc., enabling him to dispose of the mules without paying plaintiff, *held* to state a cause of action.

2. Escrows ⟸14(1)—Measure—Wrongful Act.
Where plaintiff delivered mules to a third person under a contract requiring such third person to pay a stipulated sum per head, and defendant bank delivered to such person a bill of sale for the mules, though he did not make payment as required, *held*, that plaintiff could not recover from the bank as part of damages the expense he was put to in recovering possession of those mules not sold by such third person.

3. Escrows ⟸14(1)—Recovery—Evidence.
Where plaintiff delivered mules to a third person under a contract requiring him to pay a fixed sum per head and to give a chattel mortgage, and defendant bank wrongfully delivered to such third person a bill of sale for the mules, though he did not make payment, *held*, such person having disposed of part of the mules to his damage, plaintiff could not recover for the bank's wrongful act, without proving the value of such mules when they were wrongfully disposed of.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by James S. Winfield against the St. Tammany Bank & Trust Company of Covington, La. Judgment for plaintiff, and defendant brings error. Reversed.

H. W. Robinson, of New Orleans, La. (Lewis L. Morgan, of Covington, La., on the brief), for plaintiff in error.

Lewis R. Graham and Henry Mooney, both of New Orleans, La., for defendant in error.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. [1] This was an action by the defendant in error, James S. Winfield, against the plaintiff in error, St. Tammany Bank & Trust Company, which will be referred to as the bank. The plaintiff's petition, as it was amended, disclosed the following state of facts:

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied February 1, 1919.

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Winfield, who lived at El Paso, Tex., and H. C. Wertz entered into a written contract, under which the former was to deliver to the latter 71 head of Texas mules of various brands, and the latter was to receive the mules at Covington, La., where he lived, and feed and sell the same, pay the former $60 per head, and give a chattel mortgage on the mules. The contract contained a provision to the effect that, if Wertz failed to dispose of the mules within 60 days from the date of the contract, then the mules remained the property of Winfield. Wertz did not give a chattel mortgage on the mules as provided for in the contract. Under an arrangement made with the bank it received from Winfield the bills of sale for the mules given to the latter when he acquired them, and agreed not to turn over such bills of sale to Wertz, except as he paid to it $60 for each mule sold, the amounts so paid to be remitted or credited by the bank to Winfield. It was made known to the bank that both Winfield and Wertz understood that the latter would not be able to sell the mules unless he had the bills of sale for them which had been given to Winfield. The bank delivered the bills of sale to Wertz, without receiving any payment for or on the mules, and Wertz sold a number of the mules for which he did not pay.

We think the court properly ruled that the petition, as it was amended, disclosed a cause of action, and was not subject to the exception or demurrer interposed to it. It fairly appears from the averments that the action of the bank in delivering to Wertz the bills of sale mentioned was effective in bringing about the wrongful disposition of some of the mules by Wertz, which resulted in the loss by Winfield of those mules, or the value of them. Whether it was or was not legally necessary for Wertz to have possession of such bills of sale to be enabled to sell the mules they represented, so long as his conduct was controlled by the understanding that it was not safe for him to dispose of the mules without having in possession the bills of sale given to Winfield, the conduct of the bank in delivering those instruments contrary to instructions properly might be regarded as proximately contributing to the loss caused to Winfield by Wertz's wrongful disposition of some of the mules. The question whether the wrongful delivery of the bills of sale had the effect attributed to it was one of fact.

Several of the mules died while they were in the possession of Wertz. As a result of a suit brought by Winfield, he recovered 26 of the mules which were not sold by Wertz.

[2] Over objections interposed in behalf of the defendant the court permitted the introduction by the plaintiff of evidence of the amounts of attorney's fees and court costs expended by him in the suit brought for the recovery of the mules not sold by Wertz. Error was committed in the admission of that evidence. Whatever, if any, liability was incurred by the bank in consequence of its delivery to Wertz of the bills of sale contrary to instructions was based upon that action having the effect of enabling Wertz to sell the mules without paying for them. The bank incurred no responsibility in reference to the mules which remained unsold. In no way did it become liable for a noncompliance by Wertz with his undertakings to care for and redeliver the mules not sold by him. Winfield's outlays for attorney's fees and court costs

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in the suit for the recovery of the mules were not attributable to any misconduct of the bank. Because of the error mentioned the judgment is reversed.

[3] In view of a retrial of the case, attention is called to an instruction of the court which was not excepted to. The court charged the jury:

"That if they believed that Winfield sent to the bank bills of sale for the mules, with instructions not to deliver them to Wertz, except as Wertz paid for each mule, and that, contrary to these instructions, the bank did deliver the bills of sale to Wertz, and that Wertz was accordingly able to sell certain of the mules, the jury should then find a verdict for the plaintiff for the number of mules disposed of by Wertz at the rate of $60 per head, and should also allow the items of attorney's fees, $300, and court costs of $149.75."

There was no evidence of the value of the mules sold when the bills of sale were delivered to Wertz, or when he disposed of those mules. The instruction quoted improperly assumed that their value at those times was what Wertz had agreed to pay for them. To sustain a recovery based on the bank's delivery of the bills of sale having the effect of enabling Wertz to sell some of the mules without paying for them, it was incumbent on the plaintiff to prove the value of the mules sold when they were wrongfully disposed of.

Reversed.

HESTER v. EAST TENNESSEE & W. N. C. R. CO.

(Circuit Court of Appeals, Fourth Circuit. December 5, 1918.)

No. 1659.

1. COMMERCE ⟸27(7)—EMPLOYERS' LIABILITY ACT—EMPLOYMENT IN "INTERSTATE COMMERCE."
   A brakeman, killed while on a train of empty hopper cars being moved by a switch engine to another point within the same state, their destination, however, being a further point in another state, to which they were taken the next day for loading with ore, *held* to have been employed in interstate commerce.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. COMMERCE ⟸27(6)—INTERSTATE COMMERCE—MOVING EMPTY CARS.
   The hauling of empty cars from one state to another is interstate commerce.

3. COMMERCE ⟸27(6)—INTERSTATE COMMERCE—INTERSTATE TRAIN.
   The presence of interstate cars in a train makes it an interstate train.

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville; James E. Boyd, Judge.

Action at law by Odie Hester, administratrix of Charlie Hester, deceased, against the East Tennessee & Western North Carolina Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Mark W. Brown, of Asheville, N. C. (J. W. Ragland, of Newland, N. C., and Thomas A. Jones, of Asheville, N. C., on the brief), for plaintiff in error.

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A. Hall Johnston, of Asheville, N. C., and John W. Price, of Washington, D. C. (James H. Epps, of Jonesboro, Tenn., and Price & Dulaney, of Washington, D. C., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

KNAPP, Circuit Judge. [1] Plaintiff in error, plaintiff below, brought this action under the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657–8665]) to recover damages for the death of her husband, Charlie Hester, who was killed while in defendant's service in February, 1915. Upon the evidence adduced in her behalf the trial court directed a verdict for defendant, on the ground that Hester was not engaged in interstate commerce when he lost his life, and the correctness of that ruling is the only question to be decided.

Defendant operates a narrow gauge railroad running easterly from Johnson City, Tenn., to Cranberry, N. C., a distance of 34 miles. From Cranberry an affiliated road, known as the Linville River Railway, extends to Shulls Mills, N. C., a further distance of 24 miles. The only outlet for these lines is Johnson City, where connection is made with the Southern Railway and with the Carolina, Clinchfield & Ohio. A third rail has been laid from Johnson City to Elizabethton, Tenn., about 10 miles, and standard gauge cars can be transported to and from that point. At Cranberry there is a large output of iron ore, which moves in "hopper" cars to Watauga Point, near Johnson City, where a smelting furnace is located.

Hester was a brakeman and one of the crew which operated a switch engine in the yard at Johnson City. On the day of the accident the regular freight train is said to have been "off"—that is, not running—and this switching crew was called upon to move a number of cars with a switch engine to Blevins, Tenn., some 20 miles distant. They started out with 16 empty narrow gauge cars, and one standard gauge car, which was dropped at Elizabethton. Among the 16 cars were several hopper cars at the front end of the train. The switch engine was running backwards, and Hester had been sitting on the pilot beam facing the first car. Shortly before reaching Blevins he in some manner and from some cause fell from the engine under the cars, receiving the injuries from which he died not long afterwards. In order to get him quickly to a doctor, the rear cars were left at Blevins, and the engine with 6 or 7 hopper cars went on a few miles further to Roan Mountain, Tenn., near the North Carolina border. Six of these cars were taken to Cranberry the following morning by an engine and crew of the Linville Valley road, which came to Roan Mountain for that purpose, and the same 6 cars were loaded with ore at Cranberry and hauled back to Watauga Point within the next three or four days. In short, the testimony indicates that there was a regular and frequent movement of empty hopper cars to Cranberry and their return loaded to the smelter. It also appears that when the regular train was "off," as at the time in question, it was usual for defendant's switch engine to haul empty hoppers and other cars to

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Blevins, and from there the Linville Valley would take them to Cranberry and points beyond in North Carolina.

[2, 3] It is enough to say of these and other facts of record that in our opinion they fully warrant the inference, if they do not conclusively show, that defendant and Hester were both engaged in interstate commerce when he met his death. The recited circumstances tend strongly to refute the contention that Blevins was in any sense the destination of the hopper cars hauled in the fatal train. It was customary to take empty hoppers to Cranberry, and there was no traffic at Blevins or other Tennessee point for which such cars were required. The employés of defendant could not have supposed that the hopper cars in question were to be moved only to Blevins, but must have understood that they were destined for Cranberry, where in fact they were taken almost directly. In a word, the evidence justifies a finding that the movement of the train on which Hester was killed was an interstate movement, because it carried cars which, as defendant well knew, were going through to Cranberry, N. C. The hauling of empty cars from one state to another is interstate commerce. N. C. R. Co. v. Zachary, 232 U. S. 248, 259, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159. The presence of interstate cars in a train makes it an interstate train. Southern Ry. Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72. It is not needful to expand the argument. Upon the question here considered we deem it clear that a case was made for submission to the jury, and it was therefore error to direct a verdict for defendant. Pederson v. D., L. & W. R. Co., 229 U. S. 151, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; St. L. & San Francisco Ry. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156; N. Y. C. & H. R. R. Co. v. Carr, 238 U. S. 261, 35 Sup. Ct. 780, 59 L. Ed. 1298; Chicago, R. I. & P. Ry. Co. v. Wright, 239 U. S. 548, 36 Sup. Ct. 185, 60 L. Ed. 431; Louisville & Nashville R. Co. v. Parker, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. 119.

In this brief review we have referred only to such facts as bear upon the question now before us, but it may not be improper to add that in our judgment the questions of defendant's negligence and Hester's assumption of risk were also questions for the jury.

Reversed.

AMERICAN CENTRAL INS. CO. et al. v. ISAACS.*

(Circuit Court of Appeals, Ninth Circuit. January 6, 1919.)

No. 3105.

PRINCIPAL AND AGENT ⊂=79(5)—LIABILITY OF AGENT—FRAUDULENT CONDUCT OF PRINCIPAL'S BUSINESS.

Evidence *held* sufficient to show that defendant, as agent for insurance companies for the sale of a salvaged stock of goods, was chargeable with fraud in selling the larger part of the goods in bulk to himself through a partner.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied February 10, 1919.

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Appeal from the District Court of the United States for the Second Division of the Northern District of California; Frank H. Rudkin, Judge.

Suit in equity by the American Central Insurance Company and others against David Isaacs. Decree for defendant, and complainants appeal. Reversed and remanded, with directions.

Jesse Olney, of San Francisco, Cal., for appellants.

Leon E. Prescott and Bert Schlesinger, both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. We have examined the record in this case attentively, and are of the opinion that the judgment of the court below, dismissing the bill, cannot be sustained. The complainants were insurers in varying amounts, aggregating more than $20,000, on a stock of merchandise in the city of Seattle, owned by one Bridge, doing business under the name of A. Bridge & Co. While so insured, to wit, on August 11, 1913, a fire occurred in his store, almost immediately after which he made an assignment for the benefit of his creditors to one Truax, a representative of the Seattle National Bank. For the adjustment of the loss occasioned by the fire, Bridge and his assignee employed an insurance adjuster named Mason, and the insurance companies employed a like adjuster named Main. After some differences regarding the loss, Mason finally reduced the claim on behalf of the insured and his assignee to $16,200; Main conceding that the loss amounted to $13,588.65, but refusing to concede that it was more. It was agreed between them that the sound value of the insured stock before the fire was $34,300, and that the insurance companies would take over the stock and pay that amount therefor, which they did, having, through their adjuster, Main, made an agreement with Isaacs, the defendant to the suit, who, according to the evidence, was an expert salvage man, by which he agreed to sell the insured stock for the benefit of the insurance companies, guaranteeing that they should receive from such sale $18,100, which latter sum he agreed to and did advance to them, and upon the further agreement that he should receive for his services, so stipulated for, a commission of 20 per cent. on the gross amount realized on the sale. The result of this arrangement, therefore, manifestly was to insure the complainants against any loss in excess of $16,200 and Isaacs' commission of 20 per cent. on the gross amount realized on the sale.

Isaacs at once entered into possession of the storeroom and stock, advertised, and commenced on the 7th day of September, what is spoken of by the witnesses as a fire sale, and continued it for 19 days with marked success throughout, according to all of the evidence, excepting only the testimony of the defendant Isaacs, who, while admitting that it was wholly successful in the beginning, testified that the sales decreased from day to day, running down as low as $400 to $500 a day—the average daily expenses being over $200. Isaacs also testified as follows:

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"About a week before the retail sale ended, I spoke with Mr. Main about discontinuing it. I told him we couldn't afford to continue the sale much longer, and that the best thing to do would be to finish the rest of the week, and then sell the stock out in bulk. He said: 'Go ahead; use your own judgment. Isaacs, you know what will happen to that stock if you sell it in bulk to the merchants here; they will steal it; I don't think you will get 30 per cent. for the stock.' I informed him that I anticipated going in business in the Northwest, and that, provided I could get a lease on the premises, I suggested that I would put in a bid on this stock myself in the name of some other person, and that, if any one is willing to pay more than I, they are welcome to the stock. Mr. Main asked me how I would conduct that sale, and I said, 'I will notify all the merchants in Seattle and the surroundings, accustomed to buying and dealing in that class of merchandise.' He said, 'Very well; go right ahead;' and I immediately notified all the merchants who I thought were interested, Wasserman & Schirmer, Kessler, Colsky, Cone, and Buttnick. I received about eight or ten bids. Wasserman & Schirmer bid 25 per cent.; Colsky, $4,200; Cone bid between 25 per cent. and 30 per cent.; Kessler's bid was 30 per cent.; and Buttnick bid between 25 per cent. and 30 per cent. Branner Bros., of Bellingham, Wash., made an offer of $10,000, conditioned that they could get the premises for continuing the sale, which I could not accept under those conditions. These bidders came up to the store before the sale. I showed them the original inventory given to me by Main. I told them they would have to examine the goods and judge by that inventory. I told them I would take an inventory of the goods that were left at the close of the sale, but I could not guarantee the amount of the goods that would be left. I also put an ad in the Times on Sunday. I did not think this would do any good, but thought it was the proper thing to do."

Isaacs stopped the sale Saturday evening, September 27th, and the advertisement so inserted in the Seattle Times the next morning—Sunday—was as follows:

"The balance of the A. Bridge & Co. stock, 103-05 First Ave. South, will be offered for bids Monday, September 29th, at 3 p. m.

"Coast Fire & Marine Insurance Co.,
"D. Isaacs, Manager."

Without conflict the evidence shows that, without waiting for such bidders as might have been attracted by such notice as was given by the advertisement, Isaacs sold the remaining stock in bulk at about 11 o'clock in the morning of September 29th to himself for 45 cents on the dollar of the invoice, aggregating $11,094, which he paid, less 20 per cent. thereof, which he deducted as his commission, pursuant to a bid, written out by himself with his own hand, in these words and figures:

"Mr. D. Isaacs, 103 First Ave., South, Seattle, Washington—Dear Sir: I hereby submit to you the following bid of the A. Bridge stock: Forty-seven cent ($.47) on the dollar of the invoice price. Hoping this meets with your approval, I remain, yours truly"

—and had his then employé, H. C. Seynei, sign it, with which employé, the evidence clearly shows, he had entered into a secret agreement, a few days after the commencement of the trust sale, to establish a partnership business with the stock so sold in the name of H. C. Seynei & Co., which was done; there being entered against that firm on its books a charge in the said sum of $11,094.

It is thus apparent that this trustee not only sold the trust property

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to himself for 2 cents less on the dollar of the invoice than he himself bid therefor in writing, but that from the proceeds he deducted 20 per cent. thereof as a commission to himself, thus paying to his cestui que trust but $8,876. For the stock so purchased by him he charged upon the books of the firm of H. C. Seynei & Co., in which, according to the uncontradicted evidence, he continued a secret partner, the aforesaid full amount of $11,094. The evidence further shows that during the Sunday intervening between the close of the fire sale and the following day, on which he gave the public notice that the sale in bulk of the remaining stock would be made, he took an inventory thereof, aggregating $24,653; and the evidence shows without dispute that in the evening of the day on which said bulk sale was made, at a meeting between the two partners held in the Hotel Herald in Seattle, Isaacs, with his own hand, made in writing a list of the various articles of merchandise so sold in bulk, aggregating in value $24,603.39.

While it is true that he testified, as has been above set out, that he notified all the merchants he thought would be interested of the bulk sale, and enumerated the bids he said were made to him by the parties he named, such testimony is not only in direct conflict with that of a number of his employés who were in the store at the time, but is wholly inconsistent with that of the witness Bailey, an attorney at law, whose testimony, we think, bears upon its face every indication of truthfulness. That witness testified, among other things:

"As I had been told this sale in bulk was coming off Monday morning, by Mr. Isaacs, I went down at that hour, and was there when the bids were opened. Two men whom I did not know were complaining to Mr. Seynel that they would like to have bid, had they time to examine the goods before the bids were opened, but could not do it. I do not know how many bids were in, nor what any of them called for; but a few minutes afterwards Mr. Seynei came back and told me he had got the goods, but that he knew he would all the time. Before I left the store at this time Mr. Isaacs told me that: 'We have got the goods and they are all in perfect shape. Now we will put on a sale and make plenty of money.'"

Moreover, it appears that to the very brief and unusual notice that Isaacs caused to be inserted in the Sunday edition of the Seattle Times he affixed the fictitious name "Coast Fire & Marine Insurance Co.," and deliberately testified that he did not think the advertisement "would do any good, but thought it was the proper thing to do"; whereas, it is a matter of common knowledge that notice of such sales is deemed by the commercial world as not only highly useful, but is almost always, if not universally, published, not only once, but for such reasonable time as will enable prospective purchasers both to examine the stock to be sold, as well as to attend the sale; and such is the effect of the testimony of all of the numerous witnesses upon the subject, except the defendant Isaacs.

When to all of this is added the most pregnant fact that in the advertisement he expressly stated and notified the public that the sale would not be made until 3 o'clock of the afternoon of Monday, he in fact made it to himself, through his employé, Seynei, about 11 o'clock in the morning of that day, for the consideration and under the circumstances that have been stated, we are of the opinion that it is im-

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possible to resist the conclusion that such sale was grossly fraudulent, and that the court below erred in dismissing the bill.

The judgment is reversed, and the case is remanded, with directions to that court to decree the sale in bulk fraudulent and void, and to compel the defendant to the suit to account for his proceedings as trustee, with leave to the respective parties to introduce such further evidence as they may desire and as may be proper.

ANDERSON v. FOREST CITY NAT. BANK OF ROCKFORD, ILL.

(Circuit Court of Appeals, Seventh Circuit. December 10, 1918.)

No. 2613.

BANKRUPTCY ⊜408(4)—RIGHT TO DISCHARGE—CONCEALMENT OF ASSETS.

Failure of a bankrupt to schedule his interest in his deceased father's estate, where, after payment of a note which he owed the estate, he had no valuable interest, is not a fraudulent concealment of assets, which will defeat his right to a discharge.

Appeal from the District Court of the United States for the Western Division of the Northern District of Illinois.

In the matter of C. L. Anderson, bankrupt. From an order denying his discharge, the bankrupt appeals. Reversed.

Roy F. Hall, of Buffalo, N. Y., for appellant.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge. The subject-matter of this appeal is the denial of appellant's application for discharge in bankruptcy. The ground of the denial was that the bankrupt, in fraud of his creditors, failed to schedule an interest in the estate of his father, a resident of Iowa, who had died a short time before the filing of appellant's petition in bankruptcy. It appears from the record that the father left a will in which he bequeathed a farm in Iowa, one-third to his wife and two-thirds to his three children. But it further appears that some time before his death, and after making the will he sold the farm, making no provision in the will for disposition of the proceeds in such case, whereby the proceeds of the farm, the large bulk of the estate, became intestate estate, which descended one-third to the mother and the rest to the three children equally.

The record shows that the estate of deceased consisted of a purchase-money mortgage on this farm for about $11,000, and a note, which the bankrupt owed his father, of nearly $3,000, with interest at 6 per cent. for about nine years. Appellant testified that he did not know what his father's will contained, but assumed all along that his father had left all his property to his mother. The will, while filed in the court in Iowa some time in May, was not admitted to probate until November, which was after the petition in bankruptcy was filed. It seems that shortly thereafter the trustee in bankruptcy had a copy of the will, and that he knew of its contents, before the bankrupt says

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he found it out; but he took no steps to recover for the creditors any part of the estate of deceased. Bankrupt's mother and the county clerk in Iowa and the attorney in charge of the estate all testified that they had not informed Anderson, who resided at Rockford, Ill., of the contents of the will. One Waterman testified that before the bankruptcy Anderson had told him that he expected to build a house in Rockford with some money he would get from Iowa, and that it was his impression that Anderson said the money would come from his father's estate, but Waterman was not certain about this. Anderson said that he did say to Waterman that he would get some money from Iowa, but that he expected the money was to come from his mother, who had told him that, when she got the money, she would let him have some to build a house with.

But, apart from the evidence of appellant's knowledge or want of it upon this subject, the undisputed evidence of the actual value and extent of the bankrupt's interest in his father's estate makes it plain that, after deduction of the note he owed the father's estate, he had no valuable interest remaining which could be the subject of concealment or of fraudulent withholding from the trustee. His failure to schedule any interest in his father's estate, if in fact he had none, will not sustain the objection made to his discharge in bankruptcy.

The order of the District Court denying plaintiff's discharge is reversed, with direction for further proceedings not inconsistent herewith.

UNITED STATES v. ST. JOHN.

(Circuit Court of Appeals, Seventh Circuit. December 21, 1918.)

No. 2695.

1. BAIL ⇐=44—CRIMINAL PROSECUTION—RIGHT TO RELEASE ON BAIL PENDING PROCEEDINGS IN ERROR.
   Under rule 34 of the Circuit Court of Appeals (235 Fed. xiv, 148 C. C. A. xiv) it is discretionary with the court or judge to accept bail from a defendant pending proceedings in error after conviction and sentence, although his right to bail is not the same as before conviction.

2. BAIL ⇐=49—PENDING PROCEEDINGS IN ERROR.
   In cases where the granting of bail after conviction pending proceedings in error is opposed by the government, and no bill of exceptions has been settled, application should first be made to the trial judge.

3. BAIL ⇐=44—BAIL PENDING PROCEEDINGS IN ERROR.
   Admission to bail denied to a defendant convicted of violation of the Espionage Law (Comp. St. 1918, §§ 10514a–10514d), pending proceedings in error.

Criminal prosecution by the United States against Vincent St. John and others. On application to a Circuit Judge by defendant St. John for bail pending proceedings in error. Denied.

Clarence Darrow, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne, of Chicago, Ill., and David S. Cook, of Salt Lake City, Utah, for the United States.

⇐=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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EVAN A. EVANS, Circuit Judge. Defendant, together with some 100 others, was convicted on four counts of an indictment, each count charging conspiracy to violate the so-called Espionage Act (Act June 15, 1917, c. 30, 40 Stat. 231 [Comp. St. 1918, §§ 10514a–10514d]), and was sentenced to serve a term in the penitentiary. He has sought and secured a writ of error, and now seeks to be enlarged on bail pending the hearing of his writ of error by the Circuit Court of Appeals.

[1] That a judge of this court may grant bail pending the hearing on a writ of error, in a proper case, is recognized by rule 34 of this court (235 Fed. xiv, 148 C. C. A. xiv) which reads as follows:

"2. Where such writ of error is allowed in the criminal cases aforesaid, the Circuit Court or the District Court before which the accused was tried, or the District Judge of the district wherein he was tried, within his district, or the Circuit Justice assigned to this circuit, or any of the Circuit Judges within the circuit, shall have the power, after the citation has been duly served, to admit the accused to bail and to fix the amount of such bail."

While assignments of error must be filed before any writ of error is allowed (rule 11, C. C. A., 150 Fed. xxvii, 79 C. C. A. xxvii), there is no requirement that the bill of exceptions shall be settled prior to the issuance of the writ. Paragraph 2 of rule 34 contemplates the issuance of the writ of error prior to any enlargement on bail. In the present case, while assignments of error have been filed and the writ of error issued, there has been presented no transcript of the testimony and no bill of exceptions.

The government opposes defendant's motion for bail on the ground that there is no bill of exceptions from which the court can determine whether the assignments of error are well supported by the record.

An examination of the authorities warrants the conclusion that the right of the defendant to bail prior to conviction is quite different from his right after conviction and sentence. Prior to a verdict of guilty, defendant is presumed innocent. The return of the indictment against him is not even prima facie evidence of guilt. It creates no presumption against him, and he is, excepting, perhaps, in a few offenses covered by legislation, entitled to bail as a matter of right. In many states a defendant's right to bail prior to conviction is safeguarded by constitutional provisions, and, where neither statutory nor constitutional provisions are found, bail is allowed under the common-law rule, it being a matter of discretion with the court. In re Thomas, 39 L. R. A. (N. S.) 754, notes.

But defendant stands in a different position after conviction. In fact, in some states it has been considered necessary to enact legislation conferring power upon courts to allow bail after conviction and sentence. In the federal courts this power has been given by a rule of the Supreme Court. See United States v. Simmons (C. C.) 47 Fed. 575. In this court a similar rule (34) has been adopted.

Aside from any authorities, it must be apparent that, inasmuch as bail is allowed almost as a matter of course before conviction, largely because of the presumption of innocence which prevails in defendant's behalf, a different practice should prevail where the reason for the

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rule disappears. After conviction and sentence, the burden is upon the convicted party to show error in the conviction.

However, in view of the fact that bail is granted in the discretion of the court, not alone because of the existence of this presumption of innocence, courts have, with great liberality, allowed defendants to be enlarged on bail notwithstanding conviction. Considerations affecting the determination of this question are severity of the punishment, the nature of the offense of which the defendant stands convicted, the health of the prisoner, the character of the evidence, the good faith back of the assignments of error, the public welfare, the conduct of the accused after indictment and up to and including the time of his sentence, as well as many other matters.

In fact, bail has been so frequently granted after conviction that an erroneous impression has obtained with the bar that it is allowed as a matter of right. A few authorities, therefore, might well be examined. In 3 Ruling Case Law, p. 15, we find the following:

"After conviction, no constitutional right to bail exists and the granting of bail rests in the sound discretion of the court. In cases of misdemeanor this discretion is exercised freely in favor of bail, but in felonies bail is allowed with great caution, and only where the peculiar circumstances of the case render it right and proper."

In 6 Corpus Juris, p. 965, we find the following statement supported by many authorities:

"As a general rule, the conviction of the accused does not deprive the court of the power to admit him to bail pending an imposition of sentence; but its allowance continues a matter of judicial discretion until the accused is finally committed in execution; and in some jurisdictions this power is expressly regulated by constitutional or by statutory provisions. There is, however, no constitutional right to bail after conviction; and, although in cases of misdemeanor this discretionary power is exercised freely in its favor, in cases of felonies bail after conviction should be allowed with great caution and only where the extraordinary or peculiar circumstances of the case render it right and proper."

To the same effect, see 5 Cyc. 72.

In the federal courts we find the right to bail after conviction early recognized. In United States v. Simmons (C. C.) 47 Fed. 577, the court says:

"Were it not for rule 36 of the Supreme Court [32 Sup. Ct. xiii] of the United States, it might well be argued that no bail should be accepted from a person already convicted and under sentence to be imprisoned for a term of six years."

In Re Schriber, 19 Idaho, 531, 114 Pac. 29, 37 L. R. A. (N. S.) 693, the appellate court considered a situation where the trial court refused to enlarge the defendant after conviction. I quote from the opinion:

"It would certainly be disastrous if we should hold that this provision of the Constitution grants to a person convicted of crime the absolute right to be admitted to bail pending appeal, irrespective of the merits of the case. * * * For some reason the judge subsequently concluded that he should no longer be admitted to bail. * * * We would not feel justified in interfering with the discretion of the trial judge under the facts and circumstances as they present themselves to us in this petition. * * * We are

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not familiar with the situation and the circumstances of the petitioner, and we think that is a matter with which the trial judge can deal more justly and wisely. He is familiar with the parties and their ability to give bail, and also knows the facts surrounding the commission of the offense for which he was convicted."

Extended notes appear in the report above referred to, as well as in the case of In re Thomas, supra.

Whether the court properly traces its authority to the Supreme Court rule or not is immaterial. Federal courts have exercised unhesitatingly the power to admit to bail defendants convicted and sentenced. In Ex parte Harlan (C. C.) 180 Fed. 119, 135, the question is considered at some length. I quote therefrom:

"It is needless to say that there is no constitutional right to bail in any case, after conviction. After all that has been said and written on the subject, the only rule which can be deduced from the authorities is that bail should be granted or denied as best effects exact justice between the government and the defendant according to the character and urgencies of the instant case, determined in the light of the principles of the common law as affected by the enactments of Congress. It is due to social order and proper regard for the majesty of the law, that a sentence, especially when affirmed by an appellate court, should be executed without undue delay, and courts should be careful not to give countenance to factious resistance to the orderly operation of the law by lightly admitting a convicted prisoner to bail. On the other hand, it is also to be borne in mind that the law is quick to afford opportunity and means to the citizens to redress wrongs at its hands, and delighting as it does, in the liberty of the citizen, will not, except in rare instances, compel the prisoner to undergo sentence before the final court has spoken, when he is honestly pursuing legal means to avoid a conviction."

See, also, Rose ex rel. Carter v. Roberts, 99 Fed. 952, 40 C. C. A. 203.

In the present case the trial was concluded about August 17. Defendants were sentenced on August 30. A large number of defendants were joined in the indictment and most of them are serving their sentences in the penitentiary. Defendant St. John claims that his business interests will suffer if he be not enlarged on bail. His excuse for not presenting the bill of exceptions or the transcript of the record is that the trial was so long (the taking of testimony covering some 85 days), so many exhibits were offered, that it has been impossible to prepare the bill of exceptions within the last 3½ months or to get it ready for settlement.

The absence of the bill of exceptions in the present case only emphasizes what, in my mind, is essential to the intelligent disposition of this or any similar motion. The judge who heard the case knows the attitude of each of the defendants, observed them throughout the trial and particularly while on the witness stand, understands the nature and the character of the offense, the reasonableness of defendant's claim of innocence, the strength or weakness of the government's case, the possibility of injury to defendant by reason of confinement pending the disposition of the writ of error, as well as the injustice to the public, if any, should the defendant be enlarged, and is therefore best qualified to determine whether defendant should be admitted to bail, as well as the amount of the bail.

[2] To illustrate this court's difficulties: Defendant asserts, and the

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government denies, that error was committed in the trial of the case. Defendant asserts that he had no part in the conspiracy charged and that he was not even a member of the organization commonly called the I. W. W. This claim the government denies, and asserts that defendant was one of the leading officers of the organization and an actor who played a leading role in the conspiracy. Defendant assigns error because of the alleged unlawful seizure of papers, but this court is at a total loss to know whether any papers (seized lawfully or unlawfully) belonged to, or were in the custody of, the defendant St. John. It appears to me that in all cases where the granting of bail is opposed by the government, and there is no bill of exceptions settled, the District Judge who heard the case should first be given the opportunity to hear the request and judicially exercise his discretion in the matter. His conclusion would be much more intelligent than mine and doubtless controlling on review.

There is danger lurking in the too liberal exercise of the power to admit to bail as well as in the arbitrary refusal to grant bail. Too frequently, after the defendant has been admitted to bail, his interest apparently lags, the appeal drags, the bill of exceptions is not promptly settled, and the record does not reach the appellate court as promptly as it should. There are inexcusable delays in securing the printing of the transcript—more delays in printing and serving the briefs.

The present rules of the Circuit Court of Appeals invite a very early disposition of any appeal or writ of error prosecuted in good faith and with vigor. There are three annual sessions of the court—October, January, and April. Causes may be advanced or set down specially. Writs may be heard without the testimony being printed. The clerk is able to print transcripts of great length in less than a week, while any brief of reasonable length will be printed in a day. Orders may be obtained dispensing with the printing of exhibits. In a word, the rules and the practice of the court combine to accomplish the purpose of assisting the litigants to an early disposition of their cases. Court reporters are obtainable who will provide daily transcripts of testimony, and bills of exceptions can be presented almost on the day the verdict is received.

Frequently the delays in these cases are due to the desire of the parties to avoid a hearing rather than to any other cause. In the present case, no application for bail has been made to the judge who tried the case since the assignment of errors has been filed. The offenses of which this defendant and others have been found guilty are serious and menacing to the public. Defendant has been tried and presumably lawfully convicted. The interest of the public demands the execution of the sentence unless some special reasons be shown for defendant's enlargement.

[3] Realizing that defendant is entitled, under the rules above quoted, to a determination of his application on its merits by a judge of this court, I have studied the record and such facts as do appear, and my conclusion is not clouded in doubt. While the transcript of testimony of the trial is not before me, I am favored with a full statement of the case made by the District Judge when sentence was pronounced

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This statement shows that acts were committed, and a policy pursued by many members of the organization known and referred to as the I. W. W. that were wholly at variance with the policy of this government during the war, and equally hostile to the welfare of people and industries entirely free from blame or responsibility for this country's part in the war. In large sections of the country, members of this organization not only attempted to cripple business, but to a certain extent, at least, accomplished their object. Certainly members of the organization known as the I. W. W. are not in an enviable position to urge the impairment of their property rights now, in view of their attitude towards property during the past year. Whether defendant participated in this conspiracy—whether this defendant, or any defendants, were fairly convicted of this crime—are questions that each one has the right to present and the right to have fully and fairly determined. But the court cannot and should not ignore this statement of the District Court in determining whether bail should be allowed pending the determination of these questions.

Upon the entire showing, I conclude the request for bail should be and is hereby denied.

MANSON et al. v. MESIROV.

(Circuit Court of Appeals, Third Circuit. January 15, 1919.)

No. 2415.

BANKRUPTCY ⊂=467—REVIEW—FINDINGS.

Conclusion of referee in bankruptcy, concurred in by the District Court, should not be disturbed on appeal, unless for plain error.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; John B. McPherson, Judge.

In the matter of the bankruptcy of Max Manson and Samuel F. Manson, copartners, individually and trading as Max Manson & Son and Adelphia Waist Company. On petition of Harry S. Mesirov, trustee in bankruptcy, the bankrupts were directed to turn over a sum of money, and, the order having been affirmed on certificate to the District Court, the bankrupts appeal. Affirmed and remanded.

Bertram D. Rearick, of Philadelphia, Pa., for appellants.

Edwin Fischer, Byron, Longbottom & Pape, and Jacob I. Weinstein, all of Philadelphia, Pa., for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

PER CURIAM. In the course of the administration of the bankrupt estate of Max Manson and Samuel F. Manson, the referee, after hearing proofs, made findings and entered an order that said bankrupts "pay over within 10 days to Harry S. Mesirov, as trustee herein, the sum of $2,467, belonging to their estate in bankruptcy, found to be in their possession or under their control." On certificate to it,

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the District Court reconsidered the case, and thereafter entered its opinion and decree as follows:

"When a trustee seeks to obtain a turn-over order, the established practice in this circuit is to be followed. Epstein v. Steinfeld (C. C. A. 3) 210 Fed. 236, 127 C. C. A. 54. The present proceeding is in its first stage, and I shall only say that an attentive examination of the record discloses no reason for disagreement with the referee's report. But the concluding words of his order should be slightly modified, so as to read, 'found at the time the petition in bankruptcy was filed to be in their possession or under their control.' And, as the time for payment fixed by the referee has now expired, the date of August 15 is now substituted.

"Thus modified, the order is affirmed."

Thereupon this appeal was taken by the bankrupts to this court. No principles or questions of law, or procedure, are involved. The simple issue is one of fact, and those facts are fully discussed in the opinion of the referee. The contention, in substance, now is that the referee erred in his finding of facts, and the District Court erred in adopting those findings. We have carefully examined the testimony, and find the case had the careful and considerate attention of the referee, and we see no reason to differ from the conclusions he reached. As the referee's conclusions were concurred in by the District Court, we have a case where their joint judgment should not be disturbed unless for plain error.

The order below is affirmed, and the case remanded for further procedure by the court below.

FREEDOM OIL WORKS CO. v. PITTSBURGH, C., C. & ST. L. RY. CO.

(Circuit Court of Appeals, Third Circuit. January 15, 1919.)

No. 2424.

APPEAL AND ERROR ⟸1106(4)—REVIEW—DETERMINATION.

In action by railway company to recover alleged storage charges on interstate shipments, where the case was one of far-reaching importance, a judgment entered on motion for judgment for want of sufficient affidavit of defense may, in the discretion of appellate court, be reversed without opinion on the questions involved, so as to allow proofs to be placed of record before the case is reviewed.

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Action by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, now for use of Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, against the Freedom Oil Works Company. There was a judgment for plaintiff, entered on motion for judgment for want of sufficient affidavit of defense (247 Fed. 573), and defendant brings error. Reversed and remanded.

Forest G. Moorhead, of Beaver, Pa., for plaintiff in error.

John G. Marshall and Moorhead & Marshall, all of Beaver, Pa., and Gordon Fisher, of Pittsburgh, Pa. (Dalzell, Fisher & Hawkins, of Pittsburgh, Pa., of counsel), for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

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PER CURIAM. In this case the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company brought suit against the Freedom Oil Works Company to recover for alleged storage charges on interstate shipments. The court below entered judgment on a motion for judgment for want of a sufficient affidavit of defense. Thereupon the oil company sued out this writ.

On the argument it became evident that the case was one of far-reaching importance, and this court being, as it was in Paterlini v. Memorial Hospital, 232 Fed. 360, 146 C. C. A. 407, unwilling to pass on the questions involved until, "by the proofs rather than from the uncertain averments of pleadings, we are precisely informed of the facts upon which our judgment should rest," we follow this course there indicated, namely, without expressing in any way any opinion upon the questions here involved, we deem it the exercise of wise discretion to reverse the judgment and allow the proofs to be placed of record before the case is reviewed by this court.

FARRELL et al. v. FIRST NAT. BANK OF PHILADELPHIA.

(Circuit Court of Appeals, Third Circuit. January 15, 1919.)

No. 2422.

1. APPEAL AND ERROR ⟸977(3)—GRANT OF NEW TRIAL—DISCRETIONARY POWERS OF COURT.
   The grant of a new trial is one of the most useful discretionary powers of the trial court, and such step is only taken with reluctance, and, when done, there is every presumption that it is done in pursuance of a wise discretion, and in furtherance of justice.
2. APPEAL AND ERROR ⟸110—REVIEW—DECISIONS APPEALABLE.
   A writ of error will not lie to review an order granting a new trial, and that matter can be reviewed only when the case is before the appellate court on writ of error after entry of final judgment.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action between J. Walter Farrell, Charles Weil, Sumner S. Weil, and John McKay, trading as Weil, Farrell & Co., and the First National Bank of Philadelphia. There was an order granting the latter a new trial, and the former bring error. Writ dismissed.

Henry A. Rubino and Van Vechten Veeder, both of New York City, and J. Howard Reber, of Philadelphia, Pa., for plaintiffs in error.

Joseph S. Clark and Owen J. Roberts, both of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

PER CURIAM. [1, 2] The error assigned in this case is the granting by the court below of a new trial. The grant of a new trial is one of the most useful discretionary powers of a trial court. It is not often exercised by the experienced District Judges of this circuit,

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and when done it is only, as they conceive, in furtherance of the due administration of justice. In no case in this circuit has it been held that a writ of error will lie to such grant of a new trial by the trial judge. Such step is only taken with reluctance, but when it is done there is every presumption that it was done in pursuance of a wise discretion, and in furtherance of justice, as the trial judge conceives.

It is alleged in this case that there was an abuse of discretion, because the trial judge, it is contended, granted the new trial on a mistaken view of the law. We do not deem it wise, at the present stage of this case, to express or indicate any view on that question, but confine ourselves to quashing the writ and allowing the whole case to come before us upon entry of final judgment, if error be then assigned.

GALLET et al. v. R. & G. SOAP & SUPPLY CO.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 87.

1. TRADE-MARKS AND TRADE-NAMES ⟸58—INFRINGEMENT—MARKS—CORPORATE NAME.

Complainants, French manufacturers of high-grade soaps and toilet preparations, with a registered trade-mark of "R. & G." in monogram, *held* not entitled to an injunction restraining defendant, R. & G. Soap & Supply Company, from using the letters "R. & G.," which are the initials of its organizers, in its corporate name; there being no claim of fraud, and no proof of interference with complainants' trade, the soap made by defendant being a low-priced article.

2. TRADE-MARKS AND TRADE-NAMES ⟸73(2)—SIMILARITY OF CORPORATE NAMES—RIGHT TO INJUNCTION.

Where the right to relief depends exclusively upon comparison of the corporate names of the parties and the inferences to be drawn from such comparison alone, without reference to extrinsic facts, and there is no evidence of confusion or injury, the courts will not grant injunctive relief.

3. TRADE-MARKS AND TRADE-NAMES ⟸70(1)—UNFAIR COMPETITION—RIGHT TO INJUNCTION.

A court should not interfere by injunction to restrain alleged unfair competition, when ordinary attention by the purchaser of the article would enable him at once to distinguish the one from the other.

4. TRADE-MARKS AND TRADE-NAMES ⟸98—SUIT FOR INFRINGEMENT—ACCOUNTING.

An accounting for infringement of trade-mark will not be ordered, unless it is clear that on the evidence in the case, or evidence which might be presented to the master, there could be a substantial recovery.

Appeal from the District Court of the United States for the Northern District of New York.

Suit in equity by Edmund Gallet and another against the R. & G. Soap & Supply Company. From the decree, complainants appeal. Affirmed.

Maurice Leon, of New York City, for appellants.

J. Robert Rubin, of New York City (Milton Frank, of New York City, on the brief), for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

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MANTON, Circuit Judge. [1] The appellants are partners trading under the name of Roger & Gallet, with their principal place of business in France. They trade, however, in this country through duly authorized agents here. They have obtained in the United States trade-marks No. 30,439, registered July 27, 1917; No. 35,737, registered January 8, 1901; No. 96,880, registered May 5, 1914; No. 101,629, registered January 5, 1915.

Under these trade-marks, the appellants and their predecessors conducted their business since the 2d of January, 1891, which business consists of the sale of high-grade soaps and toilet preparations. The letters "R." and "G." have their origin in the initials of the appellants, and are combined in a monogram described in trade-mark registered No. 101,629. The appellee, R. & G. Soap & Supply Company, is the successor of the R. & G. Supply Company. This firm began a premium business in the city of Binghamton, N. Y., in 1901, and is now engaged in the manufacturing, buying, selling, importing, and exporting of, and dealing generally in, soaps, teas, coffee, groceries, cloaks, suits, furniture, and all kinds of supplies for individuals. Two men, Simon Rosenthal and Maurice Gutman, citizens of Binghamton, using their initials as part of their corporate name, organized the corporation R. & G. Supply Company, which was later changed to the present name of the appellee.

The appellee conducted its business by selling these articles directly to the consumer from its manufacturing plant in Binghamton, giving premiums and stamps, which could be redeemed at its home office, for furniture and household articles. It is essentially a premium business, as well as a mail-order business. The bulk of its business is done in the mining districts of Pennsylvania; it deals in low-priced goods, and consequently does not reach the same high-class trade as do the appellants. On the other hand, the appellants' business was world-wide; they dealt in more costly commodities, and consequently to a higher-grade trade. The appellants expressly eliminated any charge of fraud.

There was no proof that the appellants' business was interfered with; that is to say, that any actual loss was sustained or trade diverted by reason of the use of these initials in the appellee's trade name. These facts were all stipulated.

The special master granted an injunction restraining the appellee from using the letters "R." and "G." either separately or in a monogram, or in the form "R. & G." or "R. and G." on labels, but did not enjoin the use of "R. & G." or "R. and G." in the corporate name; the latter use, however, to be employed only with the same size print as the balance of the corporate name.

The appellants, feeling aggrieved by the scope of this injunction, have appealed, and urge upon us that the court below erred in refusing to absolutely forbid the use of the letters "R. & G." in the corporate name of the appellee, and further in failing to grant an accounting.

Upon these stipulated facts, nothing appears except the mere use of the letters "R." and "G." by the appellee, and such use in its corporate name could not constitute an infringement of the appellants'

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trade-mark. Indeed, the use of similar trade-marks, standing alone, does not constitute infringement. Wherever aid has been had from a court of equity, there has been some evidence of unfair competition in the sale of the goods by the infringer. If the appellee had the right to use the letters "R." and "G." as it did, in its corporate name, by the grant of such name from the state, and did so conduct its business as not to palm off its goods as those of the appellants, and there is no evidence of fraud in the conduct of its business which would be calculated to reach the same result, equity will not enjoin it as an infringer. Howe Scale Co. v. Wyckoff, Seaman & Benedict, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972.

[2] Where the right to relief depends exclusively upon the comparison of the corporate names of the parties and the inferences to be drawn from such comparison alone, without reference to any extrinsic facts, and there is no evidence of confusion and injury, the courts will not grant injunctive relief. Higgins v. Higgins, 144 N. Y. 470, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769.

It was held in Cement Co. v. Le Page, 147 Mass. 207, 17 N. E. 304, 9 Am. St. Rep. 685, that the right to use one's own name in all legitimate ways, or as a whole or part of a corporate name, in the absence of contract, fraud, or estoppel, will not be enjoined, and one may use his own name with equal right in a business in which others are associated with him, as in a partnership or corporation, if it appears that such corporate or partnership name is not selected for the purpose of unfair competition. Such absolute right to use a man's own name honestly in his own business, for the purpose of advertising it, even though it may interfere and injure the business of another having the name, unless he resorts to artifice or some action calculated to mislead the public as to the identity of the business, and thus cause injury to the others, beyond that which results from the similarity of names, should not be enjoined.

Applying these rules to the facts in this record, we are of the opinion that the appellants have been accorded the fullest protection to their trade-mark rights.

[3] None of the labels which the appellee used with the name "R. & G. Soap & Supply Company, Binghamton, N. Y.," are likely to mislead the average purchaser to take the appellee's goods for those of the appellants. No ordinary purchaser would be misled by the similarity of the initials used as restricted by the decree appealed from. A court of equity should not interfere when ordinary attention by the purchaser of the articles would enable him at once to discriminate the one from the other.

The appellants used the initials "R." and "G." in a monogram, with the words "Paris, France," and the appellee the name "R. & G. Soap & Supply Company, Binghamton, N. Y." We are at a loss to understand how the ordinary purchaser could be confused or deceived.

[4] Nor are the appellants entitled to an accounting. There is no concession nor evidence which indicates that a single sale was made as a result of any misconception or misleading advertisements with the use of the initials "R." and "G." on the labels of the commodities sold by the appellee, and there can be no damage in connection with

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the violation of the appellants' rights, which have now been restrained, except there was injury to the business and good will of the appellants. Such damage could only be demonstrated by loss of sales which otherwise would have accrued to the injured business. An accounting will not be ordered, unless it is clear that either upon the record, or upon a record which the appellants might present to the master, there could be a substantial recovery. Merriam v. Saalfield, 198 Fed. 369, 117 C. C. A. 245.

We are satisfied that the appellants present no such case. Concluding, as we do, that the initials "R." and "G.," followed by the words "Soap & Supply Company, Binghamton, N. Y.," distinguished the appellee's goods from those of the appellants, so as to avoid confusion, and that there was no effort on the part of the appellee to palm off its goods for those of the appellants, the appellants are not entitled to the further relief which they ask for.

Decree affirmed.

ROYAL INS. CO., Limited, v. TAYLOR et al.

(Circuit Court of Appeals, Fourth Circuit. October 11, 1918.)

No. 1633.

1. EVIDENCE ⟸253(2)—CONFESSION OF COCONSPIRATOR.
In action on fire policy, confession of one who was convicted of burning property is not admissible against insured, on theory property was burned as part of a conspiracy, and confession was a declaration of insured's coconspirator, for confession was not made pending the conspiracy, or in furtherance of its purpose.

2. EVIDENCE ⟸253(1)—CONSPIRACY—DECLARATIONS AGAINST INTEREST.
Where insurer claimed that property was burned as result of conspiracy between insured and one who fired the property, latter's confession is not admissible against insured, in an action on the policy, on the theory it was a declaration against interest; the rule applying only to declarations against pecuniary interest.

3. INSURANCE ⟸658—ACTIONS—EVIDENCE.
Where insurer claimed that property was burned as a result of a conspiracy between insured and one who fired the property, latter's confession is not admissible against insured, in an action on the policy, on the theory that he was an accessory to the burning.

4. EVIDENCE ⟸317(2)—HEARSAY.
Mere hearsay as to declarations by a third person is not admissible in evidence.

5. APPEAL AND ERROR ⟸1066—HARMLESS ERROR—INSTRUCTION.
In action on fire policy, where there was no evidence property was incumbered or belonged to any one other than those insured, policy was prima facie evidence of their ownership; so an instruction refusing to submit the question whether property was incumbered, etc., was harmless, if erroneous, under Code W. Va., c. 125, § 64 (sec. 4818).

6. INSURANCE ⟸665(1)—FIRE INSURANCE—OWNERSHIP.
In action on fire policy, where there was no evidence property was incumbered or belonged to any one other than those insured, policy was prima facie evidence of their ownership.

7. APPEAL AND ERROR ⟸977(5)—REVIEW—NEW TRIAL.
Denial of motion for new trial cannot be reviewed on writ of error.

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In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action by J. S. Taylor and another against the Royal Insurance Company, Limited. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

George E. Price and Price, Smith, Spilman & Clay, all of Charleston, W. Va., and Steptoe & Johnson, of Clarksburg, W. Va., for plaintiff in error.

L. H. Kelly, W. E. Hines, and Van B. Hall, all of Sutton, W. Va., for defendants in error.

Before PRITCHARD and WOODS, Circuit Judges, and CONNOR, District Judge.

PRITCHARD, Circuit Judge. The defendant in error will hereinafter be referred to as the plaintiff, and the plaintiff in error will be referred to as the defendant; such being the relative positions the parties occupied in the court below.

This is an action of assumpsit brought by J. S. Taylor and A. E. Messenger against the Royal Insurance Company, Limited, of Liverpool, England, on a fire insurance policy for $5,200, issued by the defendant on the 24th day of August, 1915, on certain lumber of the plaintiffs on a lumber yard where there had been a mill located. The suit was originally brought in the circuit court of Braxton county, W. Va., and was removed on application of the defendant into the United States District Court for the Southern District of West Virginia, and the defendant set up defense that the policy in question had become void, and the plaintiffs could not recover, because the property insured was set fire to and burned on the 2d day of November, 1915, by one Jerry White, and that said White was moved, incited, hired, and procured to set fire to and burn said property by the plaintiff A. E. Messenger, with intent and design to injure and defraud the defendant.

It was also alleged that both of the plaintiffs had in the proof of loss sworn falsely that the fire did not originate by any act, design, or procurement on the part of the insured, or in consequence of any fraud or evil practice done or suffered by the insured. An amended specification or defense was afterward filed, which, in effect, set up that the property was burned on the 2d day of November, 1915, pursuant to a conspiracy entered into between the plaintiffs with each other and with Jerry White and one Ona Conrad to set fire to and destroy the property insured by the policy, and that it was burned by the said Jerry White in accordance with the plan of said conspiracy and while it was in existence. A trial by jury was had, and a verdict rendered in favor of the plaintiffs against the defendant for $5,334.28.

The case comes here on a writ of error. The assignments of error relate to the refusal of the court below to permit the introduction of certain evidence and the giving of plaintiffs' instructions Nos. 2, 3, and 4, except the tenth assignment, which relates to the court's refusal to set aside the verdict and award a new trial, on the ground that the verdict was contrary to the law and evidence.

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By the first assignment of error it is contended that the court erred in its ruling upon the admissibility of the record of the criminal prosecution of State of West Virginia v. Jerry White. The court, in referring to this phase of the question, said:

"The record of the conviction of White was admitted for the purpose of showing that Jerry White was in the penitentiary, and was therefore disqualified as a witness under section 17 of chapter 152 of the West Virginia Code. Evidence was also admitted of the fact that Jerry White had admitted in the presence of a witness or witnesses that he had burned this property. The written confession of Jerry White was not admitted; it having been offered as a whole, and containing statements not germane to the question of White having burned the property, but containing statements prejudicial to plaintiffs in this case as to his being employed by them for that purpose. It seems to me quite clear that this written confession of Jerry White was inadmissible as a whole (which was the only way in which it was offered) for any purpose in this case. The defendant was undoubtedly entitled to show, and did show, that this property was intentionally burned; it was also entitled to show, if it could, by any proper evidence, that the insured (the plaintiffs in the case) had caused the property to be intentionally burned, and a volume of evidence, circumstantial in its nature, was introduced, which, coupled with the confession of White that he had burned the property, might well have induced the jury so to find, and there was abundant evidence to go to the jury upon the issue as to whether or not the plaintiffs were entitled to recover anything, and, if so, how much; but I am unable to see any view as to the admissibility of evidence in such a case, upon what theory the statement made by White that he had been hired by the plaintiffs to burn this property could be admissible."

It is insisted by counsel for the plaintiff that the record in the case of State of West Virginia v. Jerry White is not incorporated as part of the record of this court, and that therefore the court cannot determine as to what such record contains. This position is untenable, in view of the fact that this court entered an order, upon suggestion of diminution of the record, directing that same be sent up as addenda, and, as such, same is now part of the record in the case before us. Therefore, in passing upon the questions involved herein, we will treat the addenda as part of the record.

[1] It is urged by counsel for the defendant that there was a conspiracy entered into by the plaintiffs and Jerry White to defraud the defendant, in which it was agreed that White was to burn the property of the plaintiffs. It is contended by counsel for the defendant that, where a conspiracy has been formed, the declaration of a coconspirator in the absence of the others, made pending and in furtherance of its purpose, is competent as against the other parties to the conspiracy. However, this rule does not apply in view of the facts of the instant case. Here the alleged confession was not made pending the conspiracy, nor in furtherance of its purpose.

[2] It is insisted, however, that this evidence should have been admitted upon the theory that the declaration of White was contrary to his own interests. This rule only applies where the declaration is contrary to the pecuniary interests of the party making the same.

In the case of Donnelly v. U. S., 228 U. S. 243, 33 Sup. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710, the Supreme Court, in referring to this case, among other things, said:

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"One of the exceptions to the rule excluding it is that which permits the reception, under certain circumstances and for limited purposes, of declarations of third parties made contrary to their own interest; but it is almost universally held that this must be an interest of a pecuniary character, and the fact that the declaration, alleged to have been thus extrajudicially made, would probably subject the declarant to a criminal liability is held not to be sufficient to constitute it an exception to the rule against hearsay evidence. So it was held in two notable cases in the House of Lords—Berkeley Peerage Case (1811) 4 Camp. 401; Sussex Peerage Case (1844) 11 Cl. & Fin. 85, 103, 109, 8 Eng. Reprint, 1034, 1042—recognized as of controlling authority in the courts of England.

"In this country there is a great and practically unanimous weight of authority in the state courts against admitting evidence of confessions of third parties made out of court and tending to exonerate the accused. * * * West v. State, 76 Ala. 98, Davis v. Commonwealth, 95 Ky. 19 [23 S. W. 585, 44 Am. St. Rep. 201], and People v. Hall, 94 Cal. 595, 599 [30 Pac. 7], are precisely in point with the present case, in that the alleged declarant was shown to be deceased at the time of the trial. In West v. State the defendant offered to prove by a witness that he heard one Jones say on his deathbed that he had killed Wilson, the deceased. The Supreme Court sustained the ruling of the trial judge excluding the evidence. In Davis v. Commonwealth, the offer excluded was to prove by a witness that one Pearl confessed to him on his deathbed that he had killed the person for whose murder Davis was on trial. The Court of Appeals of Kentucky affirmed the conviction. In People v. Hall it appeared that defendant and one Kingsberry were arrested together for an alleged burglary, attempted to escape, were fired upon, and wounded by one of the captors; that a physician was sent for to treat them, and that Kingsberry died from the effects of his wound before any complaint was filed against either of the parties. 'In his own behalf the defendant offered to prove that after a careful examination the physician was satisfied that Kingsberry's wounds were necessarily fatal, and that he so informed him at the time; that Kingsberry admitted to the physician that he fully realized that he was mortally wounded and was on the point of death, and had given up all hope of ever getting well; that he was conscious of death, and that, thus having a sense of impending death, and without hope of reward, he made a full, free, and complete confession to said physician in relation to this alleged crime, stating that he himself had planned the entire scheme, and that Hall had nothing to do with it and was not connected with the guilt, and was in all respects innocent of any criminal act or intent in the matter.' This evidence was excluded, and the Supreme Court of California sustained the ruling, saying: 'The rule is settled beyond controversy that in a prosecution for crime the declaration of another person that he committed the crime is not admissible.'"

In the case of Fonville v. Atlanta & C. Air Line Ry. Co. et al., 93 S. C. 287, 75 S. E. 173, the court, among other things, says:

"The general rule that the records in criminal cases are not admissible in civil cases as evidence of the facts upon which a conviction was had is well settled. There are some exceptions, but the general rule is as stated, and it is founded upon sound principles, to wit, the want of mutuality, arising out of the fact that * * * the course of the proceedings and the rules of decision in the two courts are different. A higher degree of proof is required in criminal than in civil cases. 1 Gr. Ev. § 537; 7 Enc. Ev. 850; Miller v. Sou. Pac. R. Co., 20 Or. 285, 26 Pac. 70; Chamberlain v. Pierson, 87 Fed. 420, 31 C. C. A. 157."

It clearly appearing that these declarations were not against the pecuniary or proprietary interests of White, we think the case just cited is conclusive as to this point.

[3] It is further urged that the declarations, admissions, and confession of White were admissible upon the theory that plaintiffs were

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accessories. In the case of Donnelly v. U. S., supra, the exception to the rule that evidence against the principal upon the trial of such accessory does not apply to civil trials, and only where one is on trial charged with a criminal offense, is clearly stated. Therefore this evidence was incompetent, under the rule as contended for by counsel for defendant.

[4] By the second assignment of error it is insisted that the court below erred in—

"refusing to permit the plaintiffs to prove by the witnesses Morrison, Cutlip, and Cherrington, from White's statements and admission to them, the details of the burning of the lumber, White's reason for burning the lumber, and the facts and circumstances surrounding the burning."

This evidence is purely hearsay, and, for the reasons already stated as to the admissibility of the written confession, we think that the ruling of the court below as respects admission of this testimony was eminently proper.

The seventh assignment of error is substantially the same as the first, and we have already disposed of the point involved therein.

[5, 6] By the eighth assignment of error it is insisted that the court below erred in giving to the jury plaintiff's instructions Nos. 2, 3, and 4. We think that the exceptions to instructions 2 and 3 are without merit, inasmuch as the judge clearly and explicitly stated the law applicable to the facts of this case. Therefore we do not deem it necessary to enter into a discussion of the same.

In instruction No. 4 the court instructed the jury as follows:

"The court instructs the jury that no specifications of defense having been filed by the defendant, charging or alleging that the property insured was not the property of both Taylor and Messenger, or charging or alleging that there was a lien or other incumbrance on the property insured, at the time the insurance was effected, or from that time until its destruction by fire, or charging or alleging that there was any change in the ownership of the property from the time the insurance was effected until the property was destroyed, no issue is raised in the case as to the ownership of the property specified in the policy of insurance sued upon."

Section 64 of chapter 125 of the Code of West Virginia (sec. 4818) is in the following language:

"To any declaration or count on a policy of insurance, whether the same be in the form prescribed by the sixty-first section of this chapter or not, and whether the action be covenant, debt or assumpsit, the defendant may plead that he is not liable to the plaintiff as in said declaration is alleged. But if in any action on a policy of insurance, the defense be that the action cannot be maintained because of the failure to perform or comply with, or violation of any clause, condition or warranty in, upon or annexed to the policy, or contained in or upon any paper which is made by reference a part of the policy, the defendant must file a statement in writing specifying by reference thereto, or otherwise, the particular clause, condition or warranty in respect to which such failure or violation is claimed to have occurred, and such statement must be verified by the oath of the defendant, his officer, agent or attorney at law, to the effect that the affiant believes the matter of defense therein stated will be supported by evidence at the trial."

We fail to find any evidence tending to show that the property burned was incumbered or did not belong to the plaintiffs. On the other

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hand, we think it was clearly established that this was the property of the plaintiffs, and the jury passed upon that question. There not being sufficient evidence to sustain the contention of the defendant, the instructions, even though incorrect, would be harmless error. The policy which was introduced in evidence was prima facie evidence of the ownership of the same by the insured, and, as we have stated, there being no evidence to the contrary, the defendant was not entitled to have the jury consider this question; there not being sufficient evidence to show that White did the burning.

[7] The assignment of error which relates to the refusal of the court to set aside the verdict and award a new trial is without merit. We have discussed this phase of the question so often in the past, holding that the refusal to grant a motion for a new trial is not reviewable, that we do not deem it necessary to enter into a further discussion of this point.

For the reasons stated, the judgment of the court below is affirmed.

ALWOOD et al. v. LEWIS et al.

(Circuit Court of Appeals, Fifth Circuit. November 16, 1918. Rehearing Denied February 1, 1919.)

No. 3169.

1. WILLS ⟸693(5)—POWER OF DISPOSITION—EXERCISE—BURDEN ON ESTATE.
Where a will devising land to one for life, remainder to others, authorized the life tenant to sell and dispose of timber on the lands, *held*, that the life tenant, as he had no right to destroy the estate in remainder, could not burden such estate by giving the purchaser more than a reasonable time for removal, which is a question of fact dependent on the circumstances, and the ability on part of purchaser to impose conditions on the life tenant did not increase the powers of life tenant.

2. APPEAL AND ERROR ⟸1175(7)—DETERMINATION.
Where the facts in an equity case were fully developed, and the trial court disregarded the advisory verdict of jury, *held*, where the litigation has been long drawn out, the appellate court was warranted in determining the issues of fact.

3. LIFE ESTATES ⟸23—POWER TO SELL TIMBER—REMOVAL OF TIMBER—REASONABLE TIME.
Where a life tenant, who was authorized by will to sell timber, disposed of it in 1902, and died in 1905, *held* that, by the time litigation was instituted in the federal courts in the year 1914, the purchaser had had a reasonable time for removal, and a grantee of the remaindermen should not thereafter be enjoined from cutting timber.

Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Bill by George S. Lewis and others, receivers of the Hilton-Dodge Lumber Company, against William Alwood and others. From a decree for complainants, defendants appeal. Affirmed in part, and in part reversed and rendered.

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W. W. Osborne, A. A. Lawrence, and E. H. Abrahams, all of Savannah, Ga., and A. S. Anderson, of Millen, Ga., for appellants.

Robert J. Travis and Wm. Garrard, both of Savannah, Ga., for appellees.

Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

BATTS, Circuit Judge. Among the provisions of the will of Benjamin L. Lane, probated in 1885, was one devising to Geo. W. C. Lane land "for and during his natural life, with remainder to the living children at the time of his death." It was further provided:

"That my children, to whom I have heretofore given life estates in the lands in this will given them, shall have full power and authority to sell and dispose of the timber on all said lands, and shall have the full use and enjoyment of said lands without impeachment of waste."

On the 6th of February, 1902, George W. C. Lane, the devisee, "did bargain, sell, grant, and convey" to the Hilton-Dodge Lumber Company "all the cypress timber and trees of every sort and description, standing, lying or being upon" land, a life estate in which had been to him devised. In the instrument of sale it is provided:

"That the time limit of this conveyance, as above set forth, shall be 20 years from the date of this conveyance, but the first parties [naming them] agree that said time limit may be extended from year to year thereafter, not exceeding 10 years' extension, upon the payment by the second party to the first party or his heirs of interest on the original purchase price at the rate of 6 per cent. per annum."

George W. C. Lane died in 1905. On November 11, 1911, the land was purchased from the remaindermen by appellants, who began to cut and remove the cypress. In 1913 the Hilton-Dodge Lumber Company brought its bill in equity in the superior court of Jenkins county against the purchasers of the land, making the same allegations as in the present bill, and seeking to have the respondents therein temporarily and permanently enjoined from cutting the timber. Upon a hearing before the judge of that court, an order was passed on July 25, 1914, denying the prayer of the petitioners and dissolving a temporary restraining order theretofore issued, but enjoining both parties from cutting timber. The case was appealed to the Supreme Court of Georgia. The judgment was "reversed, with direction that a hearing be had upon the right of plaintiff to injunction." Hilton, etc., Lumber Co. v. Alwood, 141 Ga. 653, 81 S. E. 1119. In the opinion it was declared:

"It is clear that the testator intended that the life tenant's living children should take the land on the death of the life tenant, and it is equally clear that in giving the life tenant a power to sell the timber off the land he did not intend to destroy the remainder estate, nor authorize the life tenant to impose upon that estate such burdens as would practically deprive the remaindermen of its enjoyment after his death."

It was further held that the purchasers were entitled to a reasonable time after the purchase in which to remove the timber, and that what

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was a reasonable time was a question of fact. Upon reversal, plaintiffs (appellees) dismissed their bill and instituted the present suit.

The trial of this case was begun before Judge Lambdin, who submitted to a jury, called to aid him in passing upon the questions of fact, the issue as to what would be a reasonable time for the purchaser to remove the timber. The jury found that a reasonable time had not elapsed when the suit was instituted by the appellees in the state court, but that it had elapsed when the suit was instituted in the federal court. The effect of the verdict, if it had been followed by the trial court, would have been to hold the defendants (appellants) responsible for the timber cut, but to preclude the appellees from further taking of timber. After the death of Judge Lambdin a judgment was rendered by Judge Speer, giving to complainants the value of the timber taken, restraining appellants from removing any cypress timber, and from interfering with complainants "in the exercise by them of any of the rights conferred by the timber deed." The last clause is construed as a holding that, under the timber deed, complainants have a right to remove the timber within 20 years after the execution of the deed, with the privilege of extension for an additional 10 years.

Appellants insist that their plea of res adjudicata, based upon the opinion and judgment of the Supreme Court of Georgia, should have been sustained. The conclusion reached renders a determination of this matter unnecessary. Nor is it necessary to determine whether the construction of a contract based upon a will creating estates in land in Georgia is to be determined by general principles of jurisprudence, or is one of those matters with reference to which the federal courts will consider themselves bound by state decisions. Consideration of these matters may be pretermitted because the conclusion of this court upon the principal issue in this case is the same as that of the Supreme Court of Georgia. The devisee of the life estate was given full power to sell and dispose of the timber, but no right given him was any more definitely given than was the estate to the remaindermen.

To hold that the rights of the purchasers of the timber might be cut off immediately after the purchase by the death of the life tenant, without the possibility of removal of the timber, would be, in effect, to destroy the full power of sale and disposition given by the devise. To hold that the tenant for life could tie up the land for 20 years, and then for another 10 years, is to permit the substantial destruction of the estate of the remaindermen.

[1-3] What would be a reasonable time for the removal of the timber is a question of fact, which might be dependent upon many circumstances. No period of time, however, the allowance of which would destroy or substantially impair the estate of the remaindermen, could be regarded as reasonable. It is contended by appellees that sales at the time of the making of the will could not have been made, except upon terms of the character incorporated in the instrument of sale. If the purpose of the devisor was to destroy or seriously impair the estate in remainder, apter language could have been and should have been used. Evidence was introduced to establish customary conditions of timber "leases." It rather tended to establish that the Hil-

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ton-Dodge Lumber Company, at the time of the sale, enjoyed a kind of monopoly of purchase. Ability of the buyer to impose upon the life tenant did not enlarge the powers of the life tenant.

If the word "dispose," in the will, adds anything to "sale," it is enough to say that any other disposition was subject to the same limitations that the rights of the remaindermen imposed upon the sale.

A jury has passed upon what constituted a reasonable time for the removal of the timber. If this verdict had been adopted by the court, it would doubtless be sustained as the conclusion of a tribunal favored by the law for determining matters of fact. But it has not been adopted, and this court has the alternative of reversing the case for a trial consistent herewith, or determining from the evidence what is or was a reasonable time for the removal of the timber. There is nothing to indicate that the facts have not been fully developed; and, perhaps, a present determination of the issue would better accord with substantial justice than the further extension of litigation, which has already dragged along its lengths for a period of more than five years. We feel that if we should adopt the conclusion of the jury, to the effect that the timber cut by appellants was taken within the reasonable period to which appellees were entitled, and further find that the period ceased at the beginning of the litigation in the state court, any right to complain would not be in appellees.

Judgment is here rendered for appellees against appellants for the sum of $1,578.15, with legal interest from March 23, 1917, and otherwise for appellants against appellees, with injunction restraining interference with the cutting and removal of the timber in controversy; costs to be divided equally.

Affirmed in part, and in part reversed and rendered.

RAMSAY v. CREVLIN.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1918.)

No. 5059.

1. APPEAL AND ERROR ⟸366(3)—REVIEW—SCOPE—DIRECTED VERDICT.
Where, at close of trial, each party requested an instructed verdict, each party was estopped from reviewing issues of fact on which there was any substantial conflict in the evidence, and, where there was substantial evidence to sustain a finding in favor of plaintiff, for whom the court directed verdict, the only question reviewable on writ of error is: Was there error in the declaration or application of the law by the court below?

2. COURTS ⟸366(7)—PRECEDENCE—STATE LAWS.
Whether Code Supp. Iowa 1913, §§ 1641b, 1641f, prohibit a corporation from selling or issuing its stock for the notes of solvent makers payable at reasonable times thereafter, is a question of state law, primarily for the decision of the Iowa courts, whose decision will be followed by the federal court.

3. CORPORATIONS ⟸92—ISSUANCE OF STOCK—NOTES.
Conceding that Code Supp. Iowa 1913, §§ 1641b, 1641f, forbid a corporation from selling or issuing its stock for the notes of solvent makers,

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an agreement by a purchaser of stock, who had given a note therefor, to reimburse the directors of the corporation if they would pay for the stock already issued, is not in violation of the statute.

4. CORPORATIONS ⟸103—STOCK—ISSUANCE—VALIDITY—"VOID."
While Code Supp. Iowa, §§ 1641b, 1641f, provide that a corporation shall not issue its stock until it has received the par value thereof, and that stock issued in violation of such provision shall be void, stock issued for a note is not wholly void, but is only voidable, and the issuance may be ratified, where the corporation receives the par value thereof; the word "void," as used by the lawmakers, being equivalent to voidable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Void.]

5. CORPORATIONS ⟸92—SUBSCRIPTION—NOTE—VALIDITY.
A purchaser of corporate stock, who gave his note therefor, cannot defeat collection of the note on the ground of want of consideration, in that the Iowa statute requires corporations to receive the par value thereof before issuing stock, where the stock was actually issued and transferred by the purchaser for valuable consideration, particularly as the issuance of the stock might be ratified by payment.

6. CONTRACTS ⟸171(1)—LEGALITY OF CONSIDERATION—AGREEMENT TO REIMBURSE—PAYMENT OF VOIDABLE NOTE.
Though, under the laws of Iowa, a note given for the price of corporate stock duly issued to the maker was void, *held* that, the maker having transferred the stock to another, an agreement on his part to reimburse directors of the corporation if they would pay the amount of the note and take it up, is not illegal or against public policy, being separable from the original purchase and note.

7. APPEAL AND ERROR ⟸750(2)—REVIEW—DIRECTED VERDICT—ASSIGNMENT OF ERROR.
Though judgment for plaintiff was on verdict directed for him on the first cause of action, the question of the validity of the second cause of action is before the appellate court by reason of defendant's assignment of error to refusal of his general motion for directed verdict.

8. APPEAL AND ERROR ⟸854(2)—REVIEW—REASON FOR DECISION—DIRECTION OF VERDICT.
Though, on motion for directed verdict by each party, verdict was directed for plaintiff on first cause of action, when it should have been directed for him on second cause for same amount, judgment will be affirmed; the validity of second cause being before the court, under rule of wrong reason for right judgment.

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by Byron Crevlin against Charles H. Ramsay. Judgment for plaintiff, and defendant brings error. Affirmed.

John T. Jacobs, of Greeley, Colo. (Herbert E. Mann, of Greeley, Colo., and H. R. Kaus, of Denver, Colo., on the brief), for plaintiff in error.

Pierpont Fuller, of Denver, Colo. (Henry T. Rogers, Daniel B. Ellis, Lewis B. Johnson, and George A. H. Fraser, all of Denver, Colo., on the brief), for defendant in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. [1] The judgment here challenged rests upon an instructed verdict for Crevlin, the plaintiff below, and

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each question presented is raised by the attack upon that instruction, and upon the refusal of the court to give to the jury an instruction, requested by Ramsay, the defendant, to return a verdict in his favor. As at the close of the trial each party requested the court to instruct the jury to return a verdict in his favor, each party was thereby estopped from reviewing every issue of fact upon which there was any substantial conflict in the evidence, and, as the record satisfies that there was substantial evidence at the trial to sustain a finding in favor of the plaintiff upon every material issue of fact in the case, the only question reviewable here is: Was there error in the declaration or application of the law by the court below? Beuttell v. Magone, 157 U. S. 154, 157, 15 Sup. Ct. 566, 39 L. Ed. 654; United States v. Bishop, 125 Fed. 181, 183, 60 C. C. A. 123, 125; Phenix Ins. Co. v. Kerr, 129 Fed. 723, 724, 64 C. C. A. 251, 66 L. R. A. 569.

This was the case. The Barnes Electric Light & Power Company was a corporation of the state of Iowa, with a capital stock of 400 shares, of a par value of $100 each, 360½ of which had been issued, and 39½ of which remained in its treasury. About July 2, 1912, the defendant Ramsay agreed to take, and six months thereafter to pay, $3,500, with interest at 6 per cent. per annum, for 35 shares of this treasury stock, and thereupon he delivered to the corporation his promissory note, dated July 22, 1912, whereby he promised to pay this sum to the corporation, and the latter at some time before August 8, 1912, issued to him its certificate for the 35 shares of stock, which, prior to the latter date, he sold and assigned to H. J. Stoop in exchange for stock in some other corporation. On August 8, 1912, there was a meeting of the stockholders of the corporation for the election of officers and the transaction of other business at which some of the stockholders objected to the voting by Mr. Stoop of the 35 shares of stock, on the ground that they had been issued in violation of sections 1641b and 1641f of the Supplement Code of Iowa of 1913, which provide in substance that such a corporation shall not issue its stock "until the corporation has received the par value thereof"; that if it is proposed to pay for such stock "in property, or in any other thing than money," the corporation shall cause such property or other thing than money to be appraised by the Executive Council of the state of Iowa, and shall not issue its capital stock therefor in a greater amount than the appraised value of such property or thing; that stock issued in violation of the foregoing provisions shall be void; that in a suit brought by the Attorney General a decree of cancellation thereof shall be rendered; that, "if the corporation has received any money or thing of value for said stock, such money or thing of value shall be returned" (section 1641d); and that any officer, agent, or representative of a corporation who violates any of the foregoing provisions shall be subject to fine and imprisonment.

After a discussion of this objection the stockholders signed an agreement that, if those who were directors of the corporation when the note was taken would pay to the corporation $3,500, they would turn over to the payors Ramsay's note for $3,500 without recourse, would waive any objections to the issuance of the 35 shares of stock, and would agree that those shares should be considered legal stock of the

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company. Farr, one of the former directors, talked with Ramsay over the telephone, told him of the objection to the voting of the stock, and asked him if he would pay the former directors the $3,500 and interest when his note came due, if they would pay the $3,500 to the corporation then for him, and he promised Farr that he would do so. Farr testified to this contract, and Ramsay testified that he had no such conversation. Upon Farr's report of this promise, four of the former directors, Crevlin, Farr, Swigart, and Bowen, paid to the corporation $3,500. The latter indorsed Ramsay's note to them without recourse, Stoop voted the 35 shares of stock, and there is no evidence that any one but Ramsay and his counsel has ever challenged the validity of this stock since. The interests of Bowen, Swigart, and Farr in their claim against Ramsay were conveyed to Crevlin, and he brought this action against Ramsay. He stated his cause of action in two counts—one on the note, and the other on the agreement of Ramsay, made on August 8, 1912, to pay to the four former directors the $3,500 and interest when the note came due, in consideration of their then paying the $3,500 to the corporation.

At the close of the trial each party made a general motion, without more, that the court instruct the jury to return a verdict in his favor; the court granted the plaintiff's motion, denied the defendant's, instructed the jury to return a verdict for the plaintiff on the first cause of action, and a verdict and judgment accordingly were rendered. This judgment is assailed here on three grounds: (1) That the taking of the note for the stock and the issue of the latter therefor were violations of the statute cited, and were against the public policy of the state, so that the note was not collectable; (2) that the note was without consideration; and (3) that the payment of the $3,500 to the corporation by the four directors, and the agreement of Ramsay to pay that amount and interest to them, were inseparable from the first transaction, grew out of it, and were tainted with its illegality, and for that reason the agreement of August 8, 1912, was not enforceable.

[2] Whether or not the statute of Iowa which has been cited prohibits a corporation from selling or issuing its stock for the promissory notes of solvent makers, payable at reasonable times thereafter, is a question of state law, primarily for the decision of the Supreme Court of Iowa. Upon that question this court will gladly follow its lead. That court discussed the question in First National Bank v. Fulton, 156 Iowa, 734, 137 N. W. 1019, but counsel disagree as to the effect of the opinion in that case and, as it is not indispensable to the disposition of this case to decide that issue, it is here dismissed without intimation of any opinion concerning it.

[3] Conceding that the taking of the note and the issuance of the stock therefor before the note was paid constituted a violation of the statute was illegal, and contrary to the public policy disclosed by that statute, it does not follow that the payment of the corporation for that stock by the four directors, or the payment for Ramsay's note by the four directors at the request of Ramsay, whereby the corporation received payment in money for the full par value of that stock, or that the agreement of Ramsay to pay to them the $3,500 they paid,

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whether that payment was made for the stock or for the note, was either immoral or illegal, or against the public policy of the state. The sole object of the statute and of the public policy it embodied was to secure to each corporation payment for its stock to the amount of its par value in money or its equivalent. It could not have been either illegal or immoral for the four former directors to effect this desired object by paying the $3,500 to the corporation in money in consideration of Ramsay's agreement to repay them that amount, with interest; nor could it have been either illegal or immoral for Ramsay, who should have paid the $3,500 in money before he took the certificate of stock to agree to pay back to them the $3,500 he induced them to pay to the corporation in consideration of that agreement. Neither the payment nor the agreement to repay, either induced, aided, or effected any violation of the statute. On the other hand, they prevented the evil effect which the statute was enacted to avoid.

[4] Again, while the statute declares that stock issued in violation of it shall be void, it does not follow that such stock is void in such a sense that there remains no locus pœnitentiæ, that such stock may not be validated by the subsequent payment and receipt of the money for it. The word "void" is often used by legislators, courts, lawyers, and laymen when its true meaning is "voidable." "It is rarely," says the Supreme Court in Weeks v. Bridgman, 159 U. S. 541, 547, 16 Sup. Ct. 72, 74 (40 L. Ed. 253), "that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act; while things are often said to be void which are without validity until confirmed. 8 Bac. Abr. Void and Voidable; Ewell v. Daggs, 108 U. S. 143 [2 Sup. Ct. 408, 27 L. Ed. 682]; Ex parte Lange, 18 Wall. 163 [21 L. Ed. 872]; State v. Richmond, 6 Foster (N. H.) 232; Anderson v. Roberts, 18 Johns. [N. Y.] 515 [9 Am. Dec. 235]; Pearsoll v. Chapin, 44 Penn. St. 9." A conveyance in fraud of creditors was declared to be "utterly void, frustrate, and of non-effect" by the statute of 13 Eliz. c. 5, and has been uniformly declared to be void by the statutes of the states, but such a conveyance is universally held to be voidable only, to be valid until avoided and to be capable of ratification by the creditors. Anderson v. Roberts, 18 Johns. (N. Y.) 516, 527; Harvey v. Varney, 98 Mass. 118; Drinkwater v. Drinkwater, 4 Mass. 354; Oriental Bank v. Haskins, 3 Metc. (Mass.) 332, 37 Am. Dec. 140; Crowninshield v. Kittridge, 7 Metc. (Mass.) 520. A gift of goods declared by statute to be void as to creditors is voidable only, and is susceptible of ratification. Snow v. Lang, 2 Allen (Mass.) 18. A preference of a creditor within 60 days of insolvency, declared to be void as to creditors by statute, is voidable only, and is capable of ratification. Colt v. Sears Commercial Company, 20 R. I. 64, 37 Atl. 314.

Turning to the decisions of the state of Iowa, whose statute is here under consideration, in Pennypacker v. Capital Insurance Co., 80 Iowa, 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. Rep. 395, the

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laws of the state of Pennsylvania forbade insurance on railroad property in that state by any company without a license from Pennsylvania and made the writing of such insurance punishable by fine. An insurance company of Iowa wrote such insurance without a license, it was sued upon the policy and defended on the ground that the policy was violative of the statute and of the public policy of Pennsylvania and was void, but the Iowa court sustained the action and said:

"The evident purpose of such a law is the protection of those paying for insurance upon property in that state. The prohibition and penalty is against the company only. No duty is required of the insured, and no act upon his part expressly prohibited."

Let the fact be noted here that the prohibition and the penalties of the Iowa statute in the case at bar are against the corporation and its officers, agents, and representatives only, and that no act of the subscriber or purchaser of the stock is expressly prohibited, nor is any penalty denounced against him. In Pangborn v. Westlake, 36 Iowa, 546, a statute of Iowa forbade the sale of a lot in any town or addition until the plat thereof was acknowledged and recorded, under a penalty of $50 for each lot so sold; but the Supreme Court of that state held that such a sale was not void.

Section 1753 of the Statutes of Wisconsin of 1898, provided that no corporation should issue any of its stock, except in consideration of money or labor, or property estimated at its true money value actually received by it equal to the par value thereof, nor any bonds, except for money, labor, or property estimated at its true money value actually received by it equal to 75 per cent. of the par value thereof, and that all stock and bonds issued in violation of this prohibition should be void. Corporations of Wisconsin issued their stock and bonds before they actually received the amounts of money, labor, or property required by this statute, but after the issue of these bonds and stocks the requisite amounts were paid therefor to the corporation. The Supreme Court of Wisconsin held (a) that the bonds and stocks were not void to such an extent that they could not be validated by the payment and receipt of the requisite amount of money, labor, or property before the commencement of the actions which challenged them; (b) that such payment and receipt made them valid; and (c) that one who accepts and holds or sells stock prematurely issued under such a statute cannot escape liability to pay therefor on the ground that the stock was issued before full value was actually received by the corporation for it because he cannot take advantage of his own wrong. Haynes v. Kenosha St. Ry. Co., 139 Wis. 227, 119 N. W. 568, 121 N. W. 124; Whitewater Tile Pressed Brick Mfg. Co. v. Baker, 142 Wis. 420, 125 N. W. 984–986.

The instances which have been cited illustrate the fact that the Legislatures often use the word "void" in statutes in the sense of utterly void, so as to be incapable of ratification, and also in the sense of voidable, yet capable of ratification by those whose rights are infringed, without clear distinction, and leave the courts to determine, from the terms of the statute, the nature of the subject-matter, the

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purpose of the legislation, the benefit sought, the evil to be remedied, and the effect of one meaning or the other, whether it was the intention of the Legislature to use the word "void" in one sense or the other. Westerlund v. Blackbear Mining Co., 203 Fed. 599, 121 C. C. A. 627. The terms of the statute in hand indicate that the legislators used and intended to use the word "void" therein in the sense of voidable, for they provided that the stock issued in violation of the statute might be canceled by means of a suit by the Attorney General, and that in the case of such cancellation the note or other thing received for the stock should be returned to the purchaser, thereby rescinding the transaction, a useless proceeding, if they declared and intended to declare that the stock was utterly void and incapable of ratification.

The purpose of the legislators in enacting the statute was to secure to the corporation payment for its stock in money or its equivalent to an amount equal to the par value of the stock. That object will be attained more successfully and certainly if the stock issued in violation of the statute is held to be voidable than if it is adjudged to be absolutely void. If it is held to be voidable, the corporation may avoid it, if its full value is not paid when demanded, and, on the other hand, may secure that value if the purchaser is willing to pay it. If it is held to be utterly void, it can recover nothing for the stock it has sold, and must return that which it has received. Take the case in hand: The proof is that, when Ramsay gave his note for the stock, none of the parties were aware of the requirements of the statute that the stock should not be issued until the consideration for it had been fully paid in money or its equivalent. If the stock was incapable of ratification, and the note was uncollectable the corporation could not lawfully receive payment for the stock after its issue. If the stock was voidable only, the corporation could, as it did, lawfully obtain an amount of money equal to the par value of the stock it issued therefor, and the conclusion is that the true construction of that statute is that the word "void" was used and intended to be used therein in the sense of voidable, hence capable of ratification, and that by the acceptance of the $3,500 from the four former directors in payment therefor and for the assignment of Ramsay's note, the stock was ratified and validated, and the action on the note rendered indefensible.

[5] Another argument of counsel for the defendant is that the note was without consideration and uncollectable, because the stock was void and worthless; but the agreement to issue the stock, which was made before the note was delivered, and which induced its delivery, was a valuable consideration for the note, the stock subsequently issued, which was, as has been held, capable of ratification, was also a valuble consideration for the note, the defendant took and sold the stock for stock of another corporation, and he cannot now take advantage of his own wrong, and defend the action on his note on the ground that he received no consideration therefor.

[6] Finally, even if the stock had been void and the note had been originally uncollectable, the agreement of Ramsay of August 8, 1912,

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to pay to the four directors the $3,500 and interest when the note should mature, in consideration that they then paid to the corporation the $3,500 which he ought to have paid before or at the time of the issue of the stock, was neither illegal, immoral, against public policy, nor unenforceable. The contention that this agreement of August 8, 1912, is illegal and unenforceable rests on the theory that it is inseparably connected with, and is in reality a part of, the illegal transaction of taking the note and issuing the stock, and that an action cannot be maintained on a contract that is illegal or against public policy; but the contract of August 8, 1912, was not inseparable from the contract of July, 1912, for the purchase of the stock. Judge Amidon, in delivering the opinion of this court in Kansas City Hydraulic Pressed Brick Co. v. National Surety Co., 167 Fed. 496, 93 C. C. A. 132, well said:

"The illegality of one contract does not extend to another, unless the two are united either in consideration or promise. Hanover National Bank v. First National Bank, 109 Fed. 421, 48 C. C. A. 482. * * * Even when a single contract embraces several agreements, some legal and others illegal, it is the duty of the court to separate the good from the bad, when that is possible. Choctaw, O. & G. R. Co. v. Bond, 160 Fed. 403, 87 C. C. A. 355; Lingle v. Snyder, 160 Fed. 627, 87 C. C. A. 529. This rule would be more readily applied when the agreements are contained in separate instruments. The plaintiff could have established its case without any aid from the illegal contracts. It is true that it pleaded those contracts in its complaint, and introduced them as part of its case upon the trial. This, however, was not necessary. * * * It is what is necessary to be shown, rather than what is in fact shown, that indicates whether the union between two contracts is such as to involve one in the illegality of the other."

The application of these indisputable rules to the contract of August 8, 1912, leaves no doubt of its independence of the contract and the transaction of July 22, 1912. In the first place, if there was any illegality or violation of public policy in the latter transaction, it was in the premature delivery of the stock before it was paid for in money, and that delivery had been made and Ramsay had sold the stock to another before the contract of August 8, 1912, was made. If there was any wrong, it had been done, and the contract of August 8, 1912, could not and did not induce, or in any way promote, the violation of the statute, or of the public policy it embodied. In the second place, it was neither a part of the contract, of the consideration, or of the promise of the contract of August 8, 1912, that the stock should be issued prematurely, and the two contracts were separate in consideration and in promise. One of the best tests of the inseparability of two contracts or transactions is the necessity of the proof of one by the plaintiff in order to maintain his action upon the other. There was no such necessity in the case at bar. All that was necessary for Crevlin to prove was his ownership of the note, Ramsay's promise to pay the amount of it when due, in consideration that the four directors would pay the $3,500 to the corporation in August, 1912, and their payment of that amount. No rational or logical way of escape is perceived from the conclusion that the contract of August 8, 1912, was separate from and independent of the contract and transaction

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of July 22, 1912, and of any vice there may have been therein, and was lawful and enforceable.

[7, 8] If the objection to the affirmance of the judgment be suggested that the court below granted the motion for an instructed verdict for the plaintiff on the first, and not on the second, cause of action, the answer is, first, that the validity of the second cause of action was assailed by the defendant in its assignment of errors on the ground that the court erred, in that it failed to instruct the jury to return a verdict in his favor, and that attack invoked a consideration by this court of the validity of the second cause of action; and, second, that a judgment sustained by the law and the evidence is not reversible because the court gave a right judgment for a wrong reason.

Let the judgment below be affirmed.

STONE, Circuit Judge. Reserving expression of opinion respecting the interpretation which should be given the Iowa statute involved, I prefer to base my concurrence upon the validity of the agreement of August 8, 1912.

ARMSTRONG SEATAG CORPORATION v. SMITH'S ISLAND OYSTER CO.

(Circuit Court of Appeals, Fourth Circuit. December 5, 1918.)

No. 1635.

1. PATENTS ⊂=328—INVENTION—MARKING BIVALVES.
The Armstrong patent No. 1,195,946, for marking bivalves by means of a tag attached to the lower shell of an oyster, *held* void for lack of invention.

2. PATENTS ⊂=27—"INVENTION"—APPLYING OLD PROCESS TO NEW SUBJECT.
The application of an old process to a new subject for an old purpose without any change in result is not "invention."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Invention.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Judge.

Suit in equity by the Armstrong Seatag Corporation against the Smith's Island Oyster Company. Decree for defendant, and complainant appeals. Affirmed.

Before KNAPP and WOODS, Circuit Judges, and McDOWELL, District Judge.

E. Hayward Fairbanks, of Philadelphia, Pa., and S. Gordon Cumming, of Hampton, Va. (J. Bonsall Taylor, of Philadelphia, Pa., on the brief), for appellant.

Samuel O. Edmonds, of New York City, for appellee.

McDOWELL, District Judge. [1] In August, 1916, patent No. 1,195,946, for "marking bivalves," was issued to M. C. and Richard Armstrong, and on September 16, 1916, all rights under the patent

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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were duly assigned to the appellant, the plaintiff below. Under this patent the plaintiff claims a monopoly in a so-called invention defined as follows:

"1. Means for identifying oysters, consisting of a tag attached to that part of the shell on which the oyster is to be served at a point outside of the ligament or hinge of said oyster, whereby, when the oyster is opened, said tag remains attached to the part to be served.

"2. An improvement in the art of identifying oysters, which consists in attaching a tag to that part of the shell on which the oyster is to be served at a point outside of the ligament or hinge of said oyster, whereby, when the oyster is opened, said tag remains attached to the part to be served."

The plaintiff's method of identifying its oysters is to drill a small hole through what may be called the lobe of the lower or deep shell, outside of the hinge, through which is passed the elongated shank of a flat piece of thin, pliable metal. One end of the metal piece, octagonal in form, contains plaintiff's trade-mark, and the elongated extension or shank is clamped after being passed through the hole in the shell. The defendant has for some time been identifying its oysters by boring a hole through the lobe of the lower shell and attaching thereto a triangular flat piece of thin metal, by running a pin having an enlarged head through a hole in the metal piece and through the hole in the oyster shell, and then flattening the lower end of the pin. The litigation between these parties commenced with a suit for unfair competition, brought prior to the issue of the patent by the present plaintiff, which was decided in favor of the present defendant. Armstrong Seatag Corporation v. Smith's Island Oyster Co., 224 Fed. 100, 139 C. C. A. 656. The present suit was instituted by filing a bill in equity for infringement. The defendant moved to dismiss the bill, chiefly on the ground of invalidity of the patent. The trial court held the patent void on its face for want of invention, and the plaintiff appeals.

If the patent in suit be supposed to cover a tagged oyster, the answer is that a tagged oyster is not a machine or a composition of matter, and it is not a manufacture. A spring chicken, with an identifying tag fastened to its leg, is closely analogous. If he so desired, any fisherman could attach an identifying tag to his fish. But none of these natural products could be classed as manufactured articles, simply because of being tagged. If the method of the patentees may be considered as a process, we are unable to perceive that it involved invention. The problem was too simple, and its solution too obvious.

In adopting the method used by the patentees to identify oysters, they displayed some skill, not of high order, but nothing approaching the dignity of invention. The practice of identifying articles of commerce by attaching a tag thereto is, as a matter of common knowledge, both very old and very general. The demand for oysters grown in unpolluted water is of comparatively recent origin. It has arisen from the rather recently acquired public knowledge of the fact that oysters grown in polluted water are capable of transmitting the typhoid germ. The desire to identify oysters as having been grown in unpolluted water is therefore also recent. This is we think the chief reason why

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tagged oysters have not long been common. What the patentees do is what any one would do who desired to attach a tag to an oyster shell, unless he bethought himself of a better method. There is in the patentees' process an entire absence of—

"that intuitive faculty of the mind put forth in the search of new results or new methods, creating what had not before existed, or bringing to light what lay hidden from vision." Hollister v. Benedict, 113 U. S. 59, 72, 5 Sup. Ct. 717, 28 L. Ed. 901. See also King v. Gallun, 109 U. S. 99, 102, 3 Sup. Ct. 85, 27 L. Ed. 870; Slawson v. Grand Street Railroad Co., 107 U. S. 649, 653, 2 Sup. Ct. 663, 27 L. Ed. 576; Phillips v. Detroit, 111 U. S. 604, 607, 4 Sup. Ct. 580, 28 L. Ed. 532.

Where only the skill of the workman, and not the genius of the inventor, was required, as in the case at bar, the result is not an invention.

[2] It has often been laid down in one form or another that using an old process for a new, but analogous, purpose, with no substantial change in result, is not invention. Brown v. Piper, 91 U. S. 37, 41, 43, 23 L. Ed. 200; Pennsylvania R. Co. v. Safety Truck Co., 110 U. S. 490, 494, 498, 4 Sup. Ct. 220, 28 L. Ed. 222; Blake v. San Francisco, 113 U. S. 679, 683, 5 Sup. Ct. 692, 28 L. Ed. 1070; Miller v. Foree, 116 U. S. 22, 27, 6 Sup. Ct. 204, 29 L. Ed. 552. But it seems hardly necessary to here invoke this doctrine. What the patentees here have done is to apply an old process to a new subject, for an old purpose, without any change in result. The purpose and the result of tagging articles of commerce was identification. This is the purpose and the result of the patentees' practice. In its entirety the thought of the patentees was only an extension of the thought of the first producer who attached a mark of identification to his goods. To apply this old practice to oysters required at the utmost some degree of skill, but no invention.

The decree of the trial court must be affirmed, with costs to the appellee.

Affirmed.

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GOLD et al. v. NEWTON, Commissioner of Patents.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 45.

PATENTS ⟸114—REFUSAL BY PATENT OFFICE—REMEDY IN EQUITY.

Where the Patent Office denied a patent to an applicant, and its decision was affirmed by the Court of Appeals of the District of Columbia, *held* that, in a suit under Rev. St. § 4915 (Comp. St. § 9460), begun in federal District Court, the Circuit Court of Appeals will not render judgment requiring the Commissioner of Patents to issue patent, where there was diversity of opinion between its members as to whether patent should issue, and there was no testimony materially changing the record before the Court of Appeals of the District of Columbia.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by Edward E. Gold and another against James T. Newton, as Commissioner of Patents, substituted for Thomas Ewing, as Commissioner of Patents. From a decree for defendant, complainants appeal. Affirmed.

Appeal from a decree in equity entered in the District Court for the Southern District of New York, dismissing a bill originally brought by plaintiffs against Hon. Thomas Ewing, then Commissioner of Patents, under the provisions of section 4915, U. S. Revised Statutes (Comp. St. § 9460), and continued against his successor in office, Mr. Newton.

Suit was brought in the district of Mr. Ewing's residence by his consent. Barrett Co. v. Ewing, 242 Fed. 506, 155 C. C. A. 282. The object of action is to obtain decree that plaintiff Edward E. Gold is entitled to a patent, containing eight claims, of which the first and second are broad and vital, and are as follows:

"1. In a car heating apparatus, the combination with a train pipe and a radiator in the car with an intervening admission valve, and an outlet valve at the discharge from the radiator, of thermostatic means for controlling said valves, and manually operated means for rendering either valve inoperative whereby the heating system is convertible at will into an admission pipe pressure system or an atmospheric pressure system.

"2. In a car heating apparatus, the combination with a train pipe and a radiator in the car with an intervening admission valve, and an outlet valve at the discharge from the radiator, of a single thermostat with connections for controlling either of said valves alone, and manually operated means for determining which valve shall be controlled by said thermostatic means, whereby the heating system is convertible at will into an admission pipe pressure system or an atmospheric pressure system."

Gold filed his application in 1904, since which time the subject-matter of this suit has been continuously fought over both in the Patent Office and the courts. The contest has been triangular, between the applicant, Edward E. Gold, one Egbert H. Gold, and a succession of Commissioners of Patents.

The questions litigated have been:

(1) Is any patentable invention over the prior art disclosed by the application and defined by (e. g.) the above quoted claims?

(2) If such invention exists, is Edward or Egbert Gold entitled to priority?

The history of litigation down to 1909 is related in Gold v. Gold, 34 App.

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D. C. 229, where the Commissioner's decision awarding priority to Edward was upheld. No judgment as to patentability was necessary, and none was made.

Thereupon in 1910 Egbert sued both Edward Gold and the Commissioner, under R. S. § 4915 (Comp. St. § 9460)—Gold v. Gold (C. C.) 181 Fed. 544, affirmed 187 Fed. 273, 109 C. C. A. 615—and was defeated again, without, however, touching the matter now before this court.

Meantime the plaintiff Edward was involved in a new interference with one Fulton, while Egbert proceeded ex parte in the office with his attempt to get a patent that may fairly be called something as near to Edward's disclosures as could be suggested without interfering.

He was met by a reference to Weber's patent, 403,162, and rejected, whereupon, in 1912, he appealed to the Court of Appeals of the District, which held with the Commissioner that "an apparatus built in accordance" with Weber's disclosure is "operable at atmospheric pressure or at practically steam admission pipe pressure at will, and that such capability is an inherent characteristic" of Weber. In re Gold, 38 App. D. C. 544. To this proceeding Edward Gold was no party; he was involved in the Fulton interference.

That interference was dissolved on the ground that the single claim in contest was unpatentable over Weber, whereupon Edward amended his specification by adding what is really an argument for differentiating Weber, and changed the language of his claims. The application took its present shape in 1913, and was later finally rejected, whereupon this plaintiff appealed to the District Court of Appeals, which had already, on Egbert's appeal, found in effect that the substantial thing which both the Golds wanted to do might be done with an apparatus made in accord with Weber's disclosure. The rejection of Edward on Weber, was affirmed in 1916. In re Gold, 45 App. D. C. 294.

This present action was then brought, and bill dismissed by L. Hand, J., because, although plaintiff had made "a discovery of great value," to be patentable, it must be "incorporated into a machine which as a juxtaposition of related parts is new in the art."

But Weber had shown an apparatus—or machine—that "can be made to work"; therefore, especially in an action of this nature, invention could not be so positively asserted as to lead (substantially) to a reversal of repeated findings by authorities both executive and judicial in the District of Columbia. Consequently the bill was dismissed and plaintiffs took this appeal.

William A. Redding and Arthur C. Fraser, both of New York City, for appellants.

Francis G. Caffey, of New York City (L. D. Underwood, of Washington, D. C., of counsel), for appellee.

Otto R. Barnett, of Chicago, Ill., amicus curiæ.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). This record reveals no difference of opinion as to the nature of plaintiff's thought, its application to or embodiment in a useful mechanical contrivance, and his priority in time is no longer open to question.

It was well known that railway cars could be and had been heated by steam piped from the engine; prior to Gold there were two leading and contrasted systems in actual use. What plaintiff calls the "high pressure" appliance received steam at train pipe pressure into the car pipes, which had an outlet thermostatically closed when the condensation water was expelled and the hot steam took effect. Then the cars were heated by direct steam as hot as the engine supplied it; when the car got too hot, the steam was turned off. This is the "steam admission pipe pressure" referred to by the Court of Appeals (ut supra).

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The second or so-called "vapor system," throttled the train pipe pressure at the inlet valve, and reduced it nearly to zero. The outlet is open, containing, however, a thermostat which regulates or maintains the inlet valve at the desired approximate closure. This is the "atmospheric pressure" apparatus above referred to by the Court of Appeals.

Each of these heating methods has advantages, and drawbacks. The high pressure system makes the car warm with a small radiating surface; the vapor system gives a mild heat grateful in cool weather, but for a really cold winter day requires a great radiating surface. Consequently with one apparatus the car is often overheated, and with the other it is at times too cold, unless a great extra weight of pipe is carried, and required perhaps only a dozen days a year.

Gold shows and claims as his invention the combination in a car-heating apparatus of train pipe, radiator, admission and outlet valves, with "thermostatic means for controlling said valves," to the end that the same pipes, etc., may by the turn of a handle be changed from one system to the other, according to the weather; and he was the first man to suggest this or do it, as has been held by the Office and the appellate court of the District of Columbia.

But plaintiff Gold was refused a patent on the sole ground that what Weber disclosed could without any substantial change of construction, and without any additions or changes that could be called improvements, be made to do what Gold discloses and claims as his invention.

The Patent Office authorities went into this matter with such care that one of the examiners was deputed to attend and witness experiments with a device said to have been made in compliance with Weber's specification and drawing. In the opinion of that examiner the machine was fairly made and fairly operated, and the experiment proved "that it was an inherent characteristic of [Weber's] apparatus that it could be converted"—i. e., changed at will—from a high pressure to a vapor supply of steam.

On this evidence the patent was rejected, because to grant it would be to patent a double use. And to this view several Commissioners and the Court of Appeals of the District of Columbia have adhered, although it seems to have been shown in the Office proceedings, and therefore to the appellate court, that both Weber's patent and Weber himself had ended their lives without ever being heard of in the art of heating railway cars, without the patented device ever receiving commercial development, and although the exact apparatus described and claimed by Weber could never, for mechanical reasons, be used in or about railway cars. It remains doubtful to what useful purpose Weber's patented apparatus could be put. The probability is that it was intended to be used in the steam heating of houses.

It is much pressed upon us that this suit is an original action, in which evidence has been adduced not previously shown either to the Commissioner or to the appellate court of the District of Columbia (Greenwood v. Dover, 194 Fed. 91, 114 C. C. A. 169; General Electric Co. v. Steinberger, 214 Fed. at 784, 131 C. C. A. 193), and it is

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not an appeal from the Patent Office (Butterworth v. Hoe, 112 U. S. 61, 5 Sup. Ct. 25, 28 L. Ed. 656).

In form this is true, but in substance we do not think it is. This record contains no reason for granting Gold a patent that was not shown to the Commissioners, and no reason why he should not have one except the Weber reference. We do not overlook the fact that, since the experiments above referred to, plaintiffs have made another embodiment of Weber, and conducted experiments with it, in our judgment with substantially the same results. Perhaps the second embodiment did not work quite as well as the first, but the principle is plain in both. We find the fact to be that the first Weber embodiment worked better than the second, because the exact limits of adjustment in order to produce the convertible feature were permanently indicated on the device as first constructed—something not shown or suggested in Weber's disclosure. This we regard as unimportant.

On these facts a majority of this court are of the same opinion as the court below—that Gold made "a discovery, and a discovery of great value." That majority also thinks that, if the language of Potts v. Creager, 155 U. S. 608, 15 Sup. Ct. 194, 39 L. Ed. 275, can ever be held to justify finding patentable invention in the use of an old device to produce a new result, this is an instance of the applicability of that rule. The same majority are of the opinion that Weber's device "was not designed by its maker, nor adapted nor actually used, for the performance of the functions of the patent" now sought by Gold. Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658.

On the other hand, we are all of opinion that the fact of difference among ourselves is reason the more for adhering to the rule of Morgan v. Daniels, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657, and especially so in a case where we have no testimony materially changing the record that was before (and indeed repeatedly before) the court authorized equally with ourselves (though in a somewhat different manner) to deal with questions of this kind, viz. the Court of Appeals of the District of Columbia.

In respect of actions like this, solely against the Commissioner, the jurisdiction still existing under R. S. § 4915 (Comp. St. § 9460), is, to say the least, a singularity in law making. While the statute exists, jurisdiction must be exercised; but we entirely concur with the court below that, in order to advise or direct the Commissioner to issue a patent which he has refused and had his refusal approved by the District Court of Appeals, there must be introduced substantially new and persuasive testimony, not adduced before the tribunals with which we are invited to differ. Here we have nothing but an argument, persuasive to a majority only of this court, and even that argument seems to have been the same throughout this long and tangled litigation.

Further, a court appealed to under section 4915 must by the evidence shown it, whether new or old, be very fully and amply persuaded of plaintiff's merits before granting relief. The fact of our disagreement on the question of invention leads to a unanimous belief that there exists no such certainty of right as should lead, not only to the

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attempted upsetting of so long a line of considered decisions, but to the present granting of a basic and fundamental patent, which for the next 17 years would dominate an art that has now obviously advanced beyond anything reduced to practice by Gold at or about the time he framed his disclosure.

We have not overlooked the difficult position produced for this plaintiff by the course of litigation in Washington. It seems quite true that both the Golds were in substance trying to get patent protection for the same thing. When priority was awarded to this plaintiff (Edward), Egbert continued his application ex parte, proposing claims expressed in terms of process, but covering the same thought that Edward has persistently expressed in terms of apparatus—e. g., in the proposed claims first above quoted.

It may be true, as argued, that if Egbert's claims had been allowed after he had lost his demand for priority he would have been compelled to pay tribute to the fundamental claims advanced by Edward, and that therefore he sought to create a precedent against himself in the courts of the District by taking an appeal, which, if successful, would still have left him an infringer, had Edward also succeeded. But when Egbert lost in the appellate tribunal, as he did, he had rendered it impossible, without new evidence or an overruling of solemn judgment once given, for anybody else to get what he (Egbert) had failed to obtain. It may also be true that this was the reason why Commissioner Ewing gave that consent which is the only excuse for jurisdiction in this circuit.

Even if we admit all the foregoing, we remain of opinion that the decent and seemly administration of the law does not permit a court of (in this matter) substantially co-ordinate jurisdiction to (in effect) overrule or disregard all that has hitherto been done, unless and except this whole court is very sure of the matter after considering evidence that is not only persuasive but new.

Not being able to arrive at that degree of certainty, the decree appealed from is affirmed, without costs.

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TODD PROTECTOGRAPH CO. v. HEDMAN MFG. CO. et al.

(District Court, N. D. Illinois, E. D. January 8, 1919.)

No. 733.

1. PATENTS ⟸66—ANTICIPATION—WHAT CONSTITUTES.
Though an inventor might have put the suggestions of previous patents together, and possibly evolved his conception in that way, the previous patents are not anticipations, although such previous disclosures necessarily limit the subsequent patent.

2. PATENTS ⟸328—CONSTRUCTION—VALIDITY—INFRINGEMENT.
The Todd patent, No. 793,249, for a printing apparatus for protecting checks from alteration, *held* valid, and claims 3, 4, and 5 infringed, while claims 1, 6, and 8 were not infringed.

3. TRADE-MARKS AND TRADE-NAMES ⟸68—UNFAIR COMPETITION.
For trusted employés of a manufacturer to make preparations for a competing business while they were in his employ, and to obtain advertising matter from such manufacturer to use in the competing business, is unfair competition.

4. EQUITY ⟸65(1)—DOCTRINE OF CLEAN HANDS—AGENCY.
The principal is not chargeable with the unjust conduct of its salesmen in pursuing its business, so as to preclude it, under the clean hands maxim, from equitable relief against an unfair competitor, where knowledge of the practices of the salesmen is not brought home to responsible officers of the corporate principal.

5. TRADE-MARKS AND TRADE-NAMES ⟸78, 97—UNFAIR COMPETITION—ADVERTISEMENT—INJURY—INJUNCTION.
For defendants, who were competitors of plaintiff, to advertise its machines for sale under a fictitious name and address, is improper, and should be restrained; for, as customers could not find any such concern or street number, plaintiff would be discredited and injured.

6. TRADE-MARKS AND TRADE-NAMES ⟸73(1)—UNFAIR COMPETITION—ADVERTISEMENT.
Where defendants, engaged in making a competing machine, sold plaintiff's patented machine, designed to protect checks from alteration, *held*, that defendants should make it clear in advertisements that plaintiff's machines were used or rebuilt ones.

7. TRADE-MARKS AND TRADE-NAMES ⟸68, 97—UNFAIR COMPETITION.
Where trusted agents of plaintiff joined a competitor and laid plans to compete with plaintiff, *held*, that advertising matter obtained by such agents from plaintiff should not be used by defendants, and its use may be enjoined.

In Equity. Suit by the Todd Protectograph Company against the Hedman Manufacturing Company and others. Decree for complainant.

Edward Rector and Albert H. Meads, both of Chicago, Ill., and Frederick F. Church, of Rochester, N. Y., for plaintiff.

Lynn A. Williams and Robert M. See, both of Chicago, Ill., for defendants.

SANBORN, District Judge. Suit for infringement of patent and unfair competition. Plaintiff is a citizen of New York and defendants are citizens of Illinois, and the amount involved exceeds the jurisdictional limit. The patent action rests on patent No. 793,249, issued

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to L. M. Todd June 27, 1905, on a printing apparatus for protecting checks from alteration.

[1, 2] *The Patent.*—The Todd invention is described in Whitaker v. Todd, 232 Fed. 714, 146 C. C. A. 640 (Third Circuit), where the patent was sustained and held infringed. The following description is taken from plaintiff's brief:

"The inventive concept underlying Mr. Todd's invention, as clearly set forth in his patent, consisted in the thought that by first forming type characters of the full face and outline of the characters to be printed (whether they be figures or letters or other characters), and then impressing or forming, upon the printing surfaces or faces of such type characters, ridges and grooves (or equivalent projections and depressions) corresponding to the ridges and grooves of a co-operating universal platen, it would be possible to print upon a sheet of paper inserted between the type and platen the complete and perfect characters represented by the type (and not merely a crude and irregular outline thereof), and at the same time to so shred the paper that the ink absorbed by it would produce an indelible and ineradicable record.

"This was an absolutely new thing in the art, never before conceived or suggested, so far as the record shows, and involving not merely a novel and more efficient means for obtaining an old result, but in fact producing an absolutely new result.

"It was not only a new thing in the art of check-protecting devices, but it was an absolutely new thing in the printing art, for no such thing as either the combination of the type and platen of the Todd machine, or the sort of printing effected by that combination, was known to the printing art prior to Mr. Todd's invention, so far as the present record discloses.

"The nearest approximation was in certain prior check-protecting devices, such as those disclosed in the Beebe patents, Nos. 554,613 and 594,319. In such prior devices a series of projections or 'indenting points,' as they are termed in the patent (of various suggested forms), were so arranged upon a type block or support as to form the mere outline of a type figure, and arranged to co-operate with a platen having correspondingly arranged depressions or recesses to receive such projections. In order that the platen might be a 'universal' one, capable of co-operating with a number of different type characters formed in outline by such projections (such, for instance, as a cipher and the nine digits), it was necessary that such projections, and the corresponding depressions or recesses in the platen, should be arranged in certain definite geometrical relations to each other, which consequently determined the outlines of the type figures which could be formed by the projections, and limited them to the corresponding geometrical positions and relations.

"While it was possible, under such an arrangement, to form the crude outlines of a cipher and the nine digits, and have the projections forming such outlines co-operate with a universal platen, it was not possible to form even such simple type figures in either full face or perfect outline, so as to print upon the paper a full and perfect figure; and it was not possible at all to form letters and other characters—even the letters of the alphabet in plain English type—and cause them to co-operate with a universal platen in such manner as to produce a readable and intelligible impression.

"If we consider, as an illustration, so simple a legend as that printed by defendants' machine—for instance, 'Pay $999 and 99 cts.'—it would practically be impossible to print such a legend, in readable and intelligible fashion (and at the same time properly shred the paper) with any combination of type characters and platen known to the art prior to Mr. Todd's invention; and it would be wholly impossible to print it in the symmetrical and perfect fashion of defendants' machine with anything known to the prior art.

"And when we come to more complicated and difficult type characters, such as those involved in any extended use of the letters of the alphabet, even in English, and still more so in various other languages, it would be impossible to print them in legible fashion and shred the paper by means of any combination of type characters and universal platen known to the prior art.

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"With a printing device embodying the inventive concept and underlying idea of Mr. Todd's invention, on the other hand, any and every conceivable sort of type figures and characters may be employed to co-operate with a universal platen in such manner as to print the full and perfect outlines of such type characters upon a sheet of paper, and at the same time so 'shred' the latter as to produce an indelible and ineradicable record. There is no limit to the use and application of the invention. If the characters to be printed are numerals, they may be in Arabic, or Roman, or any other form in which numerals are expressed. If they be letters and words, they may be in any known language, and if they be characters other than numerals or letters they may be of any conceivable form, without affecting the use and application of Mr. Todd's invention."

It would appear from the patent itself that this is the patentee's own idea. He says the object is to impress limiting markings on negotiable paper, so that the limiting amount is embossed and cut into its surface, the ink absorbed by the disrupted fibers, and an inked impression made on its face, so as to avoid fraudulent alterations.

In the Whitaker Case the principle of the Todd patent is differently described. The court say:

"The essential principle of this universal coaction is the maintenance of perfect alignment of the complementary ridges and grooves just before and at the instant of contact, and this principle is reduced to practice in the device of the patent by snugly fitting the revoluble type wheel and the platen against the side walls of the casing in a manner to obtain perfect alignment and prevent lateral motion at this critical point. This was the capital conception of the patentee."

In another case in the same circuit, also before Judge Dickinson at Philadelphia, against the New Era Manufacturing Company, a preliminary injunction was issued. In the New Era machine the ridges and grooves were diagonal, much the same as in Hedman.

The registry or mating of the ridges and grooves of the one part of the die with those of the other in the Todd patent is thus stated by Mr. Williamson:

"Todd in the patent in suit was the first one in the art to have devised a machine in which the projections on the one part would inevitably mate or register with the depressions on the other part, and in which the means for effecting the exact and circumstantial alignment of the moving part relative to the stationary part could be done away with or dispensed with; and he accomplished that result by a very simple, but very effective, means. What he did was to make the surface of the type member in the form of a continuous die. But he ran those ridges and grooves, not crosswise with respect to the direction of rotation or at some angle with respect to the directions of rotation, but ran those grooves in the very direction of rotation of the moving type-carrying member—circumferentially in the case of the drum machine; that is to say, the ridges and grooves ran around the drums continuously, with the result that, although he retained the advantages of mating or registration of die and counter die, he was enabled to dispense with the means of bringing an exact circumferential alignment of one member with respect to the other. Employing that circumferential grooving, ridging and grooving of his type-carrying member, ridges and grooves which would run continuously through all the several lines, he was obviously enabled to employ, as he did, a single or universal platen; that is to say, he did not have to have a separate platen or counter die member for each line of type, but one single counter die member with which any one of the several lines of type would properly mesh."

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It was this feature which was made the gist of the Todd patent in the Philadelphia litigation, which certainly was novel. It was held infringed by the Whitaker device, although the direction of the ridges and grooves in that device was not quite parallel to the axis of rotation, so that when the drum and platen were not in action the diagonal ridges of the respective parts were out of alignment, and when in action the parts were made to register by a cam, by which the drum was moved sidewise. So it appears that the supposed true principle of the Todd invention, that of perfect alignment at all times, was not present in the Whitaker device; but the court decided that it was sufficient to produce infringement that the parts were properly aligned "just before the time of contact," and until contact was complete.

Now, inasmuch as every efficient machine of the kind must bring about complete meshing or mating, it follows that there can be no distinction in principle between a small deviation and a large one as between those of 1 minute or 85 or 90 degrees; the Todd principle of accurate registry "with the impressionable surface of the platen at every degree of rotation of the wheel, thereby avoiding the necessity of precisely centering the type characters opposite the platen in order to secure a proper register," is departed from as soon as the complementary lines are to any extent in different planes. The Circuit Court of Appeals of the Third Circuit having held that a 1-degree departure, which destroyed the alignment except at the very time of contact, and really departed from the Todd principle, was an infringement, Judge Dickinson was logically bound to decide in the next case (that of Todd v. New Era Co. [D. C.] 236 Fed. 768) that there was infringement in a 45-degree deviation, although the depressions are just as much horizontal or axial as longitudinal; and if in the case now under consideration the Philadelphia decisions are to be followed the Hedman machine infringes, because it cannot be distinguished from the New Era device, so far as the centering feature is concerned. Therefore, unless Hedman has different means or mode of operation, comity would suggest a decree for plaintiff, unless the device is distinguished in other respects.

It appears that plaintiff's counsel appreciate the situation, and realize that Todd cannot continue to dominate the trade for the three years the patent has to run by adherence to the principle of the Whitaker Case. They now take the position that, while they do not expressly abandon that principle, yet they do not predicate the case on the prior adjudications. They still rely on them, and think they should have great weight, but present the case on what they conceive to be its full merits. Their position now is that the true novel principle in the Todd conception was forming the type characters, impressing upon them ridges and grooves corresponding to those of a co-operating universal platen, inking them, and then, by bringing the surfaces together, to shred or macerate the paper.

It is true that one of the plaintiffs' counsel said on oral argument that he thought the construction of the court in the Whitaker Case placed upon the patent was entirely too narrow (in this I agree), and that plaintiff was not asking the court to be controlled by the rule

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other hand, take this position:

"For the purpose of this brief, and for the purpose of a decision by the court, at least, we accept the propriety of your honor's intention to follow the decision of the Court of Appeals of the Third Circuit. It has been our hope and expectation, however, that this court would follow the decision of the Third Circuit Court of Appeals. The reasoning of the decisions in the Whitaker Case, following as they did the arguments of counsel for plaintiff, leads inevitably to the conclusion that the Hedman Manufacturing Company does not infringe."

Then counsel proceed to argue that Hedman does not infringe the feature of parallelism, which was the only point of the Whitaker decision.

The respective devices may be generally described as follows: In the Todd "Protectograph," the first form built and sold under the patent, there was a revolvable drum or type support, on which were arranged 30 rows of serrated type, bearing the legends, "Not over twenty dollars," "Not over five hundred dollars," etc. When a check for $19 was to be drawn, the latter was inserted in the machine, the proper line of type turned into position, when a lever was operated to force the "twenty dollar" line against the platen to print the amount and shred the paper. There was, of course, a pad to keep the type properly inked by revolution of the drum. In the later model, called the "Check Writer," the operation is quite different. This is an "exact number" machine, having the following characters mounted on the drum longitudinally of its axis, in a narrow row, one above the other: "hund., ninety, eighty, seventy, sixty, fifty, forty, thirty, twenty, nineteen, eighteen, seventeen, sixteen, fifteen, fourteen, thirteen, twelve, eleven, ten, nine, eight, seven, six, five four, three, two, one, thous., dol'rs., cents," followed by a type "⌣" to be struck before the first word and after the last to prevent additions to the amount written.

The drum is axially loosely mounted upon a rod twice its length, revolving on the rod to ink the type, and sliding lengthwise upon it to bring the proper type word into position for printing. The corrugated platen is located under the drum through its whole length. On the upper surface of the casing is a dial, representing all the word types on the drum, with an indicating point for locating the proper word and for sliding the drum back and forth on the central rod. If it is desired to fill up a check for "twenty dollars and twenty cents," the indicating point is pushed along to "twenty," a lever is worked to print the word on the paper and shred it, then the point is placed opposite "dollars," and that word printed, and so on for the rest of the legend.

Defendant's machine is quite different. In size it corresponds with the first form of Todd (the "Not Over" machine). It contains the Todd principle of first printing on the paper and then shredding, but does not contain the parallelism of ridges and grooves, being similar to the New Era machine held to infringe by Judge Dickinson. It uses only figures, so for a check of $20.20 it prints "Pay $20 and 20

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cents," all done by one impression of the type on the platen. There is a different mode of operation. Instead of the drum, with lines of words parallel to the axis, as in Todd's first machines, or separate words at right angles to the axis, as in later models, Hedman has no cylinder at all, but slices up what would be the Todd drum into seven or more thin sectors, each having the zero and all the prime numbers 1 to 9, raised in proper order, and provided with ridges and grooves, on part of sector's edge, registering with a platen below, and each provided with a finger piece for rotating it. When the appropriate sectors are revolved into position to indicate the dollars and cents, the sectors or marking elements are lined up with the "Pay $," "and," and "cts.," and held in position by detents. A universal lever then serves to press the type against the paper and platen to print the legend and shred the paper.

The difference of operation will be readily perceived. In Todd the whole line of type in the "Not Over" machine, and the separate words in the other, are swung into printing position by movement of the whole drum, while in Hedman separate sectors of the drum are independently operated to bring the single figure carried by each one into printing position. The operation is thus described by Mr. Williamson, plaintiff's expert witness:

"In defendants' machine there are several side by side rotary devices, which for convenience I will term wheels, although they are but segments of a complete circle, which bear upon their peripheries a circular or circumferentially extending series of numerals, and there are two groups of these segments or wheels, one for designating dollars and the other for designating cents; and between the two groups of wheels there is a stationary logotype consisting of the letters 'a-n-d,' and to the right of the segments or wheels of the cents value there is a logotype consisting of the letters 'c-t-s,' and on the left of the dollars group of wheels there is a third logotype in the form of a sliding block, and it carries on its outer face the word 'Pay' and the dollar sign. So that, considering the two groups or segments, we have in effect a cylinder or drum which is divided into separate parts on planes at right angles with the axis of rotation, and aligning with any one axially extending row of numerals on the rotary segments when the latter are in printing position are the three logotypes, so that at the time of making the impression upon a check there is a line of type consisting of words and numerals extending parallel with the axis of rotation of the rotary type carrying member. On the type found on both the wheels or segments and the logotypes there are ridges and grooves."

The difference in the mode of operation is simply that one turns the whole solid cylinder into a certain position by one movement, while the other turns sectors of a like cylinder into a like position by several movements. The Todd single operation is merely divided up into several, with a similar result. It is like writing a name with a rubber stamp compared with writing it in the usual way. Three of the Todd claims in issue specify only a "type support," the form shown in the patent being only the preferred one, and there is nothing in the statement of the object of the invention which suggests a type drum.

The Beebe patents in evidence, including No. 554,613, do not contain the Todd principle of forming a word or letter on paper and then shredding the body of the paper, but use indenting points showing

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merely the outline of the type characters, instead of forming their full face. The Parvin British patent of 1899, No. 3750, is a shredding machine, to be used upon paper on which the legend has first been written. But it is claimed that Parvin also disclosed the Todd conception. His device simply consists of a stamp, without cylinder or type characters, designed to shred paper previously written upon. In the specification, however, he says:

"The serrations can be made to any suitable design, so as to denote devices or words, or devices or words marked across serrations."

In his claim he counts on—

"preventing fraudulent alterations on checks or the like by crimping or stamping a series of serrations over the figures or letters whose alteration it is intended to render impossible without detection."

It is obvious that he had not thought out the problem, since his figures show only a stamp with only a single line of serrations, so that he could have had only a single line of words or figures. Evidently he never grasped Todd's idea. It is true that Todd might have put Hendrick's (No. 104,148), Beebe's and Parvin's suggestions together, and possibly evolved his conception; but that does not make them anticipations. By reason of these prior disclosures it is necessary to limit Todd more than it would be if they did not exist; but that is the full extent of their influence.

Coming, now, to the claims relied on, being 1, 3, 4, 5, 6, and 8, the elements of 3, 4, and 5 are substantially the same. They are (1) a type support provided with printing characters; (2) ridges and grooves on the printing faces; (3) an inking device; (4) a platen cooperating with the characters, with an impression surface registering with the ridges and grooves. Claims 1, 6, and 8 are narrower, and include a revolvable type wheel and circumferentially arranged grooves. The machine of defendants has all the elements of 3, 4, and 5, but instead of a type wheel has sectors of such a wheel, and the ridges and grooves are not circumferentially arranged. They are arranged diagonally to both the circumference and axis of the wheel or the sector. They might just as well be described as axially arranged as circumferentially. Claims 3, 4, and 5 are infringed, but not the others relied on. Defendants use what is thought to be the principle of the Todd invention, and any difference in operation is immaterial. Such difference is not a substantial or material one. The drum sectors used by defendants embody the Todd conception as fully as in the drum type of machine.

[3] *Unfair competition.*—The pleading and proofs relate to alleged breach of trust and violation of legal and moral obligation, disloyalty and treachery on the part of the defendants Fesler and Evans while in plaintiff's service, fraudulent sales of plaintiff's secondhand machines, impersonation of plaintiff's agents, advertising and selling such machines under a fictitious name, using plaintiff's advertising matter, alienation of loyalty of salesmen, and molestation of plaintiff's contracts of sale.

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to the injury of defendants, was brought by counterclaim, and defendants sought a temporary injunction to restrain such misrepresentation. The suit was set for prompt trial, and the injunction accordingly denied. No claim is now made by defendants on this counterclaim, which should therefore be dismissed.

It appears that, after defendants' competition commenced by the sale of the Hedman machine, very strenuous sales methods were used by agents of defendants, and to some extent by agents of plaintiff, which, although reprehensible, were simply intense, as distinguished from unfair, competition. But there are other acts on the part of defendants for which they bear the whole responsibility, apart from anything done by their salesmen, which give an entirely different aspect to the case, although in some respects they may be bound by the acts of their agents, though specific knowledge of the particular acts is not proved.

Without attempting to detail the specific facts, the testimony shows that, while Fesler and Evans were important and trusted agents of plaintiff, they took up the Hedman machine (after first trying to sell it for a fair price to plaintiff), kept their connection with it a secret as long as possible, leased a building for manufacture and office purposes, and got as far along as possible to make and sell the device, meanwhile continuing in plaintiff's service. While owing the utmost fealty to plaintiff, and making more than the usual number of sales of the Todd machine, they used what time they could to make all preparations for their own plans, and alienating some of the Todd agents. They apparently thought they owed plaintiff no duty beyond keeping up the normal amount of sales, and that while they were thus serving two masters they were free to conceal the situation, and embezzle plaintiff's advertisements, some of which had been accumulating for a long time, were acquired at great expense, and were of the utmost value. This refers especially to the large collection of raised checks, which they photographed and later used in the Hedman business. This is probably damnum absque injuria, except that defendants may be restrained from using such advertising matter. In respect to disloyalty, and the use of advertising matter, see Merchants' Syndicate Catalog Co. v. Retailers' Factory Catalog Co. (D. C.) 206 Fed. 545.

The evidence also shows that defendants have sold Todd exchanged machines without distinctly stating to the purchasers that they were not new—have advertised sales of old machines without making the advertising matter clearly to show that they were not new machines. It further appears that they have sold such old machines to persons who they knew, or had good reason to believe, would sell them as new, and who would represent themselves as Todd agents. They used a fictitious business address and name in order to sell such old machines, which necessarily tended to discredit the Todd machine. It is also shown that they have in a few instances molested plaintiff's clients by inducing them to violate their purchase contracts for plain-

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red to.

[4] The evidence shows that agents of the plaintiff in selling the Todd machine, and so far as they sold Hedman exchanged machines, have to some extent used similar reprehensible methods of competition; and it is claimed that the plaintiff, seeking equity in its favor, has not done equity towards the defendants, and therefore is not entitled to a decree against unfair competition, upon the equitable rule of "clean hands." This leads to an examination of the law in respect to how far the acts of sales agents bind their principals in a situation like this. Sales agents may charge their principal with liability for their unfair competition, although the latter is ignorant of their methods, because they are agents to sell, and their sales methods are as a matter of law those of the principal. Their agency, however, does not extend to direct injury of the principal, by charging it with unjust conduct in pursuing its business.

"The doctrine that he who comes into equity must come in with clean hands does not recognize mere imputations of guilt based upon technical theories of agency. To invoke it a knowledge must exist on the part of the principal of the facts upon which the charge of unconscionable conduct is based, and in the case of a corporation those facts must be brought home to the persons exercising general control over its affairs. * * * On the other hand, * * * the liability of the defendant for the acts of its agents exists entirely irrespective of knowledge of its officers" (citing Vulcan Detinning Co. v. American Can Co., 72 N. J. Eq. 387, 67 Atl. 339, 12 L. R. A. [N. S.] 102). Associated Press v. International News Agency (D. C.) 240 Fed. 983; Id., 245 Fed. 244, 157 C. C. A. 436; certiorari granted, International News Service v. Associated Press, 245 U. S. 644, 38 Sup. Ct. 10, 62 L. Ed. 528, affirmed December 23, 1918, opinion by Mr. Justice Pitney, Justice Brandeis dissenting.

The finding of the lower courts that plaintiff was not chargeable with unfair competition was accepted. The fact that both parties were accustomed to take news items from each other as tips to be investigated, and, if verified, the result of the investigation to be sold, the practice having been followed by news agencies generally, was held not to show an unconscientious or inequitable attitude toward defendant, so as to fix upon the plaintiff the taint of unclean hands. There is no evidence that plaintiff authorized or had knowledge of any acts of its agents which would deprive it of the right to an injunction against unfair methods of competition on the part of defendant's salesmen, nor is there very much evidence of such unfair methods. Unfair methods of plaintiff's agents might, indeed, be so general and persistent as to require the inference of knowledge by the principal, but the evidence fails on this point. And there is no evidence that plaintiff took an unconscientious or inequitable attitude toward defendant, but, so far as unfair conduct of its salesmen appears, it was rather by way of retaliation.

[5] In respect to defendants' advertising plaintiff's machines for sale under the name of "The Check Writer Emporium," which had no real existence, giving its address as "No. 655 North Franklin Street, Chicago," an entirely fictitious address, it seems clear that, as customers could not find any such concern or such street number,

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[6] It seems only fair to require defendants to make it clear in advertisements that the Todd machines offered for sale are used or rebuilt ones. Walter Baker & Co. v. Saunders, 80 Fed. 889, 26 C. C. A. 220, Ludlow Valve Co. v. Pittsburgh Co., 166 Fed. 26, 92 C. C. A. 60, Stix v. American Piano Co., 211 Fed. 271, 127 C. C. A. 639, Waterman Co. v. Modern Pen Co., 235 U. S. 88, 35 Sup. Ct. 91, 59 L. Ed. 142.

[7] Defendants have no right to the continued use of advertising matter obtained by it through the acts of Fesler or Evans while they were in a confidential relation to plaintiff, however free they might be to take or use uncopyrighted matter obtained since they were plaintiff's agents. Merchants' Syndicate Catalog Co. v. Retailers' Factory Catalog Co., supra.

There should be a decree dismissing defendants' contention, deciding the Todd patent valid, claims 3, 4, and 5 infringed, and claims 1, 6, and 8 not infringed, and for an accounting of damages and profits on account of the patent infringement, and that an injunction issue as above indicated, against further unfair competition, with costs.

I have assumed that damages or profits resulting from the unfair competition may be incapable of proof, but the matter may be deferred until the decree is settled.

UNDERHILL et al. v. BELASCO.

(District Court, S. D. New York. November 25, 1918.)

No. 13-181.

COPYRIGHTS ⊜65—INFRINGEMENT—DRAMATIC COMPOSITIONS.

A copyrighted play, in large part depicting convent life, *held* not infringed by a play the theme of which is entirely different, although relating to some extent to convent life and with somewhat similar convent scenes.

In Equity. Suit by John G. Underhill and Gregorio Martinez Sierra against David Belasco for infringement of copyright of the play "The Cradle Song" by the production of defendant's play "Marie Odile." Bill dismissed.

1. The Cradle Song.

The story is that of a community of Sisters. A baby is sent into the convent on the wheel at the door, by an unknown mother. The receipt of the infant and the decision of the Sisters to keep it form the climax of the first act. In making this decision, it is apparent that the natural love of the female for a child is what is dominating them. The simple inner life of the convent is portrayed.

An interval of 18 years elapses between the first and second act, and the child, who has led a happy, normal life, is now a girl of 18. It is her wedding day, and the Sisters are busily engaged in attending to the final details of her trousseau. It is apparent that she has won their hearts, that she is tenderly loved by them, and that all are keenly interested in her future welfare. When she departs to be married to an estimable young man, all are

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left sad because of her going away; but it is evident that all recognize her right to be a wife and mother and to live her own life. Her departure at the end of the second act ends the play.

2. Marie Odile.

The story is that of Marie Odile, a girl of 16, who has grown up in a convent, in which she is a lay sister. The first act shows that she was left on the doorstep when an infant, and that the Sisters have brought her up. In doing so they have kept her in ignorance of the world in every sense, and she has seen no men, except an aged priest and an old gardener. Marie Odile has heard of the immaculate conception. As a consequence she regards maternity as something holy, but she has no knowledge as to how maternity is achieved. A foreign foe invades the country (France) in which the convent is situated, and the Sisters take flight. Through mistake, Marie Odile is left behind in the company of the old gardener. Marie Odile sees one of the invading soldiers. He is the first young man she has ever seen, and she thinks he is St. Michael, whose portrait hangs in the convent. This ends the first act.

In the second act the soldiers are in possession of the convent, and Marie Odile is attending to their wants. The one whom she regarded as St. Michael is especially kind to her, and they are mutually attracted. She permits him to embrace her.

In the third act, which is a year later, it is revealed that the young soldier went his way and Marie Odile now has a child. She thinks the fact of her having had a child places her on the same plane as the Virgin Mary. The Sisters return to the convent, and when they find what has happened are shocked, and Marie Odile is dismissed from the convent and sent out into the world with her infant.

Paul Bonynge, of New York City, for plaintiff.
A. J. Dittenhoefer, of New York City, for defendant.

MAYER, District Judge (after stating the facts as above). This suit is the usual infringement suit in equity, brought by the plaintiffs, Underhill and Sierra, against the defendant, Belasco. Sierra is evidently a Spanish author of repute, who has written a considerable number of successful productions. Underhill is Sierra's representative in the United States, and is an educated and accomplished Spanish scholar, who translated the work of Sierra which it is claimed defendant has infringed. Defendant is a theater owner, producer, and manager. The difficulty in the case, which doubtless led to the institution of the suit, was the failure of defendant promptly to return to Mr. Underhill the manuscript of "The Cradle Song," which had been delivered to defendant by plaintiff Underhill. This, together with the acceptance shortly thereafter and production of the alleged infringing play "Marie Odile," doubtless created in the mind of Mr. Underhill the feeling that the defendant had availed of the subject-matter of "The Cradle Song," and that the play "Marie Odile" was not an original conception.

As has been frequently pointed out in reported cases, and as is matter of common knowledge, most of the incidents that happen in the world may be availed of in plays or books, and the question essentially is in what manner they are availed of. Except for some extraordinary developments, such as, for instance, have happened in the way of instruments of war in the present war, there is rarely anything that is physically new. Convents are old. The theme of a foundling in some relation or another is old. The conduct of persons

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in any given walk or department of life—that is to say, the normal conduct—is ordinarily old and well known. The task which is presented to the playwright is to weld together these old elements with some fundamental or controlling theme in such a manner as to make a successful appeal, either artistically or financially, or both. Except for the fact that the scene of both plays is in a convent, and that of necessity there are some similarities of dialogue and language, the two plays are essentially and fundamentally different.

"The Cradle Song," as stated by Mr. Belasco himself, is a sweet and gentle story, presumably of marked literary merit, disclosing in part the life within a covenant, representing the nuns as being sympathetic and kindly women, dedicated to good works and offices. The foundling in "The Cradle Song" is left at the convent with a note from its unknown mother, and grows up, to all intents and purposes, as a normal female child, and in due course falls in love with the traditional hero, although this particular person is not in any sense a hero from the standpoint of heroics, but just a perfectly sane, normal, male human being. The man Antonio and the girl are to be married, and she leaves the convent with the good will of the Sisters who have brought her up, and with their best wishes. It is perfectly plain that such a play, so far as the American public is concerned, would in all probability not have any strong dramatic appeal, although it might be highly regarded for the purpose it contains. The evidence is that it was a great success in Spain, and, as I understand it, in some other countries, which Mr. Sierra in his deposition has spoken of as Catholic countries. The reason for this, it seems to me, is quite simple. In a country where great numbers of the inhabitants are devout members of a faith, such a play might readily appeal as showing the life within one of the cherished institutions of that faith. In answer to a question, I think asked by the court, Mr. Underhill stated that the play had not been produced in England, nor has it yet been produced in this country, and while I do not pretend to any dramatic knowledge, I assume it is because the play is a simple, normal tale along the lines that I have already indicated.

In respect of "Marie Odile," the play, if not so designed, at least had the result of appealing to the desire of a good many audiences to give themselves the luxury of sorrow. This seems to be a well-known result of which the managers are entirely cognizant. In this play the playwright attempted what at the time of his first conception, and so far as seems to me since, was a bold notion, namely, that a child should be brought up in a convent so thoroughly ignorant of the affairs of the world that, even after a child was born, she would not understand what had happened. In order to produce this situation, it was necessary, as the witnesses have testified, to have a convent entered by man, a condition ordinarily not possible. To bring this about it was necessary that a war should be going on, and that the man entering the convent should be a soldier. Once the fundamental thought of the play is understood, the unexpected feature of the girl imagining that the Prussian soldier was St. Michael is a conception of marked originality from the play-writing standpoint. This play, also, instead

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fortunate woman is sent out into the world with her child. The whole theory of this play is utterly different from that of the play of Sierra, and in its striking and main points it is completely to be differentiated. It is not enough that both plays are similar in respect of some of the convent scenes. To be an infringement, defendant's play must have been essentially suggestive of the theme of plaintiff's play.

As to the good faith of Mr. Knoblauch, I think there can be no question from the evidence. Mr. Le Guerre testified in effect that the fundamental conception of the play was stated to him by Mr. Knoblauch in the latter part of 1906 or the early part of 1907. He impressed me as a truthful man, who had no reason of any kind for stating other than the truth. But in addition we have in this case the rather extraordinary incident that the memorandum book which Mr. Knoblauch then had has been preserved. It seems to me that I can see perfectly how Knoblauch happened to have this book and keep the book. He was a young playwright, so far as the evidence discloses, having then produced his first play. He had this notion of "Marie Odile" in his mind. He was obviously, according to Le Guerre and according to his own testimony, unfamiliar with the technique of convent life, and he was seeking from Le Guerre at that time as much information as he could possibly obtain in regard to the technique surrounding convent life; and thus it was that this book came to be kept. Miss Mercer substantiates, not at all in detail, but in a general way, the fact that at that time Knoblauch was considering some play of this character, and her testimony is quite useful, because she did not attempt to remember, nor did she remember, all of the details, thus indicating the perfectly natural recollection of a limited character of a truthful witness. There is no doubt that Miss Kauser also had conversations with Knoblauch back in these early days in respect of substantially the basis of the play. That Miss Kauser or Mr. Knoblauch may forget some details or have some dates misplaced is perfectly natural.

The fundamental point is that the conception of the play is in 1906 or 1907, and, as one might expect, such a play was developed over a long period of years, until the time came when the playwright was ready to put his thoughts into concrete form and through his agent dispose of the play commercially. I cannot presume to guess, when there is no evidence on the subject, whether Mr. Knoblauch saw this play in Spain, or did not see it. In any event, it is quite clear to me that the fundamental theme of the play is his own. Mr. Belasco has taken the stand, and subjected himself to examination and cross-examination, and from that examination it appears entirely clear that he did not avail of plaintiff's play; but he was at once impressed with the play of Knoblauch, after he had read the first act. The defendant is an experienced theatrical producer, and from his point of view he saw the dramatic possibilities which were quite well disclosed in the first act to a manager of his experience, and really are well disclosed even to a layman, because the first act indicates the outline of the bold conception of the play, bold in the sense of novel for play purposes,

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However, I feel that the case is quite different from some of the cases that have been in this court. In this case I think plaintiffs have acted in perfect good faith. They were entitled to their contention on the law side of the case, and they were quite justified in supposing that some unfortunate event had occurred by reason of the collocation of dates and the failure promptly to return the play.

Finally, I may say that I have read with care the parallels prepared by plaintiffs and their counsel. As was pointed out in Bachman v. Belasco, 224 Fed. 817, 140 C. C. A. 263, such parallels are very likely to occur. Given life in a convent, there must be in any two productions a certain amount of similar conversation and a certain amount of similar acts. There probably is not a play in the history of the world that has not something that is to be found in some previous publication, either in drama, or in fiction or poetry, or some form of literary endeavor; but infringement cases are never decided upon so narrow a basis. The safest guide is always to determine what the fundamental theme is, and to see whether it has been appropriated.

In the circumstances, as I think the defendant has not infringed, the bill will be dismissed, but without costs. Settle the decree on two days' notice.

UNITED STATES v. RAMSHORN DITCH CO. et al.

(District Court, D. Nebraska, North Platte Division. December 20, 1918.)

1. WATERS AND WATER COURSES ⟸130—RIGHT OF APPROPRIATION—SEEPAGE WATERS.

   Under Rev. St. Neb. 1913, §§ 3426, 3427, and in view of the general statutory scheme for the acquisition of water rights, as well as the repeal of Acts 1895, p. 260, § 44, relating to the appropriation of seepage waters, *held*, that defendant water company, which had the right to appropriate from the Platte river, was not entitled to appropriate seepage waters escaping from an interstate canal constructed by the United States under the reclamation acts and with the consent of state of Nebraska, which water had been impounded by the United States.

2. WATERS AND WATER COURSES ⟸130—APPROPRIATION—ACTION OF STATE BOARD.

   Where, under the Nebraska statutes, defendant was not entitled to appropriate seepage waters belonging to plaintiff, *held*, that the action of the state board sustaining an attempted appropriation gave defendant no rights.

In Equity. Suit by the United States against the Ramshorn Ditch Company and others. Decree for complainant.

Ethelbert Ward, Sp. Asst. U. S. Atty. Gen., of Denver, Colo., A. R. Honnold, Dist. Counsel, U. S. Reclamation Service, of Scottsbluff, Neb., and T. S. Allen, U. S. Dist. Atty., of Lincoln, Neb.

Morrow & Morrow and Fred. A. Wright, all of Scottsbluff, Neb., Willis E. Reed, Atty. Gen. Neb., Charles S. Roe, Deputy Atty. Gen. Neb., and George W. Ayres, Asst. Atty. Gen. Neb., all of Lincoln, Neb., for defendants.

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LEWIS, District Judge. This suit was brought to determine whether the defendant, the Ramshorn Ditch Company, had and has the right, as it claims, to divert and apply to irrigation forty-five and four-sevenths second feet of water, or any part thereof, flowing in a ditch or canal constructed by, in the possession and under the control of the plaintiff. All of the defendants, other than the Ramshorn Ditch Company, are State and Water Division and Water District officials who have to do under the State statute with the distribution of water for irrigation between different claimants thereto. The complaint alleges that the Ditch Company has not that claimed right, and prays for injunctive relief.

The facts are these: The plaintiff constructed, maintains and operates a large irrigation system in the valley of the North Platte, a part of which is in and covers lands lying in Wyoming, and the remainder is in this State. Its acts in this respect were authorized by the Reclamation Act approved June 17, 1902 (32 Stat. 388, c. 1093 [Comp. St. §§ 4700–4708]), and the so-called Warren Act approved February 21, 1911 (36 Stat. 925, c. 141 [Comp. St. §§ 4738–4740]). The dam constructed by the plaintiff to impound the flood waters of the North Platte is in the State of Wyoming, and has a capacity of something more than one million acre feet, which expressed otherwise, in cubic contents, signifies a body of water twenty miles long, one and a quarter miles wide, and sixty-four feet deep. As this storage water is released it is permitted to flow down the river to the head gates of large canals on both sides, into which it is taken and carried to the vicinity of lands to be irrigated in both States, from which it is then taken into laterals and delivered to landowners who distribute it over their lands in ditches made for that purpose. The canal with which we are now concerned has a capacity, in Wyoming, of sixteen hundred feet, which gradually becomes less as it extends eastward into this State. It is known as the Interstate Canal. It is taken out of the Platte River on its northerly side in Wyoming about thirty miles west of the State line, and its total length in the two States is one hundred and eighty miles. The laterals constructed by plaintiff have a total length of eight hundred miles. In addition to the lands in Wyoming to be irrigated by the waters in this canal it was contemplated and believed that more than one hundred thousand acres in Nebraska could also be irrigated, consisting of about eighty thousand acres of Government lands, ten thousand acres of State lands, the remainder, lands in private ownership. The territory to be furnished by the canal on the south side of the river is not so extensive, but the project in its entirety is a very large one, and has required several million dollars in its construction and development. The Interstate Canal crosses the State line about the westerly edge of Sheep Creek Valley, and then runs almost due north about five miles before crossing that Creek, thence in a southeasterly direction, and again loops north around the main valley of Dry Sheep Creek. The distance thus covered by the canal as it traverses the two valleys is about twenty miles, so that water escaping in any manner from the canal in that distance would naturally tend to pass down into the troughs in those valleys by surface flow or seepage, the strata under-

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canal was first applied in this State in 1908, and in 1909 forty-eight thousand acres of growing crops were furnished water under the canal in this State. The lands in the two valleys were irrigated from this source.

Following the trough of Sheep Creek Valley in its course a little to the east of south the distance from the loop of the canal around it to the Platte River is about twenty miles. Dry Sheep Creek Valley, which runs more directly south, comes in to Sheep Creek Valley some four or five miles from the river. There is no evidence that there was ever any natural flow of water in Dry Sheep Creek. In the early days, and up to some twenty years ago, there was a small flowing stream in the upper part of Sheep Creek, but at no time did it reach the river on the surface. Its visible flow accumulated in what are called sinks, just above the sand hills or mounds which lay across the valley about a third of the way down it from the loop of the canal. Below the sand hills and on to the river there was no natural channel. The country there was grassed over. The sinks and the small stream above flowing into them were utilized in the early days by stockmen as watering places, but the flow, and the water in the sinks, gradually grew less and began to disappear several years before the canal was constructed, and stockmen resorted to the sinking of wells, both above and below the sinks, and in this way found water for their cattle. A year or so after water was turned into the canal, and lands in the two valleys were begun to be irrigated, wet places in the two valleys appeared upon the surface. This condition increased from year to year until large pools or small lakes were formed both above and below the sand hills, and these accumulating waters, as they increased, began to form connecting channels and to cut a way in which to flow downward toward the river. This condition of course rendered much of the land which had been irrigable in the two valleys unfit for cultivation. It became marshy and increasingly saturated. Thereupon the plaintiff, at an expense of about $45,000.00, constructed ditches in Sheep Creek Valley, both above and below the sand hills, and thus brought the saturating waters into a common channel directed toward the river. It first turned the waters into a privately owned irrigating ditch, and they were thus carried to the river. Later they increased in volume and spread over the country below. A drainage district was organized to receive the waters from the ditch constructed in the valley by the plaintiff, and it carried them direct to the river, the plaintiff bearing a part of the expense of the drainage ditch. By series of contracts, made in 1912 and 1915, between the plaintiff and the owners of the Farmers' Ditch, the plaintiff obtained the asserted right to turn these waters into the Farmers' Ditch and to use them in irrigating lands under that ditch, and extensions of it to be made, on contracts with landowners, which it claimed the right to make and fulfill by virtue of the Warren Act. For that purpose it constructed concrete Diversion Works at a cost to it of $1450.00, and thus diverted the water in June, 1914, from its ditch into the Farmers' Ditch, and continued to do so during each irrigation season thereafter up to July 21, 1917, on which

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out of the Farmers' Ditch, turned it into the District Drainage Ditch, and posted written notices thereat, signed in his official capacity as Water Commissioner, warning the U. S. Reclamation Service and its officers, particularly its Project Manager, that in accordance with the provisions of the Irrigation Laws of the State of Nebraska the head gate of that diversion into the Farmers' Ditch had been opened (closed) "for the purpose of delivering water to appropriation 1465" (Ramshorn Canal Company), and that the head gate must not be opened or interfered with until permission should be received from some officer of the State Board of Irrigation, Highways and Drainage. The Ramshorn Canal was below the Farmers'. It crosses the District Drainage Ditch; and as the water thus turned into the District Drainage Ditch by the Water Commissioner came down to the point of crossing it was turned in to the Ramshorn Canal and used for the irrigation of lands under it.

The Interstate Canal carries about twelve hundred second feet of water where it reaches Sheep Creek, and the evidence leads to the conclusion that the loss from the canal by seepage in the twenty miles around the heads of the two Sheep Creeks is from thirty-eight to forty second feet, and that the loss in the irrigation laterals under the canal in the same vicinity is about forty second feet. In addition, the amount of seepage in the two valleys was increased by irrigation, but there is no testimony from which that can be approximately estimated. The flow in the ditch constructed by the Government varies from thirty-five to eighty second feet at the Diversion Works. Ordinarily it amounts to about forty to fifty second feet. The plaintiff did nothing in the way of draining the seeped lands in Dry Sheep Creek Valley. That work was done by private landowners, and the flow in plaintiff's ditch above the Diversion Works is considerably augmented from that source.

Section 8 of the Reclamation Act accepts the requirements of local laws "relating to the control, appropriation, use or distribution of water used in irrigation," and it requires that "the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws."

The State Constitution has no provision relating to the appropriation and use of water, but the legislature, by various acts, has completely covered the subject. By Act of 1895:

"The water of every natural stream not heretofore appropriated within the State of Nebraska is hereby declared to be the property of the public and is dedicated to the use of the people of the state, subject to appropriation as hereinbefore provided" (Rev. Stat. 1913, § 3370); "as between appropriators, the one first in time is first in right" (section 3371); "the right to divert unappropriated waters of every natural stream for beneficial use shall never be denied * * *" (section 3372); "the priority of such appropriation shall date from the filing of the application in the office of the State Board" (section 3373); "it shall be the duty of the Board to make proper arrangements for the determination of priorities of right to use the public waters of the state, and determine the same" (section 3400); "as the adjudication of a stream progresses, and as each claim is finally adjudicated, it shall be the


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office an order determining and establishing the several priorities of right to use the water of said stream, and the amount of the appropriation of the several persons claiming water from such stream and the character and kind of use for which such appropriation shall be found to have been made" (section 3403); "each appropriation shall be determined in its priority and amount by the time at which it shall have been made and the amount of water which the works are constructed to carry" (section 3404); "the State Board of Irrigation, Highways and Drainage is given original jurisdiction over all matters pertaining to water-rights for irrigation" (section 3407).

Appeal from the action of the Board to the Supreme Court is provided for. Section 3412 provides that application must be made to the State Board before the appropriator commences the construction, enlargement or extension of any works for the purpose of appropriating any of the public waters of the State. It expressly provides that the United States of America, and every person, association or corporation may make the appropriation. These provisions of the local statute have express reference to the "waters of every natural stream," also designated as "the public waters of the state." The Board does not ordinarily deal with flood water that, unless stored and held for use during the irrigation season, would otherwise pass on down the stream. The State Legislature, by section 3455, Rev. Stat. 1913, expressly authorizes the United States to appropriate and store such waters in conformity with the Reclamation Act (32 Stat. 388), and also recognizes the right of the United States to dispose of such waters in accordance with the provisions of the Warren Act. The United States made its original application (No. 768) to the State Board on September 9, 1904, in conformity with the eighth section of the Reclamation Act and the State statutes, for a permit to construct its reservoir in the State of Wyoming and to store therein the unappropriated waters of the North Platte River, to bring them into this State in its canals and to distribute them therefrom for irrigation; and it was by that Board allowed a priority for that purpose under that number and of that date. By subsequent orders of the Board the time for completing the canals under said application was extended to September 1, 1919, and for completing the application of water to the land, to September 1, 1924. The application is voluminous. It sets forth a description, by legal subdivisions, of many thousand acres of land in both States, and in addition contains this:

"Interstate Canal. This canal contemplates the enlargement of the Whalen Falls Canal and continued easterly to the limit of irrigable land, and the right to irrigate all the irrigable lands on the north side of the North Platte River, supplementing those without adequate supply at any season and furnishing full right to all others."

The application discloses the entire project in the two States. The order of the State Board approving and allowing the application, made on February 14, 1905, recites, among other things:

"The lands to be irrigated under this permit being all lands described in said application which lie within the State of Nebraska and are not covered by prior existing rights."

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cation to appropriate the waters in the ditch which it had constructed in Sheep Creek Valley. The State Engineer, acting as secretary of the Board, made objection to the application that it was not specific in some respects, and gave thirty days to the plaintiff for amendment. At that time section 44 of the Legislative Act of 1895 was in effect. It was as follows:

"All ditches constructed for the purpose of utilizing the waste, seepage, swamp, or spring waters of the State shall be governed by the same laws relating to the priority of right as those ditches constructed for the purpose of utilizing the waters of running streams; provided, that the person upon whose lands the waste, seepage, swamp, or spring waters first arise shall have the prior right to the use of such waters for all purposes upon his lands."

Pending the time given to amend the application that section of the Act of 1895 was repealed, and thereupon, and before the thirty days expired, the application was dismissed and the Board declined to further hear the applicant. This course taken by the Board appears to be due to its opinion at that time that since the repeal of the statute there was no provision under which such waters could be appropriated, and that the statutes in that respect were applicable to the waters of natural streams only.

The Ramshorn Ditch Company has an old appropriation from the North Platte, which is known as Docket No. 945. Its date is March 20, 1893, and is for forty-five and five-sevenths second feet. The head gate of that ditch is on the north bank of the river at the lower edge of the two Sheep Creek draws or valleys. The river is broad and shallow, and owing to the formation of sand-bars or islands opposite the head gate, due to the shifting river sands, it is difficult and expensive for the Ramshorn Company to maintain diversion works in order to receive the amount of its appropriation into its head gate and ditch. But the evidence does not disclose that the amount of the natural flow in the river is not sufficient at all times to supply the Ramshorn priority. On the contrary it appears that it is at all times ample for that purpose. But the Ramshorn Company was constantly put to great expense in maintaining its diversion works. It saw that if it could get the water in plaintiff's ditch it would be rid of that expense. So on June 13, 1913, it filed its application with the State Board for an appropriation of the waters in controversy. Among other things which it sets forth in its application is this:

"That the source of the proposed appropriation is seepage water accumulating in the Sheep Creek basin or draw which does not naturally connect with the North Platte River. That the amount of the appropriation desired is forty-four (44) cubic feet per second of time. That it is proposed to locate the head gate on the east bank of a ditch which will collect the seepage water and convey it to said Ramshorn Ditch"

—and that the total cost would be $3,100.00. On February 23, 1914, the Board dismissed the application—

"for the reason that a prior appropriation has been granted and is in use on the lands that are asked to be irrigated under this application."

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The Ramshorn Company filed with the Board on May 11, 1914, a petition for a rehearing of its application; and notwithstanding the fact that the District Drainage Ditch, which was constructed by the plaintiff and the Morrill Drainage District to carry these waters to the river when they were not turned into the Farmers' Ditch was ample for that purpose, and had been completed in July, 1913, the verified petition for a rehearing, among other things, recites:

"Your petitioner further represents that it is necessary to collect and drain away these seepage waters to prevent serious damage to adjacent farms and other property. That drainage is an expensive burden unless the water can be used so as to compensate therefor. That the water in question is not public waters of the state and is not taken from a natural stream."

There is no proof that the rehearing was granted; but the Ramshorn Company filed its second application for an appropriation of these same waters, on September 12, 1916, in which it represented that the source of the appropriation is "seepage water rising in the Sheep Creek basin." The amount desired is forty-five and five-sevenths second feet, and "that it is proposed to locate the head gate of the said water collected in drain ditch at siphon under Tri-State (Farmers') Canal." (This is near the point at which the waters can be interchangeably turned through plaintiff's concrete Diversion Structure either into the Farmers' Canal or taken down under that Canal and thence into the District Drainage Ditch on to the river.) This application was granted on September 22, 1916, subject to certain limitations and conditions, among which are:

"The prior rights of all persons who by compliance with the laws of the State of Nebraska have acquired a right to the use of the waters of this stream must not be interfered with by this appropriation. The amount of the appropriation shall not exceed $45^4/_7$ cubic feet per second of time. * * * This appropriation shall be supplementary to and part of the original appropriation covered by Docket No. 945, Ramshorn Ditch Company, and shall take the same priority as Docket No. 945."

It is on this action of the Board that the Ramshorn Company claims the right to take and use this water; and the Water Commissioner, in taking the steps which he took in diverting the water from the Farmers' Ditch so that it could go down the District Drainage Ditch to the Ramshorn Ditch, justifies his action under the same order.

The foregoing are all of the material facts necessary for consideration in reaching a conclusion on the merits of the controversy.

[1, 2] In addition to the foregoing legislative acts, wherein provision is made for the appropriation of "the water of every natural stream," it is necessary to consider, in determining the rights of the parties, two sections of the Act of 1913, now embodied as sections 3426 and 3427, in Nebraska Revised Statutes, as follows:

Sec. 3426. Any person, persons, district, company or corporation owning, constructing or operating an irrigation canal in this state, are hereby authorized to collect or assist to collect any seepage water thereunder or under any adjacent irrigation canal by the construction of drainage ditches and to apply said waters to irrigate with on the lands covered by the original appropriation of such canal, while said seepage waters are being conducted by said drainage ditches toward the natural streams.

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land water percolating thereunder shall not be impaired.

(2) Seepage waters so collected by the canal owner or operator shall be treated as supplemental to and part of the original appropriation of such canal, the total quantity of which shall not be increased nor exceed an aggregate of three acre feet in any calendar year for each actually irrigated acre of land.

Sec. 3427. When any seepage or drain water is mingled with that of any natural stream, it shall become part of the public waters of the state, subject to diversion among existing appropriators of the State of Nebraska, in the order of their respective priorities and rights based upon preferential use as defined by the laws of the State of Nebraska.

These are special provisions on the subject of seepage water. This statute gives the first right to him who may develop them on his own land, to use them and to use all of them, if he so desires, on his own land, and any water that he may so develop and use is not charged against an appropriation that he may have of water from a natural stream. They are not counted as a part of his appropriation, if he have one. They do not supplement it. The owner of an irrigation canal has the right to collect seepage water from it "by the construction of drainage ditches and to apply said waters to irrigate with on the lands covered by the original appropriation of such canal while said seepage waters are being conducted by said drainage ditches toward the natural streams." If seepage waters under a canal are thus collected and used they "shall be treated as supplementary to and part of the original appropriation of such canal."

Section 3426 is silent of any intention to require applications to the State Board in the same manner that is required to perfect an appropriation of water from a natural stream before the right given by the statute attaches. Certainly the landowner who develops water under the provisions of that section is not required to take action before the Board before he obtains the right to use the developed water on his land. And as to the canal owner who collects the water for use, it is expressly provided that the water so collected shall be treated as a part of the original appropriation of such canal. It does not contemplate a proceeding before the State Board through which an applicant canal owner may obtain an original and independent right to the use of additional water over and above his prior appropriation. Its sole purpose, by its terms, is to grant him the right to collect and use such water, charging him with it, in the event he does so, against his original appropriation. It was a practical view to take of the subject-matter. Seepage, leakage, waste and return waters are all of uncertain quantities, variable from season to season. They may disappear altogether, and cannot be depended upon. If their source be leakage from the canal or laterals, that may be wholly stopped by an impervious structure at a later date; if their source be irrigated lands, irrigation may be suspended or wholly stopped, and the seepage would consequently cease. The other sections of the statute in relation to proceedings before the State Board all have to do with stream flow, denominated public waters, and declared to be the property of the public, and provide for the acquisition of the individual's right to use them by having them respectively determined and adjudicated by the


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Board and a permanent record made fixing priorities. The rights thus to be fixed by the Board are permanent in character, and can be exercised by the owners according to their priorities during each season. The difference between the right thus acquired and that given by section 3426 is obvious. Seepage water is not dependable; its permanent flow and use cannot be expected. The Legislature treated it in this view. If collected and used, the amount used is charged against the original appropriation of the canal. Whether or not it is being used is constantly under the eye of the Water Commissioner, whose duty it is to see to the distribution and use of water in his district. Section 44 of the Act of 1895, repealed in 1911, had to do only with possible disputes between those using seepage from the same source, and there may have been an implication that those disputes were subject to adjudication by the Board in the same manner as the right to take water from a natural stream should be determined. There is no basis for such an implication in Section 3426, enacted two years later to cover the same subject-matter. I am of the opinion that this section gives the right and defines the conditions under which it can be acquired, and the limitations to which it can be applied, that the statute, ex vi termini, grants the right on compliance with its requirements; and that it is not within the jurisdiction of the State Board to pass upon and determine in whom or when it attaches. The plaintiff collected the seepage waters and was using them to fulfil its Warren-Act contracts. The lands on which they were being applied by it, and the ditch in which it was being conducted to those lands, brought them nearer to the natural stream which they, if unobstructed, would have finally reached. The Ramshorn Company, after it induced the Water Commissioner to turn them into its canal, also applied them to irrigate lands on the same water-shed. But the Ramshorn Company took no part in developing and collecting the seepage water. It did nothing and spent nothing for that purpose. It never complied with the requirements of section 3426. When they reached the line of its canal, after being turned down the District Drainage Ditch by the Water Commissioner, it diverted these waters into its canal at a nominal expense. The amount of water which it claimed a right to appropriate from the ditch of the plaintiff, in its petition to the Board, is identical with the amount of its original appropriation from the river. Its purpose is obvious. It was seeking to obtain water from some other source than the source of its original appropriation so that it could avoid the expense of maintaining diversion works in the river's shifting sands. Considering both of its applications, the one dismissed and the one finally granted, it represented to the Board that it had collected, or intended to collect, the waters in controversy at great expense to it. It sought to make the Board believe that it had complied with the requirements of section 3426, and the action of the Board in granting its last petition must have been on the assumption that it had done so, but confessedly this is not true.

Counsel for the Ramshorn Company devote a large part of their brief and argument in support of the proposition that seepage water is a part of the natural stream which it would, in natural course, finally

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reach and add to the stream flow; and cite, among other cases, Irrigation Co. v. Campbell, 2 Idaho, 411, 18 Pac. 52; McClintock v. Hudson, 141 Cal. 275, 74 Pac. 850; Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755; Irrigation Co. v. Irrigation Co., 31 Colo. 62, 72 Pac. 49; Josslyn v. Daly, 15 Idaho, 137, 96 Pac. 568; Comstock v. Ramsay, 55 Colo. 244, 133 Pac. 1107; and Durkee Ditch Co. v. Means (Colo.) 164 Pac. 503. The proposition is relied upon in refutation of the plaintiff's claim that the right to collect and use these waters belongs to it because they are flood waters and were brought in by it through its canal, that before it brought them in the seeped water here in controversy did not exist, and that by virtue of these facts the water should be considered as developed or new water, to which plaintiff should be given the first right until the seepage in fact reaches the river flow. The rule for which counsel contend is undoubtedly established beyond controversy by the authorities they cite, on the state of facts developed in those cases. The facts in each of those citations were alike. The question presented to the courts was, Whether or not leakage, seepage, waste, return and percolating waters could be collected and then diverted and used for irrigation so as to decrease the natural flow of the stream, to the detriment of prior appropriators below, whose appropriations had been fed by the underground waters before they were diverted. The specific question here involved, Has the canal owner the right to collect and use on his original appropriation waters which leak from his canal and laterals? was not up. The Comstock case is typical. The court said:

"That appropriators of water out of a natural stream for irrigation purposes with priorities decreed are entitled to have the conditions substantially maintained on the stream as they were when the appropriations were made and have existed during the continuance and perfection of such appropriations"

—and the court held that to cut off such waters by intervening works between the point where they escaped and where they would naturally reach the stream, from the lower appropriators, was the same thing in practical effect as to cut off a natural tributary to that stream. It announced the principle, and cited much authority in support, that seepage waters which contribute to the natural flow and thereby supply appropriators farther down are not subject to new and independent appropriation and diversion when there is thereby an interference with the right of use by prior decreed appropriators from the stream. And it was declared in that case, and in the others cited, in effect, that seepage waters are a part of the natural stream which they would finally reach from the moment they escape from control, for the protection of rights there under consideration. But the Ramshorn Company presents no facts here calling for the application of that principle in its behalf. The right of a canal owner like the one here claimed by plaintiff was not involved or considered in any of those cases, and there is no complaint here by the Ramshorn Company that the use that the plaintiff was making of these waters at the time it caused them to be turned into its ditch decreased or lessened the flow of the stream above the Ramshorn head gate, to its injury, so that it was thereby not able to

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whether the doctrine of these cases can be accepted in this jurisdiction in view of Section 3427, but the facts here presented are such that a definite construction of that section is not required. The State Supreme Court may later have occasion to give us its full effect. We will wait until it speaks on the subject, unless it become unavoidable that we construe it. Furthermore, the contention puts the Ramshorn Company in a doubtful attitude. It can hardly be heard to say that the seepage water is a part of the stream and must be permitted to find its way to the body of its flow, in the absence of proof of damage to some appropriator by its interception, and at the same time claim a right to participate and become a beneficiary in the obstruction of that flow, and to make a new diversion and use of the water. Its attitude is contradictory. The legal proposition it advances is sound, when confined to a condition of facts on which it rests, but has no application here.' To carry that principle to the length of holding that because seepage waters under certain conditions are considered a part of the stream, and the State statute gives a right to appropriate waters of the stream, therefore seepage waters may be appropriated within the literal terms of the State statute, cannot be acceded to. The State statute did not give the right to appropriate and take the waters in the plaintiff's ditch. The action of the State Board on September 27, 1916, was no more than a declaration on its part that the Ramshorn Company had, in the opinion of its individual members, complied with the requirements of section 3426, and inasmuch as it had no authority to take official action on that subject-matter its order did not give to or establish any right in the Ramshorn Company. The conclusion follows that the Ramshorn Company has no right to take the water from the plaintiff's ditch against its objection and protest, and that the Water Commissioner acted beyond his official authority and without right when he went upon the plaintiff's diversion structures on the ditch and turned the water flowing therein into the Ramshorn Ditch; that as against the Ramshorn Company the plaintiff has the right to be unmolested in the possession of its ditch, the right-of-way thereto and the diversion structures thereon, and to use or dispose of the flow in such a way as it may desire.

A decree as prayed in the bill may be prepared and submitted.

SALAMANDRA INS. CO. v. NEW YORK LIFE INS. & TRUST CO.

(District Court, S. D. New York. December 16, 1918.)

1. INSURANCE ⟸80—INSURANCE AGENTS—PREMIUMS.

Where a Russian fire insurance company, which did business in the United States, was represented by a German partnership, which in turn engaged local agents in the United States, *held*, that the local agents, who did not fully agree to a contract of agency submitted directly to them by the Russian fire company after relations with Germany were forbidden on account of the war, were not bound, under New York Insurance Law, § 38, to deposit to the credit of the Russian company com-

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2. War ⟸12—Enemies' Property—Trust Funds—Commingling Property.
The alien character of a fund is not divested because the custodian mixed it with other funds, which were unquestionably impressed with a trust for the benefit of American citizens.

3. War ⟸11—Trading with Enemy—Power of Congress.
Congress, by virtue of its war powers, has power to declare unlawful trading with enemy aliens, as it has done by Act Oct. 6, 1917 (Comp. St. 1918, §§ 3115½a–3115½j).

4. War ⟸12—Trading with Enemy—Power of Congress.
Under Trading with the Enemy Act Oct. 6, 1917, § 7, subd. (c), as amended by Act Nov. 4, 1918, § 1, the determination of the Alien Property Custodian, made in good faith, entitles him to the possession of alleged enemy property, and such possession will not be interfered with by injunction; the act providing methods for relief of those whose property was improperly taken.

5. Constitutional Law ⟸278(1)—Due Process of Law—Trading with the Enemy Act.
In view of Trading with the Enemy Act Oct. 6, 1917, § 9 (Comp. St. 1918, § 3115½e), such act is not invalid as violating Const. Amend. 5; there being no deprivation of the property of citizens, or friendly aliens, without due process of law.

6. War ⟸12—Trading with Enemy—Armistice.
Where the Alien Property Custodian determined funds were alien property, the signing of an armistice does not entitle adverse claimants to the fund, on the theory that the war had ceased, Trading with the Enemy Act Oct. 6, 1917 (Comp. St. 1918, §§ 3115½a–3115½j) itself declaring that the end of the war shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall by proclamation declare a prior date; it appearing no such prior date has been declared.

7. War ⟸12—Trading with Enemy—Application of Act.
Trading with the Enemy Act, § 9 (Comp. St. 1918, § 3115½e), providing a method for relief of any person claiming any interest, right, or title in any money or other property, etc., is extensive enough in its provisions to give relief to a claimant who asserted that it wholly owned, to the exclusion of all other persons, funds detained as alien property by the Alien Property Custodian, and hence such person is not entitled to equitable relief, etc.

In Equity. Suit by the Salamandra Insurance Company against the New York Life Insurance & Trust Company. On motion to make permanent pendente lite an injunction previously issued restraining the defendant from paying to A. Mitchell Palmer, as Alien Property Custodian, certain funds. Injunction heretofore granted, and bill, dismissed for want of equity.

Charles A. Towne, Leon O. Bailey, and William S. Thomson, all of New York City, for complainant.

Emmet & Parish, of New York City, for defendant.

Francis G. Caffey, U. S. Atty., of New York City (Earl B. Barnes, Asst. U. S. Atty., of New York City, and Lee C. Bradley, General Counsel to Alien Property Custodian, of counsel), amicus curiæ.

KNOX, District Judge. This is a motion to make permanent, pendente lite, the injunction issued herein upon November 4, 1918,

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the defendant, and for which funds the said custodian made formal demand upon the defendant upon October 15, 1918.

The complainant is a fire insurance company organized under the laws of Russia, and since 1899 has been engaged in the business of writing fire insurance within the United States. Pursuant to the provisions of the law of the state of New York, the complainant had deposited with the defendant cash and securities of the approximate value of $500,000. This sum has fluctuated in a manner dependent upon the amount of insurance from time to time in force and the losses sustained upon the risks of the complainant. At the present time the defendant, as trustee under a deed of trust executed by the complainant, holds the sum of about $4,072,787.89 in cash and securities for the purpose of securing the complainant's liabilities to its policy holders. The last-mentioned amount includes the sum of $115,013.19 which is the subject-matter of this litigation; said sum having been deposited with the said defendant in July, 1918.

Ever since the complainant engaged in business in the United States, and until October 29, 1916, the complainant was represented, by way of general agents, by the copartnership of H. Mutzenbecher, Jr., which copartnership it is admitted is a German concern, and consequently takes on the character of an enemy. This copartnership received by way of compensation for its services in the United States 3½ per cent. of the net premiums on business written in this country, which compensation was paid from Petrograd.

From 1899 to 1913 a local firm, in which William G. Willcox and William Y. Wemple were members, acted within the United States as agents of the complainant. This firm, however, received its compensation from the general agent of the company, viz. H. Mutzenbecher, Jr. In March, 1913, Meinel & Wemple, Incorporated, became the local agents of the complainant, and for its services received, by direct remittance from the Mutzenbecher firm, a commission of three-fourths of 1 per cent. of the net premium income of the complainant in the United States, together with the expenses incurred by Meinel & Wemple, Incorporated; the amount of said commissions being payable out of the sum of 3½ per cent. of said premiums earned by and paid to the firm of Mutzenbecher, Jr.

About October 29, 1916, the Russian government being then at war with the Imperial German government, there was promulgated at Petrograd an edict or ukase forbidding business relations between subjects of the Russian government and those of Germany, whereupon the complainant undertook to cancel the agency agreement of Mutzenbecher, Jr. Thereupon Meinel & Wemple, Incorporated, were forwarded an agency contract by the complainant, under which Meinel & Wemple, Incorporated, should, if the contract were accepted, become the complainant's agent and manager within the United States, and should, for its services, receive commissions of 3½ per cent. based upon the net premiums, which it will be borne in mind is the same rate of commissions formerly paid to Mutzenbecher, Jr.

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also required that concern to do all the work formerly done by Mutzenbecher, Jr., and this involved, if the work was to be done, the purchase of insurance maps, the keeping of records, etc., formerly possessed and kept by Mutzenbecher, Jr. These consequent expenses, if incurred, would involve a considerable outlay.

Owing to the uncertainty of conditions in Russia, Meinel & Wemple, Incorporated, acted upon the theory that such expenditures were not presently necessary, and, having a contract which provided for additional services, endeavored to communicate with the home office of the complainant with a view of modifying the contract. While awaiting a response to these communications, Meinel & Wemple, Incorporated, deducted from the net premiums of the complainant 2½ per cent. thereof, and deposited said sum in the name of Meinel & Wemple, Incorporated, and from said account paid, monthly, to itself, three-fourths of 1 per cent. of said net premiums, together with the expenses incurred. In other words, Meinel & Wemple, Incorporated, received compensation at the same rate previously received by it during the life of the Mutzenbecher, Jr., agency; it being the expectation of Meinel & Wemple, Incorporated, that the balance of said commissions, calculated at the rate of 2½ per cent., should, after the deductions referred to, be permitted to accumulate, to the end that it might form a fund from which to purchase the equipment, etc., contemplated by the agency agreement between the complainant and Meinel & Wemple, Incorporated. This disposition, however, was contingent upon the approval of the complainant, which might request the payment of such balance to it.

In passing, it may be remarked that upon January 5, 1917, H. Mutzenbecher, Jr., cabled Meinel & Wemple, Incorporated, assenting to the execution by that concern of the American agency agreement. It is also asserted that since October 31, 1916, the German concern of Mutzenbecher has had nothing to do with the complainant's affairs, that said German firm has received, not only all the moneys to which it was entitled as of October 31, 1916, but in addition thereto an overpayment of $4,100.

No further word has been received from the complainant with respect to the Meinel & Wemple, Incorporated, contract, and the last-mentioned corporation has accordingly continued to represent the complainant, setting aside the said 2½ per cent., and deducting the said commission of three-fourths of 1 per cent. and expenses. The balance remaining constitutes the said sum of $115,013.19 which the Custodian demands as being enemy alien owned property.

The foregoing, in a general way, represents the situation as presented by the bill and the complainant's affidavits, and to the allegations so made there is nothing before me to show the contrary, saving and excepting the formal demand of the Custodian, wherein it appears that—

"I, A. Mitchell Palmer, Alien Property Custodian, * * * after investigation, do determine that the following money and other property * * * belong to and are by you held for, on account of, or for the benefit of H. Mutzenbecher, Jr., whose address is Hamburg, Germany, and whom, after

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investigation, I determine to be an enemy, not holding a license granted by the President. * * *"

It appears that in June, 1918, the Custodian, through one of his agents, began an investigation of the office of Meinel & Wemple, Incorporated, for the purpose of ascertaining if said corporation held any enemy owned funds or property. Upon the completion of the inquiry it was suggested that the fund of $115,013.19 had been set aside for H. Mutzenbecher, Jr., and that there was a secret agreement or understanding whereby the fund would be turned over to Mutzenbecher, Jr., at the end of the war.

Upon the expression of such conclusion, Meinel & Wemple, Incorporated, placed at the disposal of the Custodian all of its books and papers and the statements of its managing officers, and said corporation also notified the Custodian that it felt it its duty to the complainant to turn the fund in question into the account held by the defendant under the trust agreement hereinbefore referred to.

[1] No answer being received to this communication addressed to the Custodian, Meinel & Wemple, Incorporated, did deposit the fund with the defendant pursuant to the permissive terms of said trust agreement. It may be remarked that, so far as I am informed, the only provision of law which by any construction could require such disposition of the fund is section 38 of the Insurance Law of the state of New York (Consol. Laws, c. 28), which provides:

"Every person appointed or acting in this state as agent of any insurance corporation, who receives or collects any moneys as such agent, shall be responsible in a trust or fiduciary capacity to such corporation therefor."

It is my judgment that this provision of law did not make it incumbent upon Meinel & Wemple, Incorporated, to dispose of the fund in the manner in which it has been disposed of.

[2] I am also of opinion that, granting for the moment that the determination of the Alien Property Custodian is correct as to the alien character of the fund in question (which fact I do not find), such alien character is not divested by reason of the mixing of the fund with another fund which unquestionably is impressed with a trust for the benefit of American policyholders of the complainant. A voluntary and gratuitous increase of a trust fund will not be permitted to continue to the prejudice of a third party, when the fund is of such nature that the voluntary and gratuitous increase may be followed and segregated, all without the diminution or impairment of any security theretofore held for the benefit of the cestuis que trustent of the original fund. A tainted fund may not be given immunity from the penalties attaching thereto by an unlawful and unauthorized mixture with a fund enjoying immunities.

With the foregoing observations and the preliminary matters disposed of, I may proceed to determine if the injunction should be continued or vacated, and also whether the bill should be dismissed for want of equity.

[3, 4] Before doing so, it is only fair to Messrs. Willcox, Meinel, and Wemple, who are the managing officers of Meinel & Wemple,

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Incorporated, to say that the conclusion which I shall reach must in no wise be taken as a reflection upon the integrity, loyalty, and honor of those men, or any of them. There is absolutely nothing before me which will serve to impeach their character even remotely; indeed, from the affidavits on file the conclusion is inevitable that they are men of high probity and unquestioned loyalty and devotion to this government, and the position they have assumed is altogether consistent with such conclusion. However, the Alien Property Custodian having determined that the fund in question is alien owned, and even though that conclusion may be founded upon evidence which would appear to this court to be insufficient, the determination of the Custodian, so long as it is not reached in bad faith, must determine the possession of the fund.

Subsection (c) of section 7 of the Trading with the Enemy Act, approved October 6, 1917 (40 Stat. 416, c. 106), reads:

"If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian."

Upon November 4, 1918 (chapter 201, § 1), two days after the filing of the bill herein, the above section was amended to read as follows:

"(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this act.

"Any requirement made pursuant to this act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

"Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in

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lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

As to the power of Congress to address itself to legislation looking to the seizure of alien enemy owned property, there is no need of discussion. The war legislation of Congress, from the time of the Revolution to the present, indicates the power of Congress in the premises.

I am unable to see any difference in principle between the seizure of the person of an alien enemy in our midst and the seizure of his property; the latter may, by the use to which it may be put, be quite as dangerous as the former. The seizure of both may be essential to the safety of the community. If we assume this to be true, and Congress has by appropriate action provided for such contingency, the haste and speed which are exercised in the seizure become of the highest importance, and it would be an incongruous situation—indeed, it would be intolerable—that, pending a determination of a dispute between the possessor of property determined by a responsible official to be alien owned and the officer making the demand, the property in question should remain in the possession of him against whom the demand is made. The effectiveness of a seizure in such circumstances would be greatly impaired, if not wholly destroyed.

I do not apprehend that any one would argue that this court should exercise its extraordinary powers of injunction to restrain the marshal from executing a presidential warrant issued for the arrest of an alleged alien enemy, even though it was asserted by such person that he was a citizen or a friendly alien. Once the warrant was executed, the person arrested would, upon habeas corpus, be heard upon the question of his citizenship. If the determination of the Executive can, in the first instance, deprive an individual of his liberty, I am unable to see why it should be that property should enjoy any greater rights as respects its possession, once the Executive has determined it to be alien owned. And in the above illustrations I do not believe it could fairly be said there was not due process of law merely because the arrested individual was not heard prior to his arrest.

The power exercised by Congress in the enactment of the Trading with the Enemy Act (Act Oct. 6, 1917, c. 106, 40 Stat. 411 [Comp. St. 1918, §§ 3115½a–3115½j]) is, I suppose, by reason of its dealing with the subject-matter of alien enemies, who exist only in times of war, based upon the war power of Congress. The power of Congress to declare war carries with it all the powers which are necessary to make the war so declared effective. In McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, Chief Justice Marshall said:

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and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

That case also declares that—

"Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court," it was said, "disclaims all pretensions to such a power."

What, can it be asked, is, in the present days, more appropriate to the effective carrying on of war than to seize, and thus render impotent, the money and property determined by the Executive to be owned by alien enemies?

In Brown v. United States, 8 Cranch, 110, 3 L. Ed. 504, Chief Justice Marshall in unequivocal language declared the existence of the power of the sovereign to take the persons and confiscate the property of the enemy wherever found. It follows that wherever the enemy is present, and where his property is situate, Congress may determine there exists the element of danger, and to the extent of the jurisdiction of Congress the power exists, not only of seizure, but of disposition to the limits of the necessity. Miller v. United States, 11 Wall. 268, 20 L. Ed. 135.

[5] And in the present legislation, at least so far as it affects the case at bar, there is no contravention of the Fifth Amendment of the Constitution. The very act, in section 9 thereof (Comp. St. 1918, § 3115½e), contemplates the possibility of mistaken action upon the part of the Custodian, and to the end that no loyal citizen or friend shall be deprived of his property without due process of law the section reads:

"Sec. 9. That any person, not an enemy, or ally of enemy, claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said Custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may, with the assent of the owner of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: Provided, that no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the District Court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal

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to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated.

"Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

"This section shall not apply, however, to money paid to the Alien Property Custodian under section 10 hereof."

Under the provisions of this section the rights of a person who is not an enemy or ally of enemy are adequately protected. If the property which has come into the hands of the Custodian belongs to a citizen of the United States, or indeed to a friendly alien, the title of such person thereto is not finally divested. Any title which vests in the Custodian will be defeasible in its nature. Whether the defeasance, if it may be called such, shall operate, will depend upon the outcome of the proceedings to be instituted by the citizen or friendly alien, who, in appropriate proceedings under section 9, asserts title to the property. Pending a determination of the issues arising in such proceedings, the possession at least, and perhaps a defeasible title, is in the Custodian, and as an administrative matter I do not see where else it could be, if the act is to have any salutary effect in the way of rendering enemy property unavailable for the purposes of the enemy.

That a citizen or friendly alien will, by such an enforced surrender of property wrongly determined by the Custodian to be enemy in its character, be subjected to inconvenience, annoyance, and possible expense, goes without saying—the justification for these considerations must be the purpose intended to be served. They are, in the final analysis, but incidents to the operation of a protective and preventive measure which has for its purpose the protection of the nation.

The situation presented by this case, assuming the contention of the complainant to be justified, is no more rigorous, I may say harsh, than it would be if the taxing authorities of the government should assess a tax against the complainant, the authority for which assessment the complainant disputed. The collector, for instance, of internal revenue, would issue a warrant, under which the chattels of the complainant would be distrained and pass into the hands of the collector, and the complainant, however just its claim for immunity from the tax so assessed and collected might be, nevertheless, in order to recover the chattels distrained, would be forced to bring suit against the collector, and thus subject itself to inconvenience, annoyance, and expense. However, by decisions too numerous to cite the courts have uniformly held that the revenues of the government are too im-

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construction of the tax gatherer of the provisions of the statute under which he acts is determined. The insolvency of the sovereign is unthinkable. Money wrongly collected may be recovered, and as a matter of policy the interests of the government in such matters take precedence over the rights of the citizen. If this be true, even in times of peace, it certainly should be true, and I think it is, in time of war, when the subject-matter is property asserted by a responsible government officer to be that of an enemy. As was said in the Legal Tender Cases, 12 Wall. 457, 551 (20 L. Ed. 287), with respect to the Fifth Amendment of the Constitution:

"That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit, laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses—may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a nonintercourse act or an embargo be enacted, or a war be declared?"

It was said upon the argument that the Custodian now holds in property or money determined by him to be enemy owned upwards of three-quarters of a billion dollars. The power of this fund in the hands of enemies might be stupendous, so far as its ability to work injury to the country is concerned. Suppose that, upon the seizure of this vast sum, objections had been interposed by citizens or friendly aliens upon the ground that they claimed title to the whole or part thereof. It seems to me that it is inconceivable that the claimants of such property should during the trial and appeal be permitted to remain in possession of the funds and property.

[6] It is urged upon me that I should not now uphold the authority of the Custodian, even if such authority exists, to have the possession of the fund, owing to the fact that an armistice with the enemy has been signed and is now in effect, and the declaration of the President, when he addressed Congress upon November 11, 1918, to the effect that "the war thus comes to an end," indicates that the necessity of the legislative enactment is past. With this I cannot agree. At this moment the armed forces of the government are occupying the territory of the enemy; they are there not as friends, but as an army of occupation, to enforce and make secure the terms of the armistice pending the negotiations for peace; and the very act provides that "the end of the war," as used in the act, "shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be 'the end of the war' within the meaning of this act." Such proclamation has not been made. Until it shall be made, or until Congress repeals or modifies the statute in question, judicial tribunals will question neither the authority nor the necessity of the act, provided it does not transgress the provisions of the Constitution. Political pol-

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[7] It is urged upon me that the fund being, as it is asserted by the complainant, wholly owned by it to the exclusion of the property interests of all other persons, the complainant is not and cannot be a person "claiming any interest, right or title in any money or other property." In other words, it is said section 9 is available only to persons who claim in the property seized something less than the entire title thereto. With this contention I cannot agree. In my judgment an interest in property may comprehend the entire title thereto as well as something less than the entire title. If a man owns the fee simple of certain real estate, he certainly has an interest in it, and that interest is the equivalent of his title "to" the property.

I have already gone beyond the limits of propriety in the length of my discussion of the matters here involved, and, interesting and important as are the remaining points raised by the able arguments and briefs of which I have had the benefit, I must bring this opinion to an end. It will therefore be the order of the court that the injunction heretofore granted herein will be vacated, and the bill filed herein will be dismissed for want of equity. There can be no equity in the complainant until the fund in question has passed into the possession of the Custodian, and the complainant has taken the jurisdictional steps provided in section 9 of the act.

Submit order in accordance with the foregoing opinion.

WATTS et al. v. ELY REAL ESTATE INV. CO.

(District Court, D. Arizona. January 2, 1919.)

No. E–55.

1. PUBLIC LANDS ⇐198—MEXICAN GRANTS—CONSTRUCTION OF TREATY.
   The provision of the treaty of Guadalupe Hidalgo of 1848 (9 Stat. 922) relating to Spanish and Mexican land grants did not operate to reserve any lands within the Gadsden Purchase, all of which remained subject to disposal by Congress until claims for such grants were presented, located, and approved.

2. PUBLIC LANDS ⇐220—DECREE OF COURT OF PRIVATE LAND CLAIMS—MATTERS CONCLUDED.
   Under Act March 3, 1891, c. 539, 26 Stat. 854, creating the Court of Private Land Claims, a decree of that court in a suit between the United States and a claimant under a Mexican grant could not affect the title of a prior grantee, who was not a party to the suit.

3. PUBLIC LANDS ⇐223(3)—CONFLICTING GRANTS—PRIORITY.
   A grant by Congress of lands in New Mexico, to be selected by the grantee, and which were so selected, and the selection approved by the Surveyor General and confirmed by the Land Department, cannot be displaced as to any of the lands by a Mexican grant, claim to which was not made until long afterward.

4. LIMITATION OF ACTIONS ⇐44(1)—ACCRUAL OF RIGHT OF ACTION—ACTION TO RECOVER GRANTED LANDS.
   Where a survey of a large grant of public lands was necessary to segregate the lands granted, limitation does not begin to run against

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5. Deeds ⊂=114(1)—Lands Conveyed—Sufficiency of Description.
Description in deeds *held* sufficient to include land in controversy.

In Equity. Suit by Cornelius C. Watts and Dabney C. T. Davis, Jr., against the Ely Real Estate Investment Company. Decree for complainants.

Kingan & Campbell, of Tuscon, Ariz., for plaintiffs.
Selim M. Franklin, of Tuscon, Ariz., for defendant.

SAWTELLE, District Judge. This is an action brought by Cornelius C. Watts and Dabney C. T. Davis, Jr., against the Ely Real Estate Investment Company, to quiet title to a tract of land containing approximately 2,000 acres, located in Santa Cruz county, Ariz. Plaintiffs are citizens of the state of West Virginia, and the defendant is a corporation organized and existing under the laws of the state of Missouri.

The bill alleges that by an Act of Congress of June 21, 1860 (12 Stat. 71, c. 167) authority was given the heirs of Luis Maria Baca to select approximately 500,000 acres of vacant land, not mineral, in the then territory of New Mexico, to be located by them in square bodies not exceeding five in number; that—

"on June 17, 1863, pursuant to the provisions of said act, the said heirs selected and located as the third of said bodies a tract of land, then situated in the said territory of New Mexico, and now in the county of Santa Cruz, state of Arizona, described as follows, to wit: 'Commencing at a point one mile and a half from the base of the Salero Mountain in a direction north 45 degrees east of the highest point of said mountain, running thence from said beginning point west 12 miles, 36 chains, and 44 links; thence south 12 miles, 36 chains, and 44 links; thence east 12 miles, 36 chains, and 44 links; and thence north 12 miles, 36 chains, and 44 links, to the place of beginning.' On April 9, 1864, said selection and location were approved by the Commissioner of the General Land Office, and a survey ordered, which survey was thereafter made, approved, and filed in the office of the Commissioner of the General Land Office, and in the offices of the register and receiver of the land office in Arizona. The plaintiffs, by mesne conveyances, acquired the title in fee simple to the whole of the south half of said land, and became and are now the owners thereof in fee simple, and entitled to the possession thereof."

The defendant makes some claim adverse to the plaintiffs to said land or some part thereof.

The defendant filed its answer, alleging therein, amongst other things, that the defendant—

"is the owner in fee simple of all that certain tract and parcel of land situate in the county of Santa Cruz, state of Arizona, known and called the Rancho San Jose de Sonoita, being a confirmed Mexican land grant, * * * a portion of which grant is within the limits of the tract of land mentioned, described, and claimed by plaintiffs in their bill of complaint, the said portion of said Mexican grant, so included within the limits of the said lands claimed by plaintiffs and described in their bill of complaint, being described and platted in that certain survey which plaintiffs allege was made of the said tract described in the complaint, and approved and filed in the office of the Commissioner of the General Land Office and in the office of the register

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and receiver of the land office in Arizona; that this defendant does not have or make and never has had or made, any claim adversely to the plaintiffs to the lands described in the complaint herein, except that part or portion thereof which is within the limits and a part of the said Rancho San Jose de Sonoita aforesaid; * * * that defendant does claim to be the owner in fee, and avers that it is the owner in fee simple, and does claim adversely to plaintiffs, all that part or portion of the tract of land described in plaintiffs' complaint, which is within the limits and boundaries of the confirmed Mexican land grant aforesaid, and does allege that plaintiffs have not, nor has either of them, any right, title, or interest in or to any part thereof. Defendant further avers that the plaintiffs, and each of them, are barred and estopped to litigate the matters and things set forth and complained of in their said bill of complaint, in so far as the same affects the title of this defendant in and to that portion of the lands described in said complaint, which are within the limits and boundaries, and are a part of the said Rancho San Jose de Sonoita, the confirmed Mexican grant aforesaid."

The defendant further alleges, in substance: That during the year 1892 the United States of America did file in the United States Court of Private Land Claims its bill against Santiago Ainsa, as administrator of the estate of Frank Ely, deceased, and others, as defendants, wherein the United States, by its attorney, alleged, amongst other things, that the said Ainsa, as such administrator, claimed to be the owner through mesne conveyances to that certain tract of land situate in the then territory of Arizona, known and called the "Rancho San Jose Sonoita" by virtue of a grant made by the officers of the republic of Mexico, when said lands were a part of said republic, and afterwards ceded to the United States by what was known as the "Gadsden Purchase"; that said grant was void—and did pray for a decree of said court that the title to said grant be adjudicated and further be decreed to be invalid and void. That said Ainsa, as such administrator, did file his answer to the said bill, wherein, amongst other things, he did aver that as such administrator he was the owner in fee of the said tract of land known as the San Jose de Sonoita grant, and that he deraigned his title from the grantees of the republic of Mexico, and that the said republic of Mexico did on or about May 15, 1825, sell and grant the said tract of land to one Leon Herreras; that the title or grant was a complete and perfect title and grant—and did pray for a decree of said court adjudging his title to the said lands to be a complete and perfect title in fee, and that he be adjudged to be the owner thereof. That on August 6, 1902, the said Court of Private Land Claims rendered its judgment and decree in favor of the said Ainsa, as administrator as aforesaid, and against the United States of America, wherein said court did adjudge and decree that the said grant, called "Rancho San Jose de Sonoita," and in said decree described, constituted a valid title, and that the said title was perfect and complete at the date of the acquisition of the territory by the United States, and did further decree the confirmation of the title to said grant to the said Herreras, and his heirs, successors and assigns. That the said judgment and decree at all times since has been, and now is, in full force and effect. That the said plaintiffs herein deraigned their title from the United States of America, and therefore are barred and forever estopped, by the said judgment and decree of the said Court

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of Private Land Claims aforesaid, from claiming any of the lands within the limits of said San Jose de Sonoita grant to be, or to have been, the lands of the United States, or to be, or to have been, subject to sale, gift, or disposal by the United States. That for more than ten years prior to the commencement of this action defendant and its grantors were, and the defendant now is, in the peaceable and adverse possession of all of the said confirmed Mexican land grant aforesaid, cultivating and using the same and paying taxes thereon, and claiming title under deeds duly recorded. That plaintiffs' cause of action against the defendant as to all of the lands within the limits of said confirmed Mexican land grant aforesaid, which are within the limits of the tract of land claimed by plaintiffs, and described in their bill of complaint, is barred by the provisions of sections 695, 696, 697, and 698 of the Revised Statutes of Arizona of 1913.

The lands embraced within the Baca grant have been the source of much litigation, and numerous controversies involving the title thereto have occupied the attention of the courts and the Land Department since Congress passed the Act of June 21, 1860, authorizing the Baca heirs to select, instead of the land claimed by them, upon which was situated the town of Las Vegas, New Mexico, an equal quantity of vacant land in the then territory of New Mexico. The history of this grant has become a part of the history of Arizona, and the reported cases, including the cases of Ely's Administrator v. United States, 171 U. S. 220, 18 Sup. Ct. 840, 43 L. Ed. 142, Faxon v. United States, 171 U. S. 244, 18 Sup. Ct. 849, 43 L. Ed. 151, Lane v. Watts, 234 U. S. 539, 34 Sup. Ct. 965, 58 L. Ed. 1440, and Wise v. Watts and Davis, 239 Fed. 207, 152 C. C. A. 195, furnish interesting reading.

Five questions are presented by the record in this case:

First. Whether the judgment of the Court of Private Land Claims, in the case of United States v. Ainsa, Administrator, is res adjudicata as between the United States and plaintiffs, its grantees, on the one hand, and Ainsa, administrator, and defendant, his grantee, on the other hand, and whether plaintiffs are estopped by said judgment from litigating the question of title to that portion of said tract of land located within said Sonoita grant.

Second. Whether the lands selected by the Baca heirs were, at the time of selection, vacant lands of the United States, or whether that portion thereof within the limits of the said Sonoita grant was private property.

Third. Whether the Contzen survey and field notes show upon their face that the lands within the limits of said Sonoita grant, as confirmed, are excluded from the limits of the lands described in the complaint herein.

Fourth. Whether plaintiffs' cause of action against defendant is barred by the statute of limitations.

Fifth. Whether plaintiffs have title to, or interest in, any of the lands described in the complaint herein.

[1] 1. It is my opinion that the judgment of the Court of Private Land Claims in the case of United States v. Ainsa, Administrator, is not res adjudicata as between plaintiffs and defendant, and that plain-

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in the Court of Private Land Claims, neither the United States nor the said Ainsa, administrator, or his grantee, had any title or valid claim to the said lands.

The San Jose de Sonoita grant was made by the Mexican government to one Leon Herreras in the year 1824, and is within the limits of the Gadsden Purchase, which was acquired by the United States under the terms of the treaty of Guadalupe Hidalgo of 1848. The defendant herein deraigns title under said Herreras and the Mexican government. It is claimed that under the terms of said treaty and the provisions of the act of July 22, 1854, the lands embraced within said Sonoita grant were reserved from entry and sale. In the case of Lockhart v. Johnson, 181 U. S. 516, 21 Sup. Ct. 665, 45 L. Ed. 979, the Supreme Court said that the mere fact of a claimed Mexican grant did not reserve the lands covered by it.

"It was only after their presentation to the Surveyor General of New Mexico for his report thereon that the lands were reserved 'until the final action of Congress.' There was no reservation except by this statute and it related only to lands covered by a claim presented to the Surveyor General. There is no language in the treaties which implies a reservation." Lane v. Watts, 235 U. S. 22, 35 Sup. Ct. 5, 59 L. Ed. 104.

There being no language in the treaty which implied a reservation, Congress had the right to dispose of the lands as it saw fit, and in my opinion the Act of June 21, 1860, "effected a repeal pro tanto of the reservation of the act of 1854." In pursuance of the Act of June 21, 1860, the Baca heirs, on the 17th day of June, 1863, selected a tract of land containing 100,000 acres, of which the Sonoita grant is a part.

"A petition for confirmation of the San Jose de Sonoita grant was not presented to the Surveyor General until December, 1879. It will be seen, therefore, that there was no disclosure of these claims until after the selection of the Baca grant and its location by the Land Department, the consummation of which was accomplished by the approval of the location April 9, 1864." Lane v. Watts, supra.

"The title having passed by the location of the grant and the approval of it, the title could not be subsequently divested by the officers of the Land Department." Wise v. Watts and Davis, 239 Fed. 207, 212, 152 C. C. A. 195, 200.

Neither could the title be divested by the proceeding in the Court of Private Land Claims, to which proceedings the owners of the lands were not made parties.

"The title to the lands involved passed to the heirs of Baca by the location of the float and its approval by the officers of the Land Department and order for survey in 1864, in pursuance of the Act of June 21, 1860." Lane v. Watts, supra.

[2] A careful examination of the Act of March 3, 1891, c. 539, 26 Stat. 854, creating the Court of Private Land Claims, discloses that that court was authorized to determine the validity of titles and the right of claimants to lands which had not theretofore been sold or granted by the United States to other persons; and the title to the lands in controversy having, as we have seen, passed to the heirs of Baca on April 9, 1864, the judgment of that court could not effect or

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invalidate the same. Said Act of March 3, 1891, contains the following provisions:

Section 13, subd. 6: "No confirmation of or decree concerning any claim under this act shall in any manner operate or have effect against the United States otherwise than as a release by the United States of its right and title to the land confirmed, nor shall it operate to make the United States in any manner liable in respect of any such grants, claims, or lands, or their disposition, otherwise than as is in this act provided."

Section 8: "That any person or corporation claiming lands in any of the states or territories mentioned in this act under a title derived from the Spanish or Mexican government that was complete and perfect at the date when the United States acquired sovereignty therein, shall have the right (but shall not be bound) to apply to said court in the manner in this act provided for other cases for confirmation of such title; and on such application said court shall proceed to hear, try and determine the validity of the same and the right of the claimant thereto, its extent, location and boundaries, in the same manner and with the same powers as in other cases in this act mentioned.

"If in any such case, a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States, and always subject to and not to affect any conflicting private interest, rights or claims held or claimed adversely to any such claim or title, or adversely to the holder of any such claim or title. And no confirmation of claims or titles in this section mentioned shall have any effect other or further than as a release of all claim of title by the United States; and no private right of any person as between himself and other claimants or persons, in respect of any such lands, shall be in any manner affected thereby."

Section 14: "That if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree, and upon proof being made to the satisfaction of said court of such sale or grant, and the value of the lands so sold or granted, such court shall render judgment in favor of such claimant against the United States for the reasonable value of said lands so sold or granted, exclusive of betterments, not exceeding one dollar and twenty-five cents per acre for such lands; and such judgment, when found, shall be a charge on the Treasury of the United States. * * *"

[3] 2, 3. As above stated, no claim was presented to the Sonoita grant until 1879, and when Congress passed the Act of June 21, 1860, authorizing the Baca heirs to make selection of certain lands, it had a right to assume, as did also the Baca heirs when they located the same, and the Surveyor General when he reported said location, and the Commissioner of the General Land Office when he approved the same on April 9, 1864, that the lands were vacant lands of the United States and subject to selection and location under said Act of June 21, 1860. It was made the duty of the Surveyor General of New Mexico to pass upon the character of the lands and to determine whether they were vacant and nonmineral. He did determine that these lands were vacant and nonmineral, and his report was adopted by the Commissioner of the General Land Office on April 9, 1864, at which time, as we have seen, the title passed. This finding of the Surveyor General and of the Land Department was and is conclusive. Lane v. Watts, 234 U. S. 525, 540, 34 Sup. Ct. 965, 58 L. Ed. 1440.

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The Act of 1860 authorized the Baca heirs to locate a certain quantity of land "in square bodies." It was so located, and the surveyor, upon locating the initial or starting point, evidently encountered little difficulty in fixing the exterior boundaries of the lands so selected and located. Having located the initial point, it was incumbent upon such surveyor to survey the outboundaries thereof in accordance with the description contained in the location of 1863.

I attach no importance whatever to the action of Mr. Contzen, the engineer who made the survey, in indicating on his map and survey of Baca float No. 3 the location of the two Mexican grants, Tumacacori and Calabazas, and San Jose de Sonoita. It is true that he was instructed by the Land Department to survey these two grants, but such instructions on the part of the Land Department were without authority of law, and could not affect or invalidate the title which became vested in the Baca heirs in 1864. Besides, in the case of Faxon v. United States, 171 U. S. 244, 18 Sup. Ct. 849, 43 L. Ed. 151, the Tumacacori and Calabazas claim was, by the Supreme Court, held to be void, and the claim of the San Jose de Sonoita grant was never presented to the Land Department until long after the title to the lands embraced therein became vested in the Baca heirs.

[4] 4. A further defense asserted is that of the statute of limitations. A complete answer to this contention is that a survey was necessary to segregate the lands from the public domain; that this survey was not made until 1905, and not filed in and approved by the Land Department until December, 1914; therefore the statute of limitations did not commence to run until the latter date.

[5] 5. The last point made in the case is, to quote counsel, as follows:

"That the plaintiffs are not the owners of the land in controversy, and that is based upon the fact that the deed to Robinson, nor the deeds from Robinson on down, do not convey, either to these plaintiffs, or to their grantors, the land in controversy."

This raises the question as to the sufficiency of the description of the lands contained in each of the several deeds, above referred to, to convey the title to the lands set forth in the complaint herein. A similar objection was made to said deeds in the case of Watts and Davis v. Wise et al. It was there contended that said deeds did not convey the lands described in the 1863 location, but conveyed other and different lands. This court held that said deeds described and conveyed the 1863 location. This ruling was assigned as error on appeal to the Circuit Court of Appeals, and was by that court approved and affirmed; that court holding that the false description of 1866 should be rejected and effect given to the true description of 1863.

I think the deeds admitted in evidence herein convey the specific land here involved. A decree will be entered in accordance with the foregoing.

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UNITED STATES v. COLLINS.

(District Court, W. D. Louisiana, Shreveport Division. January 20, 1919.)

No. 2524.

1. INTOXICATING LIQUORS ⟸138—REED AMENDMENT—"OR."

Reed amendment to postal appropriation made by Act March 3, 1917 (Comp. St. 1918, § 8739a), making it offense to order, purchase, or cause intoxicating liquors to be transported in interstate commerce into any state whose laws prohibit their manufacture or sale, applies if either manufacture or sale is prohibited; conjunctive construction of "or" not being permissible.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Or.]

2. COURTS ⟸366(27)—FOLLOWING STATE DECISIONS—REED AMENDMENT.

Transportation of intoxicating liquors into Texas, which has prohibited their manufacture for beverage purposes, is violation of Reed amendment of postal appropriation made by Act March 3, 1917 (Comp. St. 1918, § 8739a), though there is some ground to believe court of last resort in Texas will hold state prohibitory law unconstitutional, as the federal court will not anticipate and be guided by what the state court might thereafter hold.

3. INTOXICATING LIQUORS ⟸138—REED AMENDMENT—NECESSITY FOR STATE-WIDE PROHIBITORY ACT.

Condition of Reed amendment to postal appropriation made by Act March 3, 1917 (Comp. St. 1918, § 8739a), prohibiting transportation of intoxicating liquors in interstate commerce into any state whose laws prohibit manufacture or sale, is that state shall have prohibited manufacture or sale within entire territory, not merely in parts under local option.

4. INTOXICATING LIQUORS ⟸138—REED AMENDMENT—TRANSPORTATION "INTO" DRY STATE.

Reed amendment to postal appropriation made by Act March 3, 1917 (Comp. St. 1918, § 8739a), is not violated unless there is actual transportation of intoxicating liquors from point without to point within state, which has prohibited their manufacture or sale; "into," as used, conveying idea of entrance, passage, or motion.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Into.]

Gould Collins was charged with violation of the Reed amendment, and he moves to quash the indictment. Demurrer sustained.

Joseph Moore, U. S. Atty., and J. H. Jackson, Asst. U. S. Atty., both of Shreveport, La.

J. S. Atkinson and J. M. Grimmet, both of Shreveport, La., for defendant.

JACK, District Judge. The defendant in count 1 of the indictment stands charged with violation of that part of the postal appropriation act of March 3, 1917 (39 Stat. 1069, c. 162 [Comp. St. 1918, § 8739a]), known as the "Reed Amendment," which is as follows:

"Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory, the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors

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for beverage purposes, shall be punished as aforesaid: Provided, that nothing herein shall authorize the shipment of liquor into any state contrary to the laws of such state"

—in that he did, in the parish of Caddo,

"unlawfully, knowingly and willfully, and with intent to transport the intoxicating liquors hereinafter described, from the said parish of Caddo, state of Louisiana, to Texarkana, in the state of Texas, the said state then and there being a state wherein the manufacture of intoxicating liquors for beverage purposes was prohibited by law, order, purchase, and cause to be transported in interstate commerce, a certain shipment of intoxicating liquor, to wit, ten cases of whisky; that is to say, did order, purchase, and cause the said intoxicating liquor to be transported in interstate commerce, from the city of Monroe, Louisiana, and into the parish of Caddo, Louisiana, and with said state of Texas as the destination of said transportation, by transporting the same in an automobile from the said city of Monroe, Louisiana, to the parish of Caddo, and which said intoxicating liquor was not then and there being transported for sacramental, scientific, medicinal, or mechanical purposes, contrary to the form of the statute," etc.

In count 2 of the indictment the same offense at the same time and place is charged, the only difference being that in this count the intended destination of the liquors transported was the county of Bowie, which county was a county wherein, under the local option law of Texas, the sale of intoxicating liquors was prohibited.

The second count is based on the assumption that, even though the state of Texas has not legally adopted state-wide prohibition, the Reed amendment is applicable to an interstate shipment of intoxicating liquors into a "dry" county of that state.

The defendant has moved to quash the indictment. It is contended that the Reed amendment is applicable only to those states where both the sale and the manufacture of intoxicating liquors is prohibited throughout the state, and that under a recent decision of the Texas Court of Criminal Appeals (Ex parte Myer, 207 S. W. 100, not yet officially reported), that section of the state-wide prohibition law of Texas prohibiting the sale of intoxicating liquors has been declared unconstitutional. The section prohibiting the manufacture of such liquors was not at issue and so was not passed on.

[1] As will be noted by reference to the Reed amendment previously quoted, it is applicable to any state the laws of which prohibit "the manufacture or sale therein of intoxicating liquors for beverage purposes." Thus it is sufficient if either the manufacture or the sale is prohibited. The attention of the court is called to a line of decisions in which the disjunctive "or" is sometimes construed as "and," but I do not think such a construction applicable in this case. Congress had the authority to prohibit the shipment of intoxicating liquors into states which prohibit the manufacture of liquors, or which prohibit the sale of liquors, either one or the other, or both, and there is no good reason to conclude that Congress did not intend exactly what it said.

It is further argued, however, that under the recent Texas statute, not only is the manufacture and sale of intoxicating liquors prohibited, but likewise their importation from another state, and that if the Legislature of Texas, as held by the Court of Criminal Appeals of that

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the state and their importation from without the state, as this would necessarily make the sale impossible after the limited supply on hand was exhausted; consequently, that while the Court of Criminal Appeals had before it only the question of the sale of intoxicating liquors, it would necessarily follow that the remainder of the law was likewise unconstitutional and that that court, to be consistent, would have to so hold whenever the question was brought up.

[2] While this court will accept the ruling of the highest state court of criminal jurisdiction as to the constitutionality of a statute of that state, even though it may itself entertain a contrary view, it will not anticipate and be guided by what that court might hereafter hold. The state law, as it now stands, prohibits the manufacture of intoxicating liquors in Texas for beverage purposes, and thus brings transportation of such liquors within the Reed amendment. In the recent case of United States v. Dan Hill, 248 U. S. 420, 39 Sup. Ct. 143, 63 L. Ed. ——, the Supreme Court of the United States held the Reed amendment applicable to liquors intended for personal use, although under the state law they might be shipped in. Thus the purpose of the Reed amendment is not merely to assist the various states in enforcing prohibition to the limited extent provided by their statutes. It is a law unto itself, passed under the authority of Congress to regulate interstate commerce, and its applicability to intoxicating liquors shipped into a state for beverage purposes is conditioned only on that state's having prohibited the manufacture or having prohibited the sale of such liquors for beverage purposes.

[3] This condition, however, that the state shall have prohibited the manufacture or sale of liquors clearly means such prohibition within the entire state. This is made plain by the provision in the act immediately preceding the Reed amendment which forbids the mailing of any letter or newspaper containing advertisements of intoxicating liquors addressed to—

"any place or point in any state or territory of the United States, at which it is, by the law in force in the state or territory at that time, unlawful to advertise or solicit orders for said liquors."

Congress was careful to make this inhibition applicable, not only to advertisements mailed to any point in a state in which state-wide prohibition prevails, but also to such advertisements mailed to any point in the state at which point the sale of such liquors is prohibited. If in the Reed amendment, immediately following, it had been intended to make it likewise applicable to "dry" sections of a "wet" state, it would, as in the preceding section, have been so specifically provided. In the case of McAdams v. Wells Fargo Express Co. (D. C.) 249 Fed. 175, cited by counsel as holding the contrary, the sole issue presented appears to have been whether the act was applicable to liquors shipped for personal use and not for sale. No contention was made, as in the case at bar, that the Reed amendment did not apply to intoxicating liquors shipped into prohibition territory of a

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local option state. In the case of State ex rel. Brewing Co. v. Quincy, etc., Railway Co. (Mo. App.) 204 S. W. 584, the expressions of the court relative to the Reed amendment were obiter dicta.

[4] While the indictment, following the language of the statute, charges that the defendant ordered, purchased, and caused to be transported the liquor in question, the closing part of the indictment particularly describing the offense restricts it to the charge that defendant caused the transportation of the liquor from Monroe, La., to Shreveport, with the intent of continuing the transportation into the state of Texas. It is finally urged in the demurrer that, if the Reed amendment is applicable to Texas, it is necessary that the intoxicating liquors should have been actually transported into that state, as the transportation in interstate commerce forbidden by the act is—

"into any state or territory, the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes."

The case of United States v. Chavez, 228 U. S. 525, 33 Sup. Ct. 595, 57 L. Ed. 950, is relied on by counsel for the government in support of the contention that it was not necessary that the liquors transported with Texas as their destination should have actually crossed the border and been taken into that state. In the Chavez Case the defendant was indicted under a statute, the first section of which provides that, whenever the President shall find that in any American country domestic violence exists which would be promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export, except under certain limitations, any arms or munitions of war from any place in the United States to such country. The second section provides that "any shipment of material hereby declared unlawful shall be punishable," etc. The defendant, charged with violation of the statute, while carrying Winchester cartridges from the city of El Paso to Mexico, was arrested before he crossed the border. The court held that, while the term "export" technically means the shipment from this country and the entry into another, yet in common speech the shipment of goods from this to a foreign country, without regard to their landing in such country, is often spoken of as an export, and that Congress used the word in this sense. This the court thought was made clear by the second section of the act, which it held does not purport to punish the act of exporting, but in express terms "only punishes any shipment." The contrary construction of the act would have made it wholly inoperative in such cases, as, after a party intending to violate the law actually crossed into Mexico with the forbidden munitions of war, he would be beyond the jurisdiction of the court. Such, however, fortunately is not the case with prosecutions under the Reed amendment. Had the defendant, Collins, completed his journey into Texas with the prohibited liquors, he might still have been prosecuted in a United States court in that state.

Webster defines "into" as meaning:

"To the inside of; within; expressing entrance, or a passage from the outside of a thing to its interior parts; following verbs expressing motion, as 'come into the house,' 'go into the church,' etc."

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The language of the act is plain and unambiguous, and it must be read and enforced as it is written. The transportation must be "into" a state, "the laws of which prohibit the manufacture or sale of intoxicating liquors for beverage purposes." There must be a transportation from a point without the state to a point within the state.

As the indictment does not charge that the intoxicating liquors were transported from Louisiana into the state of Texas, but only that they were transported from Monroe, La., to Shreveport, with intent to continue the transportation on into the state of Texas, the facts alleged do not constitute an offense under the statute, and the demurrer is sustained.

CENTRAL R. R. OF NEW JERSEY v. NEW YORK CENT. R. CO.

(District Court, E. D. New York. December 21, 1918.)

WHARVES ⊂⊃20(1, 5)—WHARFINGER—DUTY OF.

Respondent *held* at fault for the sinking of a car float at a float bridge; it appearing that respondent's conductor, in charge of a switching engine which should have unloaded cars on the float, left and began other work after moving the cars, so that the float was thrown out of equilibrium, while the floatman was not guilty of negligence.

In Admiralty. Libel by the Central Railroad of New Jersey against the New York Central Railroad Company. Decree for libelant.

Macklin, Brown, Purdy & Van Wyck, of New York City (William F. Purdy, of New York City, of counsel), for libelant.

Alexander S. Lyman and William Mann, both of New York City, for respondent.

CHATFIELD, District Judge. Float 29, on September 2, 1917, was taken by the tug Jersey Central from Jersey City to the float bridges at Sixty-Eighth street, North River, arriving there at about 9:50 p. m. On the way another float had been taken in tow and left at Weehawken, and the Jersey Central had stopped at Fifty-Ninth street for some time, as the float bridges at Sixty-Eighth street were in use. An attempt was made to place the float at the middle float bridge, but this was too high, and so the float was pulled out and put in at the southerly float bridge, where it was fastened by four toggles, two lines to the drums, two lines to cleats, one line to the rack, and a breast line. The Jersey Central then left, and the work of unloading was not begun until 1:30, when an engine with two pulling cars started to draw the loaded freight cars from the float. One of the pulling cars broke loose during the operation, but this seems to have had nothing to do with the later occurrences. It appears that the float had three cars upon the middle track, four upon the port or northerly track, and five upon the starboard or southerly track. The engine succeeded in taking from the float but one car, as the tide had then fallen so that the slope of the bridge made it impossible to pull the cars up, for the couplings unfastened when the cars struck the slope.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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or starboard lines of cars back to the middle, so as to restore balance.

The testimony shows that before leaving Jersey City the captain sounded and found 8 or 9 inches of water. The vessel had been pumped by a tug three days before, which operation could reduce the water to between 6 and 7 inches before the pump sucked. Further pumping by tug would not be resorted to until some 14 or 15 inches of water had collected. Evidently the result of leaving the tug moored to the float bridge, with the loaded cars toward the forward or toggle end, caused the water in the float to settle at that end, and thus gradually to increase the strain of the extra load. In addition, it appears by a preponderance of evidence that one car had been withdrawn from the port side, leaving but three upon that side to five upon the starboard. This caused some list to starboard, with the result that the starboard forward corner was down, giving a twist to the entire boat. Evidently the seams were thus opened, and after a time the accumulation of water was sufficient to force out (by the strain resulting from suspension to the float bridge) two of the planks, which, after the float was placed upon dry dock, were found loose, in such a manner as to show that they had been forced away from their proper position before the vessel sank.

Dispute arises as to the conversation between the conductor of the switching train and the floatman, when the engine left to do other work after failing to pull the cars up the slope. The conductor admits that it would have been possible to have removed the cars one at a time by the use of a cable, and that he did not attempt this because he had other work to do, but states that the floatman told him that the float had been leaking before leaving Jersey City and that it had taken in a lot of water, which caused it to list. An attempt to corroborate this testimony was made by a former employé of the Central Railroad of New Jersey, who testifies that the boat was listed badly to starboard while crossing the river, and that he sounded and found considerable water on the way over. The testimony of the other witnesses shows that this man was not upon the float in question, but had been upon the one which was left at Weehawken, and his attention was not called to the matter until the following day, when he heard of the accident, so that his testimony is not convincing, particularly in view of his manner of testifying and his certainty that this float is over 30 years old, as opposed to the definite testimony that she was built 14 years ago.

But the testimony of the conductor is made improbable by the very circumstances of the case. It is admitted that the floatman had no means of pumping the float, and that if pumping was needed a tug had to be called therefor. If the conductor knew that the float was leaking to such an extent as to have acquired a list from the presence of the water, and not from the extra weight of the cars on the starboard forward corner, and if the amount of water in the float was such as to be a probable source of danger, it was the duty of the men in charge of the float bridges to remove the freight cars, so as to avoid undue straining of the boat, or, if the convenience of their work required

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a tug to do the pumping. Even careful watching of the condition of the float might not have avoided the accident, if the presence of this water forced out two planks, and thus caused a sudden inrush of a considerable quantity of water. The condition of the float was in fact discovered by one of the attendants at the float bridges, who testifies that the floatman was in his cabin asleep. The floatman contradicts this, and states that he was around the float most of the time. But, as the floatman could not tell when the engine would return to remove the cars, and if the condition of the float was such that the conductor in charge of the train saw fit to go about other work rather than to remove the cars, or restore the equilibrium of the float, it cannot be held as negligence on the part of the floatman to have failed to sound an alarm, or to apprehend that the float would be left for such a length of time that damage would result. The floatman denies the conversation attributed to him, as to the leaky condition of the boat, and testifies, on the other hand, that the attention of the conductor was called to the twist upon the float by a brakeman, and that the conductor replied that the float was all right.

Of the two stories, that of the floatman is much more probable, for, as has been said, it would be culpable on the part of the conductor to leave the float, unless he thought it was all right, and there would have been difficulty in bridging the float if it had been then badly listed. This accident, evidently, was the result of the usual assumption that extraordinary injury is not apt to occur, and to the casual indifference to possible dangers which is exhibited by workmen in the ordinary performance of their duties.

The New York Central Railroad Company should be held responsible for the situation which resulted and the damage which occurred.

FRIESEN v. CHICAGO, R. I. & P. RY. CO.

(District Court, D. Nebraska, Lincoln Division. December 27, 1918.)

No. 248.

RAILROADS ⟸5½. New, vol. 6A Key-No. Series—FEDERAL COURTS—DISTRICT OF SUIT—RAILROAD ADMINISTRATION.

Under Act March 21, 1918, §§ 8, 10 (Comp. St. 1918, §§ 3115¾h, 3115¾j), and despite section 9 (section 3115¾i), *held*, that orders of the Director General of Railroads, through whom the President assumed control of the railroads pursuant to Act Aug. 29, 1916 (Comp. St. 1916, § 1974a) that suits against carriers while under federal control, should be brought in the county or district where the plaintiff resided at the time of the accrual action, were not effective to so limit that right, and, where authorized by state law, a plaintiff might sue in a district other than that in which he resided at the time of accrual of the action, upon a cause of action not arising out of the railway company's duties as a common carrier.

At Law. Action by Klaas N. Friesen against the Chicago, Rock Island & Pacific Railway Company, begun in the state court and removed to the federal court. On motion to dismiss. Denied.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Fawcett & Mockett, of Lincoln, Neb., for plaintiff.
E. P. Holmes, of Lincoln, Neb., for defendant.

MUNGER, District Judge. This action was begun in the state court on May 21, 1918. The petition alleged acts of negligence of the defendant railway company, on May 21, 1916, causing personal injuries to the plaintiff. The action was removed to this court and on June 10, 1918, the defendant moved to dismiss the action because the cause of action arose in Kansas and because the plaintiff resided in Kansas at the time of the accrual of plaintiff's cause of action. This motion was supported by an affidavit showing that the defendant would need a number of the railway employés as witnesses at the trial and it would inconvenience the operation of the railroad and cause great expense to require them to appear as witnesses at the trial. In support of its motion the defendant referred to General Orders No. 18 and No. 18a, dated April 9, 1918, and April 18, 1918, issued by the Director General of Railroads, providing that such suits against carriers, while under federal control, shall be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose. The plaintiff shows that he made a bona fide change of residence from Kansas to Nebraska immediately after the date of his injuries. He claims that the statute of limitations barred his beginning his action in Kansas from a few days after this action was begun.

The underlying question in the case is whether or not the Director General has authority to make the orders restricting the districts in which such a suit may be brought. The action, as begun in the state court, was against the defendant railway company as a corporation, and service of summons was made upon an agent of the company in the county wherein the suit was instituted, in accordance with the state statutes, permitting such service of process. Comp. St. Neb. 1913, §§ 7636, 7638.

The plaintiff's cause of action, as alleged in his petition, is based on negligent acts of the engineer of a railway train in running his train and thereby causing it to strike the plaintiff, when he was at a station and signaling to it to stop, so that he might board it as a passenger.

By Act Aug. 29, 1916, c. 418, 39 Stat. 619 (Comp. St. 1916, § 1974a), the President was empowered, "through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." The President by his proclamation of December 26, 1917, took possession of the railways and directed that they should "remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders regulating commissions of the various states in which said systems

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special orders determine, and that any orders, general or special, thereafter made by said Director General should have paramount authority. He also declared that suits might be brought by and against such carriers and judgments rendered as hitherto until and except so far as said Director General might by general orders otherwise determine. The orders of the Director General complained of in this case were made on April 9, 1918, and April 18, 1918. Before they had been made, an Act of Congress had been approved on March 21, 1918 (40 Stat. ——, c. 25). This act was the subject of long debate in each house of Congress. It limited in many ways the powers that had previously been conferred on the President to control the railways. By section 10 (Comp. St. 1918, § 3115¾j), it was provided:

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier; and any action which has heretofore been so transferred because of such federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control."

By reference to section 1 of the act (Comp. St. 1918, § 3115¾a) we are informed that the word "carriers" in the act refers to certain railroads and systems of transportation of which the President had theretofore taken possession and control.

The plaintiff claims that the words of section 10, "actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law," authorized him to bring suit against the defendant in the manner then authorized; that is, on March 21, 1918, when this act was approved, and that his action was so brought conformably to the laws of Nebraska then in force.

On behalf of the defendant, it is contended that these words, when viewed together with the whole act, and its scope and purpose are considered, merely allow the carrier to be named as a defendant, notwithstanding the fact that the United States is in control and operating the railways; that this was meant to give relief to claimants, so that they could express their grievances by suits in court instead of by appeals for executive or congressional clemency. It is also contended that by the preceding words of this section, which read:

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions

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of this act or any other act applicable to such federal control or with any order of the President"

—the President is given authority to make orders limiting the place where suits may be brought. The contention is that federal or state laws must give way when they are inconsistent either with the provisions of that act or with any order of the President, and that an order of the Director General of Railways is an order of the President by virtue of the terms of section 8 (Comp. St. 1918, § 3115¾h), as follows:

"That the President may execute any of the powers herein and heretofore granted him with relation to federal control through such agencies as he may determine."

It will be noted that by the terms of section 10, the carriers are not made subject to all federal and state laws, but are subject only to all laws and liabilities "as common carriers." In many relations to the public, carriers are governed, not by the rules applicable to common carriers, but by rules relating to them merely as corporations, as contracting parties, or as owing duties apart from the carriage of goods or passengers. The use of the words "common carriers" is thus distinguished from the word "carriers" which is used in the first sentence of this section and in many places in the same section and in other sections of the act. The probable effect of the discrimination in the use of these words was pointed out in the debate in the Senate (56 Cong. Rec. 3576, 3580). If Congress had desired to leave to the President the entire control and management of the railways of the United States by executive orders, the former act of Congress did not require amendment; or, if Congress desired to continue the grant notwithstanding the careful restrictions in the second act, it could have employed the words "carriers" or "railway companies," instead of the words "common carriers," and omitted the words "except so far as may be inconsistent with the provisions of this act."

The plain meaning of the words used in this section is that the laws then existing governing the relationship of the railways as common carriers were to remain in effect except when they were inconsistent with the terms of that act of Congress or of any other act applicable to federal control or with any order of the President. Orders of the President relating to the carriers' duties and liabilities, other than as common carriers, were not authorized by this portion of section ten. The authorization of the bringing of an action at law as then provided by law, against the railway company upon a cause of action, not arising against it as a common carrier, was therefore not subject to an order of the President limiting the districts in which such an action could be commenced, because of anything contained in this section of the act of Congress. Authority for the orders in question, as applied to an action of this kind, is sought in the provisions of section 9 (Comp. St. 1918, § 3115¾i), as follows:

"That the provisions of the act entitled 'An act making appropriations for the support of the army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved August twenty-

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such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred."

It may be conceded that the President would have been authorized to make these orders under the broad grant of power in the act of August 29, 1916, but by the terms of section 9 this grant thereafter remains in force "except as expressly modified and restricted in this act," and the President is granted further powers "necessary or appropriate to give effect to any of the powers herein and heretofore conferred." These words are a restriction of the powers previously vested in the President, so that he may not take action contrary to the provisions of this act of Congress. It was manifestly not the purpose of Congress in the elaborate provisions of this act to give authority by which the President might abrogate any or all of it. The provisions for financial management of the roads while under federal control and for the reimbursement of the owners; the right of the Interstate Commerce Commission, under the terms of section 10, to hear complaints of the justness of an order of the President establishing or changing rates, regulations, and practices of the carriers; the creation of a criminal offense, by the terms of section 11 (Comp. St. 1918, § 3115¾k), for violation of the act or interfering with the possession or use of the property of the carrier; the declaration in section 12 (Comp. St. 1918, § 3115¾l) that moneys and other property derived from the operation of the carriers during federal control are the property of the United States; and the declaration in section 14 (Comp. St. 1918, § 3115¾n), that the period of federal control shall not extend beyond 21 months after the proclamation of the President of the exchange of ratifications of the treaty of peace—are illustrations of powers, liabilities, and limitations that were not subject to annulment by an executive order. The general grant of power in section 9 is to give effect to the powers "herein and heretofore granted," and not to the powers herein or heretofore granted, and the prior act remains in force "except as expressly modified and restricted by this act."

The conclusion is that the plaintiff was authorized by the act of March 21, 1918, to bring his action at law according to the laws then in force, and that General Orders Nos. 18 and 18a of the Director General of Railroads were not effective to so limit that right as to require that a suit be brought only in the county or district of his residence or where the cause of action arose. This conclusion has not been reached without respectful consideration of the views of Judge Trieber in an unpublished opinion in the case of Wainwright v. Pennsylvania Railroad Company; but I am unable to concur in his conclusion that the statute authorizing suits to be brought as now provided by law may be limited by an executive order to the use of a part of the methods provided by law.

An order in accordance with these views will be entered in this case.


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RUTHERFORD v. UNION PAC. R. CO.

(District Court, D. Nebraska, Hastings Division. January 11, 1919.)

1. RAILROADS ⟹207—RECEIVERS—LIABILITY AS CARRIERS.
The receiver of a railroad company is a carrier as to goods and passengers transported.

2. RAILROADS ⟹5½, New, vol. 7A Key-No. Series—OPERATION UNDER GOVERNMENTAL CONTROL—"CARRIER."
As the Director General is the carrier since the President has taken control and possession of railroads under Act Aug. 29, 1916, § 1 (Comp. St. 1918, § 1974a), Order No. 50 of the Director General providing for his substitution in case of actions against railroad company for causes of action arising since governmental control is warranted notwithstanding Act March 21, 1918, c. 25, § 10 (Comp. St. 1918, § 3115¾j), providing that actions or suits may be brought against such carriers, for the Director General is the carrier, being analogous to a receiver, and it is proper that he be substituted in place of the railroad company.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Carrier.]

At Law. Action by Alfred T. Rutherford against the Union Pacific Railroad Company. On motion of the defendant to substitute William G. McAdoo, Director General of Railroads, as the defendant. Motion sustained.

Tibbets, Morey, Fuller & Tibbets, of Hastings, Neb., for plaintiff.
C. A. Magaw, of Omaha, Neb., and Ragan & Addie, of Hastings, Neb., for defendant.

MUNGER, District Judge. The defendant, the Union Pacific Railroad Company, has presented a motion to substitute William G. McAdoo, Director General of Railroads, as the defendant in this action in the place of the railway corporation. The action is one for damages for personal injuries inflicted on the plaintiff by the defendant while he was being transported as a passenger by the railroad company, and occurring since December 31, 1917, and was begun on October 26, 1918.

[1, 2] The defendant supports its motion by that part of Order No. 50 of the Director General of Railroads, dated October 28, 1918, which reads as follows:

"The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom."

The plaintiff claims that by the terms of section 10 of the act of Congress approved March 21, 1918 (Comp. St. 1918, § 3115¾j), "actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law," and therefore he is entitled to bring and maintain his action and to prosecute it to judgment against the railroad company named as defendant, and

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that the order of the Director General is not effective, because it is violative of this provision of the statute.

The question involved is the proper meaning of the word "carriers" as used in this statute. Before the enactment of this statute the President by his proclamation of December 26, 1917, had taken possession and control of the railroads of the United States, acting under the authority granted to him by the act of Congress approved August 29, 1916 (39 Stat. 645, c. 418, § 1 [Comp. St. 1918, § 1974a]). The proclamation had directed that this possession, control, and operation should continue to be exercised by William G. McAdoo, as Director General of Railroads, and unless he should otherwise provide by order, that the board of directors, receivers, officers, and employés should continue the operation of the railroads in the names of their respective companies. From and after the taking of possession of the railroads by the President, the corporations or persons who had previously controlled them ceased their functions and obligations as carriers. While goods and passengers continued to be carried, the carriage was conducted by the Director General. The acts of the former officers and employés, who retained their positions and conducted the details of operation, were the acts of the Director General. The part of section 10 of the act of March 21, 1918, on which the plaintiff relies, did not provide that actions at law might be brought by and against the railway corporations, but did provide that they might be brought against "such carriers," and this referred to the "carriers while under federal control" mentioned in the first part of the section. It would have been an anomaly to have given the actual control of the railroads to the Director General, and to have provided that suits arising out of his acts should be brought against the corporations who had been divested of authority over those acts. Moreover, the language which immediately follows that portion of the statute relied on by plaintiff demonstrates that the "carrier" who is subject to suit is the agent of the President who is operating the railroads. The language is:

> "And in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government."

The corporations or persons who had lost control and possession of the railroads would have no occasion to assert the defense that they were instrumentalities or agents of the government as to acts which occurred after their control had terminated.

Under these acts of Congress and the proclamation of the President the Director General is a carrier. He conducts the business of receiving and transporting goods and passengers for hire. A receiver of a railway company is a carrier as to the goods and passengers transported, (United States v. Nixon, 235 U. S. 231, 234, 35 Sup. Ct. 49, 59 L. Ed. 207; United States v. Ramsey, 197 Fed. 144, 146, 116 C. C. A. 568, 42 L. R. A. [N. S.] 1031), and the office of the Director General is analogous to that of a receiver of the railway companies.

By the acts of Congress, the President was given authority to exercise the control of the railroads by such agencies as he should deter-

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mine. He may appoint one or many persons, or one or many partnerships or corporations to carry out his will and to perform the business of carriage of goods and passengers over the several railroads. The purpose of Congress in the giving the right to bring suits against the carriers was to give the right of suit by or against any of such agencies as should be engaged in the actual control of the operations of the railroad after the President assumed control. The order of the Director General therefore does not conflict with the language of this statute, but is pursuant to and in execution of it, and was authorized by the power conferred on him.

The motion will be sustained.

DERBY v. STATEN ISLAND RAPID TRANSIT RY. CO. et al. DALY v. STATEN ISLAND RAPID TRANSIT RY. CO. DAILEY v. STATEN ISLAND RAPID TRANSIT RY. CO. et al.

(District Court, E. D. New York. June 18, 1918.)

NAVIGABLE WATERS ⟸20(5)—BRIDGES—INJURY TO VESSELS FROM OPERATION OF DRAW.

A railroad company, operating a drawbridge across Arthur Kill, *held* in fault for a collision between barges in tow and the bridge on a night when the bridge lights could be seen only a short distance, where the tug signaled for opening the draw when a mile distant and at intervals thereafter without answer until so close that it could not turn in time to avoid collision.

In Admiralty. Suits by Michael J. Derby and by Stewart J. Dailey against the Staten Island Rapid Transit Railway Company and the Lehigh Valley Transportation Company, and by Bartle Daly against the Staten Island Rapid Transit Railway Company. Decree for libelants against the Railway Company.

Herbert Green and Leo J. Curren, both of New York City, for libelants Derby and Daly.

Macklin, Brown & Purdy and Pierre M. Brown, all of New York City, for libelant Dailey.

Cravath & Henderson and Lyle H. Hall, all of New York City, for Staten Island Rapid Transit Ry. Co.

Harrington, Bigham & Englar and T. Catesby Jones, all of New York City, for Lehigh Valley Transp. Co.

GARVIN, District Judge. Three cases have been tried together. They arise from an accident occurring early February 1, 1917, when a tow of loaded coal boats swung around and collided with a drawbridge of the Staten Island Rapid Transit Railway Company, which connects Staten Island with New Jersey.

The tug Mahanoy, owned by the Lehigh Valley Transportation Company, with a tow loaded with coal, was coming through Arthur Kill, bound for New York, from Perth Amboy, N. J. The weather, if not actually foggy, was far from clear, and lights could not be distinguished for any great distance. The Mahanoy, proceeding east,

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a mile from the bridge, according to credible testimony which I believe, blew four whistles, to indicate an intention to go through the draw. According to the pilot, no reply was received from the bridge. When he first blew the whistle, he could see no lights on the bridge; he continued on his course, slowing down and blowing four whistles at intervals without receiving any reply. Finally, when the lights of the bridge came in sight, through the haze, his whistles were then answered by the bridge. He saw that the draw was closed, and that he would not be able to take his tow through. Whereupon he turned toward the Jersey shore, apparently as quickly as he could, but was unable to make the turn safely, and a part of the tow crashed into the bridge. Two boats were injured as a result, the Michael J. Derby, owned by Michael J. Derby, and the Clara B. Follette, owned by Stewart J. Dailey, and a third boat, the Columbia, owned by Bartle Daly, was injured, when the tow was swung around by the turning of the Mahanoy toward the Jersey shore. Each of the owners has brought an action, and each is now seeking to hold the Staten Island Rapid Transit Railway Company and the Lehigh Valley Transportation Company for the damage which his boat has sustained.

Considerable testimony was introduced to explain why the draw was closed. It appears that a freight train had stopped on the bridge, and that as soon as the engineer in charge of the bridge heard the four whistles of the tug, according to his testimony, he gave two whistles in reply, then blew an alarm, indicating that the bridge was closed. In view of the fact that the night was cloudy and a boat might approach the bridge without being able to see that it was closed, it was the duty of the engineer, upon finding that the bridge could not be opened for several minutes, to exercise greater care than usual. Under these circumstances, I am of the opinion that the Staten Island Rapid Transit Railway Company was at fault. The Lehigh Valley Transportation Company was not negligent. The authorities amply justify these conclusions. Dillon v. Pennsylvania R. R. Co. No. 32 and Staten Island Rapid Transit Co. (E. D. N. Y. Dec. 23, 1915), oral opinion; McCaffrey's Sons v. Staten Island Rapid Transit Ry. Co. and Lehigh Valley Railroad Co. (S. D. N. Y. Jan. 21, 1916), 256 Fed. —.

In Clement v. Metropolitan West Side E. Ry. Co., 123 Fed. 271, 59 C. C. A. 289, it was held:

"A bridge spanning a navigable river is an obstruction to navigation, tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated, that navigation may not be impeded more than is absolutely necessary; the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft, and maintained in suitable condition thereto. It is also his duty to place in charge those who are competent to operate the bridge, to watch for signals, and to open the bridge for the passage of vessels, and for the performance of such delegated duty he is responsible. It is also his duty to equip the bridge with proper lights, giving warning of the position of the bridge and of its opening and closing. If for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open

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for passage. She is not bound to heave to until the bridge has been swung or raised and locked, and to critically examine the situation before proceeding (City of Chicago v. Mullen, 54 C. C. A. 94, 116 Fed. 292), but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the signal, and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened (Manistee Lumber Company v. City of Chicago [D. C.] 44 Fed. 87; Central Railroad Company of New Jersey v. Pennsylvania Railroad Company, 8 C. C. A. 86, 59 Fed. 192), when it becomes the duty of the vessel, if possible, to stop, and, if necessary, to go astern."

Decree accordingly, in each case.

UNITED STATES v. SWELGIN.

(District Court, D. Oregon. May 22, 1918.)

No. 7700.

ALIENS ⇐71½, New, vol. 7 Key-No. Series—NATURALIZATION—SETTING ASIDE CERTIFICATE OF CITIZENSHIP.

In suit to cancel certificate of naturalization issued to defendant on ground that, at time defendant was naturalized and during the five-year period immediately preceding, he was not attached to the principles of the Constitution of the United States or well disposed to the order and happiness of the same, and that he had been and was a member of an organization commonly called the I. W. W., evidence *held* to show that the I. W. W. advocated anarchy and the overthrow of established order, and to warrant the annulment of the certificate of naturalization; defendant admitting his adherence to such principles.

In Equity. Bill by the United States against Carl Swelgin to vacate and annul a certificate of naturalization. Decree entered annulling certificate.

Bert E. Haney, U. S. Atty., and Robert R. Rankin, Asst. U. S. Atty., both of Portland, Or.

C. H. Libby, of Portland, Or., for defendant.

WOLVERTON, District Judge. This is a suit to vacate and annul a certificate of naturalization. The defendant, Carl Swelgin, is a native of Germany. On January 3, 1913, he filed a petition in the circuit court of the state of Oregon for the county of Coos, praying for his naturalization as a citizen of the United States. On April 25, 1913, an order of the court was made and entered admitting him as a citizen, and on May 27th a certificate of admission was issued by the clerk of the court.

The bill for vacation of the certificate alleges, that upon the dates named, and during the five-year period immediately preceding the date of the filing of said petition for naturalization—

"the said defendant, Carl Swelgin, was not, has not been, and is not now attached to the principles of the Constitution of the United States, nor is the said defendant well disposed to the good order and happiness of the same, nor is said defendant of good moral character, and that said defendant has been

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since the year 1911, and now is, a member of the organization known and entitled 'Industrial Workers of the World,' which organization is more commonly known as and called the 'I. W. W.'; that defendant has been an organizer in said organization, and that said organization has advocated and does advocate resistance to the existing governmental authority of the United States, and the complete control and ownership of all property in the United States through the abolition of all other classes of society; and that such purposes of said organization are to be accomplished without regard for right or wrong, but by the use of such unlawful means and methods known as 'sabotage' and direct action."

Then the preamble is set out, which I will not read. It is then further alleged that defendant's certificate of naturalization was procured by deception and fraud practiced upon the court, consisting of false representations and concealment of facts, by which the court was misled and imposed upon, and induced to make and render its order and judgment directing the issuance of said certificate of naturalization.

The proofs show, and the defendant admits, that he became a member of the organization known as the "Industrial Workers of the World" in December, 1911, and was such member at the time he was admitted as a citizen of the United States, and ever since has been a member thereof. I should qualify that, because the witness has said that there was a time following August, 1913, for a period of two or three years, that he was not a member; but he thereafter did become a member, and has continued such ever since. Not only this, but he has been active in the order, in promoting its propaganda and furthering the cause that the order espouses. He asserts his firm belief in the principles enunciated by the preamble and constitution of the order, and admits that he is in full sympathy with the propaganda and practices thereof. Among other things, he indorses the sabotage recently practiced upon the timber and lumber industries in the Northwest, and when asked if he was willing to join the military forces of this country against Germany, he answered, in effect, that he entertained conscientious scruples against entering the army. He further states that the views he entertained respecting these subjects at the time and previous to his naturalization were the same as he now holds and adheres to. So that it appears that his attitude of mind then respecting the principles and practices of the order of the Industrial Workers of the World was the same as his attitude now, to which he firmly adheres.

No further evidence is necessary for establishing his purposes and designs as it relates to organized government and the peace and tranquility of society, and we have only to inquire, touching the doctrine and principles of the organization, whether they are promotive of or inimical to the maintenance and stability of organized government, and whether they are calculated to promote peace and good order in society, or whether they are adapted by design to the demoralization and degradation thereof.

I should say in this connection that the defendant has said that he indorses the preamble and constitution of this organization, and that further than that he is not acquainted with its principles and purposes; but, having actively engaged in the organization, and having been actively engaged in the furtherance of the cause in which the organiza-

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be no question in the mind of the court that he was thoroughly acquainted with all its principles and propaganda. Let us therefore recount some of the doctrines, principles, and practices of the order. The preamble makes this enunciation:

"Between these two classes [the working class and the employing class] a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system."

The pledge is in these words:

"I do solemnly pledge my word and honor that I will obey the constitution, rules, and regulations of the Industrial Workers of the World, and that, keeping always in view its fundamental principles and final aims, I will, to the best of my ability, perform the task assigned to me. I believe in and understand the two sentences, 'The working class and the employing class have nothing in common,' and 'Labor is entitled to all it produces.'"

The tactics or methods of the I. W. W. are given by Vincent St. John, an adherent of the cause. I read only slight excerpts:

"As a revolutionary organization the Industrial Workers of the World aims to use any and all tactics that will get the results sought with the least expenditure of time and energy. The tactics used are determined solely by the power of the organization to make good in their use. The question of 'right' and 'wrong' does not concern us.

"It aims, where strikes are used, to paralyze all branches of the industry involved, when the employers can least afford a cessation of work—during the busy season and when there are rush orders to be filled.

"Failing to force concessions from the employers by the strike, work is resumed and 'sabotage' is used to force the employers to concede the demands of the workers.

"All supplies are cut off from strike-bound shops. All shipments are refused or missent, delayed and lost if possible. Interference by the government is resented by open violation of the government's orders, going to jail en masse, causing expense to the taxpayers—which are but another name for the employing class.

"In short, the I. W. W. advocates the use of militant 'direct action' tactics to the full extent of our power to make good."

Sabotage is defined by its authors and adherents to be:

"Any conscious and willful act on the part of one or more workers intended to slacken and reduce the output of production in the industrial field, or to restrict trade and reduce the profits in the commercial field, in order to secure from their employers better conditions or to enforce those promised or maintain those already prevailing, when no other way of redress is open.

"B. Any skillful operation on the machinery of production intended not to destroy it or permanently render it defective, but only to temporarily disable it and to put it out of running condition in order to make impossible the work of scabs and thus to secure the complete and real stoppage of work during a strike."

And again:

"Sabotage means either to slacken up and interfere with the quantity, or to botch in your skill and interfere with the quality of capitalist production or to give poor service. Sabotage is not physical violence; sabotage is an internal, industrial process. It is something that is fought out within the four walls of the shop. And these three forms of sabotage—to affect the quality, the quantity and the service—are aimed at affecting the profit of the employer. Sabotage is a means of striking at the employer's profit for the pur-

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pose or forcing him into granting certain conditions, even as workingmen strike for the same purpose of coercing him. It is simply another form of coercion."

I read from a pamphlet entitled "On the Firing Line":

"The program of the I. W. W. offers the only possible solution of the wage question whereby violence can be avoided, or at the very worst, reduced to a minimum. To all opponents of the organization wherever found, we desire to state that this organization will to the best of its power and ability, bend every effort towards making that program effective. We also desire to serve notice upon the ruling class and all its defenders, that whatever form the struggle may take, we are determined to continue in spite of all odds until victory has been achieved by the working class. If the ruling class of to-day decide as its prototypes of the past have decided, that violence will be the arbiter of the question, then we will cheerfully accept their decision and meet them to the best of our ability and we do not fear the result.

"The Industrial Workers of the World is without doubt the most revolutionary body in the world to-day.

"Being propertyless and landless they have no patriotism nor reason for patriotism.

"The abolition of the wage system and the creation of a new social order is its ideal. For this ideal the members will suffer hunger, brave the blacklist, rot in the bastile, and fight—ever fight—for the freedom that awaits them when the rest of the workers awaken.

"To it has come the knowledge that justice, liberty, rights, etc., are but empty words, and power alone is real. Refusing to even try to delegate its power, it stands committed to the policy of direct action.

"It strives to have the workers realize the tremendous power tied up in their muscle and mind—a power that represents the measure of the masters' weakness. The workers are asked to withhold their labor power, to refuse to apply it to the machine, or to apply it so that the machine does not function properly, and thus defeat the masters.

"They [the workers] will seize and hold the machinery of production and distribution and operate it in their own interests."

Again, from a pamphlet entitled "Why Strikes are Lost":

"Thus organized the workers will use all means that may be at their command in their battle for control. Strikes, irritation strikes, passive resistance strike, boycott, sabotage, political action, and general strikes in industrial plants, will all be means applied with precision, and changed whenever conditions so dictate."

The "Social General Strike," to which the order is committed, is thus defined:

"The profoundest conception of the general strike, however, the one pointing to a thorough change of the present system; a social revolution of the world; an entire new organization; a demolition of the entire old system of all governments—is the one existing amongst the proletarians of the Roman race (Spain and Italy). For them the general strike is nothing less than an introduction to the social revolution. Therefore we call this the general strike, to distinguish it from general strikes for higher wages, or for political privileges (political mass strikes)—'The Social General Strike.' This conception of the general strike will be dealt with in this treatise.

"It is therefore not of such great importance for the propagandists and followers of the general strike theory (as, for instance, the Spanish and French workers understand it) to get all the workers to lay down their tools at the same time, as it is to completely interrupt production in the whole country, and stop communication and consumption for the ruling classes, and that for a time long enough to totally disorganize the capitalistic society, so that after the complete annihilation of the old system, the working people can

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take possession through its labor unions of all the means of production, mines, houses, the land—in short, of all the economic factors."

This pamphlet then deals with divers subjects illustrating the application of the doctrines, and culminates with this climax:

"With a free society, without class rule and exploitation, a society of free co-operation, we have that which corresponds with the absence of government, 'Anarchism.'"

I read a stanza which purports to be one of the songs of the order. It is styled "The Red Flag":

"The People's flag is deepest red,
It shrouded oft our martyred dead;
And ere their limbs grew stiff and cold
Their life-blood dyed its every fold.

"Chorus:

"Then raise the scarlet standard high
Beneath its folds we'll live and die,
Though cowards flinch and traitors sneer,
We'll keep the red flag flying here."

"The Lumber Jack," a publication of the order, in an editorial exclaims:

"The 'Red Flag,' and sing it always to the courts while the people stare and wonder."

In this relation, it may be stated that the doctrine of the order carries its adherents to a disregard of and a resistance to the orders and judgments of the courts, through organized protest and calumny, and violence, if need be, to accomplish their purposes.

I read further a few extracts from the "Industrial Worker," published at Spokane, Wash. This is the issue of April 4, 1912, and the excerpt is found in column 2, page 2, of that issue. It is an editorial under the title, "Our Labor Problem":

"We accept what benefits us from the socialist propaganda, we accept that portion of anarchist action that is of value, and we retain that which experience proves to be an aid in the class struggle."

In the issue of May 8th it is declared:

"The I. W. W. opposes the institution of the state. It holds that state or governmental control of industry would merely introduce a different form of slavery. Government implies governors and governed, a ruling and a subject class. No man is great enough or good enough to rule another.

"The I. W. W. is creating its own ideas of morality and ethical conduct, as opposed to the current conceptions of what constitutes 'right' and 'wrong.'"

I have read only a very meager number of these excerpts which have been introduced in evidence; but they serve to illustrate the principles and the practices of the order. They are thoroughly indorsed, evidently, by the adherents of the order and by those who seem to be able to expound its doctrines. Other expressions may be found, such as these:

"Towards the existence of government the I. W. W. is openly hostile.

"It is anti-patriotic.

"The kernel of evil lies in the very existence of the state, and violence is an economic factor."

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No one can read these pamphlets and pronunciamento of the order without concluding, by fair and impartial deduction, that it is not only ultra socialistic, but anarchistic. It is really opposed to all forms of government. It advocates lawlessness, and constructs its own morals, which are not in accord with those of well-ordered society. Its adherents are anti-patriotic. They own no allegiance to any organized government. And I am unable to understand by what right such of them as come from another country can claim that they are entitled to be admitted to citizenship under the Stars and Stripes. The very oath they take, avowing their allegiance to this government, is to them a worthless ceremony, for they do not intend to submit themselves to its Constitution, laws, rules, and regulations, nor to defend it in time of insurrection, or against an aggression from abroad, or when it is at war with other nations.

When, therefore, the defendant declared that he was attached to the principles of the Constitution of the United States, and was well disposed to the good order and happiness of the same, he made avowal of that which was not in his heart, and thereby deceived the court. And, further, he was a disbeliever in and opposed to organized government, and he fraudulently misled the court as to that.

So that the government's case is clear that defendant's certificate of naturalization was procured by fraud and deception imposed upon the court which directed its issuance, and the annulment of the certificate must follow.

UNITED STATES v. NELSON.

(District Court, E. D. New York. June 24, 1918.)

1. INDICTMENT AND INFORMATION ⇐3—NECESSITY OF INDICTMENT—NATURE OF PUNISHMENT—REQUIRING CONVICTS TO LABOR—FEDERAL CONVICTS.
   Greater New York Charter, § 700, requiring inmates of all criminal jails of the city to be employed in labor, does not apply to federal convicts sentenced to such jails, unless their sentence includes hard labor; any other construction necessarily meaning that no crime against the United States involving imprisonment in a New York City penal institution could be prosecuted otherwise than by indictment.
2. INDICTMENT AND INFORMATION ⇐3—SELECTIVE DRAFT LAW—SALE OF LIQUOR TO SOLDIERS—PROSECUTION.
   A prosecution for selling liquor to soldiers in uniform, in violation of Selective Draft Act May 18, 1917, § 12 (Comp. St. 1918, § 2019a), may be instituted by information.

Criminal prosecution by the United States against Oscar Nelson. On motion to set aside verdict. Denied.

Melville J. France, U. S. Atty., of Brooklyn, N. Y., for the United States.

Robert H. Elder, of New York City, for defendant.

GARVIN, District Judge. Defendant has been convicted of the crime of violating section 12 of the act of Congress known as the Selective Service Law approved May 18, 1917 (40 Stat. 82, c. 15

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[Comp. St. 1918, § 2019a]). The prosecution was based upon an information. Defendant moves to set aside the verdict of the jury, claiming that the penalty, which may be imprisonment for not more than 12 months, is an infamous punishment, because it may be at hard labor, and that a crime which may be punished by a sentence of that character must be prosecuted by indictment.

The Fifth Amendment to the Constitution of the United States reads:

"No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

Defendant claims that in the state of New York, where the United States Court sentences to a state penal or reformatory institution, it is necessarily a sentence at hard labor. Rev. St. § 5539 (Comp. St. St. § 10523), provides:

"Whenever any criminal, convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any state or territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the state or territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such state or territory."

Section 171 of the New York Prison Law (Consol. Laws, c. 43) provides:

"The superintendent of state prisons, the superintendents, managers and officials of all reformatories and penitentiaries in the state, shall, so far as practicable, cause all the prisoners in said institutions, who are physically capable thereof, to be employed at hard labor for not to exceed eight hours each day. * * *"

Section 5541 of the Revised Statutes (Comp. St. § 10527) provides:

"In every case where any person convicted of any offense against the United States is sentenced * * * for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the Legislature of the state for that purpose."

As a sentence for more than one year cannot be imposed in the case at bar, and as the commitment, therefore, cannot be executed in any state jail or penitentiary within the district or state where this court is held, the commitment must be to some county jail or institution in the city of New York.

[1] Defendant claims, further, that if the court is of the opinion that the only institution to which it has power to sentence the defendant is to some local institution within the city of New York, that, too, is necessarily a sentence at hard labor, because of section 700 of the Charter of the City of New York (Laws N. Y. 1901, c. 466) which provides:

"Every inmate of an institution under the charge of the commissioner of correction, and this includes all the criminal jails in the city, whose age and health will permit, shall be employed in quarrying or cutting stone, or in

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such articles as may be required for ordinary use in the institutions under the control of the commissioner, or for the use of any department of the city of New York, or in preparing and building sea walls upon islands or other places belonging to the city of New York upon which public institutions now are or may hereafter be erected, or in public works carried on by any department of the city, or at such mechanical or other labor as shall be found from experience to be suited to the capacity of the individual."

Section 702 of the Charter provides:

"The hours of labor required of any inmate of any institution under the charge of the commissioner shall be fixed by the commissioner. In case any person confined in any institution in the department shall refuse or neglect to perform the work allotted to him by the officer in charge of such institution, * * * it shall be the duty of the officer in charge of such institution in which such person or persons is or are confined to punish him or them by solitary confinement, and by being fed on bread and water only, for such length of time as shall be considered necessary. * * *"

The only punishments provided by Congress for a violation of section 12 of the Selective Service Law are a fine, or imprisonment for not more than 12 months, or both. Nothing whatever is said about hard labor being a part of the punishment, and therefore the court has no power to include it in the sentence.

In view of the foregoing, I am of the opinion that the provisions of sections 700 and 702 of the Charter of the City of New York, are not intended to authorize the employment of federal prisoners at hard labor unless the sentence so directs. Federal prisoners must of course be subject to the discipline of local jails, but they cannot be there confined at hard labor under a sentence imposed as a result of having committed the crime of which the defendant herein has been convicted. Any other construction of the Charter would necessarily mean that no crime against the United States involving imprisonment in a penal institution of the city of New York may be prosecuted except by indictment.

It was said by Hughes, J., in United States v. Smith (C. C.) 40 Fed. 755, at page 760:

"I do not agree with counsel, who resist the filing of this information, that the term 'state prison' was used by the Supreme Court in the general sense of any jail or lockup of a county or city owned by the state. Such a construction would lead us to the absurd conclusion that the Supreme Court meant to hold that no offense involving confinement, however brief, in a state or city jail or station house could be prosecuted by information."

Not decisive of the point involved, but indicating the attitude of the court, is the decision of Paul, J., in United States v. Cobb (D. C.) 43 Fed. 570, at page 571:

"Section 5541 of the Revised Statutes provides that: 'In every case where any person convicted of any offense against the United States is sentenced * * * for a longer period than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the Legislature of the state for that purpose.' Under this provision, when a statute prescribes a punishment by confinement not exceeding one year, the convict cannot be confined in any state prison or penitentiary.

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section 5512 of the Revised Statutes, in which the punishment defined may be confinement for a period of three years, and under which, if convicted, he may be confined in a state prison or penitentiary, according to the provisions of section 5541, Rev. St., above quoted, it is clear that he cannot be prosecuted by information, but only on a presentment or indictment of a grand jury. The demurrer in this case is therefore sustained. In the case against John Smith and H. A. Cobb, who are prosecuted under the provisions of section 5506 of the Revised Statutes, the imprisonment prescribed by the statute cannot exceed one year; and therefore, if convicted, their confinement in any state jail or penitentiary is inhibited by the provisions of section 5541, quoted above.

"Counsel for the defendants contend that section 5546 of the Revised Statutes [Comp. St. § 10547] removes the inhibition prescribed in section 5541, and allows the court to send the convict to a state prison or penitentiary where the period of confinement prescribed by the statute is for the term of one year or less. The court does not concur in this view. Section 5546 reads as follows: 'Sec. 5546. All persons who have been, or who may hereafter be, convicted of crime, by any court of the United States, whose punishment is imprisonment in a district or territory where, at the time of conviction, * * * there may be no penitentiary or jail suitable for the confinement of convicts, or available therefor, shall be confined during the term for which they have been or may be sentenced * * * in some suitable jail or penitentiary in a convenient state or territory to be designated by the attorney general, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the district or territory where the conviction has occurred; and, if the conviction be had in the District of Columbia, in such case, the transportation * * * shall be by the warden of the jail of that district; the reasonable, actual expense of transportation, necessary subsistence and hire and transportation of guards and the marshal, or the warden of the jail in the District of Columbia, only, to be paid by the Attorney General out of the judiciary fund. But if, in the opinion of the Attorney General, the expense of transportation from any state, territory, or the District of Columbia, in which there is no penitentiary, will exceed the cost of maintaining them in jail in the state, territory, or the District of Columbia during the period of their sentence, then it shall be lawful so to confine them therein for the period designated in their respective sentences.'

"Section 5546 neither by express words nor by implication repeals, modifies, or changes the provisions of section 5541. Section 5546 is legislation on a subject entirely different from that of section 5541. Its object is to define the duties of the attorney general when there is no jail or penitentiary in the district or state where the person is convicted in which such person may be confined. It preserves throughout the distinction between jail, as one class of prisons, and state jail or penitentiary, as another class of prisons. It could not have been contemplated that a person convicted under a statute where the punishment prescribed is confinement in jail could, by reason of being sent to another state, because there was no jail in the district or state where he was convicted where he could be confined, be confined in a state prison or penitentiary of the other state to which he is sent. The mere fact of the Attorney General engaging prisons in another state than that in which the convict is sentenced cannot change the character of the convict's punishment, or make that infamous which was not so by the sentence, nor authorize the court to confine in a state prison or penitentiary, with or without hard labor, a person who has been convicted and sentenced under a statute which prescribes imprisonment alone as the punishment, and excludes the idea of imprisonment in a state jail or penitentiary, with or without hard labor. Any other construction would lead to the unreasonable conclusion that a person convicted under a statute that imposes confinement for a term not exceeding one year, and that does not impose hard labor as a part of the punishment, and sentenced to confinement for one month, could be sent to a state jail or penitentiary. The only case where a person can be sentenced to a jail or penitentiary not exceeding one year is where the statute prescribes

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hard labor as part of the punishment, and leaves the term of imprisonment in the discretion of the court, as in the Case of Robinson,[1] cited by counsel for defendants, which was an indictment under section 5406, tried at a former term of this court. In such a case, from the very character of the punishment inflicted, the convict has to be sent to a state jail or penitentiary. If the theory advanced by counsel for defendants was correct, that, under the provisions of section 5546, a person sentenced to imprisonment for a period not exceeding one year can be sent to a state prison or penitentiary, it would follow that there are no crimes against the United States the punishment for which is imprisonment, that can be proceeded against by information."

[2] In conclusion, it may be observed that the constitutional amendment relied upon by the defendant, by its very language does not require an indictment, even for a capital or otherwise infamous crime, in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. This gives the government the right, in time of war, to prosecute by information a violation of section 12 of the Selective Service Law, even if such a violation be held to be an infamous crime, for such a crime is a case arising in the land or naval forces in actual service in time of war. The Fifth Amendment does not provide that the cases must be against the land or naval forces. It is clearly much broader and refers to such crimes as involve the land or naval forces in their origin. Section 12 of the Selective Service Law forbids the sale of intoxicating liquor to a man in uniform in the military service of the United States, and therefore a violation of its provisions is now a crime arising in the land forces in actual service in time of war.

The motion to set aside the verdict of the jury must be denied.

In re FOOD CONSERVATION ACT.

(District Court, N. D. New York. December 26, 1918.)

1. CRIMINAL LAW ⟸1209—DOUBLE PUNISHMENT.

When a defendant has been indicted, convicted, and punished under Act Aug. 10, 1917, § 15 (Comp. St. 1918, § 3115⅛d), for importing distilled spirits in violation of its prohibition, he cannot be proceeded against in rem for forfeiture of the vehicles used in bringing in such spirits, under Rev. St. § 3062 (Comp. St. § 5764), but the spirits, being unlawfully in the United States, may be seized and condemned.

2. CRIMINAL LAW ⟸1206(1)—STATUTE CREATING NEW OFFENSE—PUNISHMENT.

When a statute creates a new offense and fixes the penalty, or prescribes a specific punishment, only that punishment can be inflicted which the statute prescribes.

3. JUDGMENT ⟸559—CONCLUSIVENESS—"ACQUITTAL"—"CONVICTION."

An "acquittal," as between the same parties, establishes once for all that the acts alleged were not committed by the one charged with the offense, while a "conviction" is an adjudication, once for all, as between the same parties, that the acts alleged were committed, and in such case the consequences prescribed by law must follow.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Acquittal; Conviction.]

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

[1] No opinion filed.

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In the matter of violations of Food Conservation Act Aug. 10, 1917, § 10, by bringing into the United States distilled spirits.

The question arises under section 15, chapter 53, Act Aug. 10, 1917, 40 Stat. 282 (Comp. St. 1918, § 3115⅛*l*), whether or not those who violate the act by bringing into the United States from the Dominion of Canada, or any foreign country, distilled spirits, forfeit to the United States, not only such distilled spirits, but the vehicle used in so importing or bringing in such articles.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y., for the United States.

Geo. J. Moore, of Malone, N. Y., for certain defendants.

RAY, District Judge. [1] Act Aug. 10, 1917, c. 53, § 15, 40 Stat. 282 (Comp. St. 1918, § 3115⅛*l*), provides:

"That from and after thirty days from the date of the approval of this act no foods, fruits, food materials, or feeds shall be used in the production of distilled spirits for beverage purposes; * * * *nor shall there be imported into the United States any distilled spirits.* * * * Any person who willfully violates the provisions of this section, * * * or who shall import any such liquors without first obtaining a license so to do when a license is required under this section, * * * shall be punished by a fine not exceeding $5,000, or by imprisonment for not more than two years, or both."

This provision forbids and prohibits the importation—that is, bringing—into the United States of any distilled spirits, and makes such bringing in a crime punishable by fine or imprisonment, and the fine and term of imprisonment are specified. This section is not a part of the customs laws, providing for the importation of "dutiable" goods.

Section 3096, c. 11, R. S. U. S. (Comp. St. § 5808), "Provisions Applying to Commerce with Contiguous Countries," provides:

"All persons may import any merchandise *of which the importation shall not be entirely prohibited*, into the districts which are or may be established on the northern and northwestern boundaries of the United States, in vessels or boats of any burden, and in rafts or carriages of any kind or nature whatsoever."

This does not permit the importation of distilled spirits, as, since the enactment of August 10, 1917, the importation has been absolutely and wholly prohibited, and even before that a duty was imposed on distilled spirits, and they could only be imported through the custom house on payment of the duties imposed.

Section 3098, R. S. U. S. (Comp. St. § 5810), provides that:

"The * * * driver of any carriage or sleigh, and every other person coming from any foreign territory adjacent to the United States into the United States, *with merchandise subject to duty*, shall deliver, immediately on his arrival within the United States, a manifest of the cargo or loading of such * * * carriage or sleigh, or of the merchandise so brought from such foreign territory, at the office of any collector or deputy collector which shall be nearest to the boundary line, or nearest to the road or waters by which such merchandise is brought"

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not done, or if the custom house be passed by—

"the merchandise *subject to duty*, and so imported, shall be forfeited to the United States, *together with the vessel, boat* * * * *or the carriage or sleigh*, * * * *drawing the same*, * * * and such master * * * or other importer shall be subject to a penalty of four times the value of the merchandise so imported."

This section, providing for the forfeiture of the vehicle in which goods are brought into the United States without entry or payment of duty, applies to vehicles drawing or transporting "dutiable goods" only.

Prior to the enactment of the law of August 10, 1917, distilled spirits were subject to duty, and hence, if brought in in violation of law—that is, without payment of duty—the spirits and vehicle in which transported could be seized as forfeited under the provisions of the statute quoted. I find no express and specific provision for the forfeiture and seizure of goods brought into the United States, where the importation is absolutely prohibited by statute, or of the vehicle, etc., by which such goods or merchandise was drawn or in which carried. Such merchandise is not dutiable. But I do find the following which I think applicable in this case. Section 3059, R. S. U. S. (Comp. St. § 5761), specifies the officers who may make searches and seizures, and section 3061 (section 5763) provides that any such officer—

"may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, * * * and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast or person, * * * which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person, in possession or charge, or by, in, or upon such vehicle, beast or otherwise, he shall seize and secure the same for trial."

Section 3062 (section 5764) then provides:

"Every such vehicle and beast, or either, together with teams or other motive power used in conveying, drawing, or propelling such vehicle or merchandise, and all other appurtenances * * * shall be subject to seizure and forfeiture."

These sections were enacted in 1866 and are still in force. Under their provisions, standing alone, the distilled spirits brought into the United States from Canada since the act of August 10, 1917, became a law, as well as the vehicles in which same were brought, become subject to seizure and forfeiture, inasmuch as the distilled spirits were and are brought in "contrary to law." The bringing in is absolutely prohibited. But section 15 of the act of August 10, 1917, provides a punishment by fine or imprisonment for so bringing in or importing the liquors, and makes no reference directly or indirectly, or by inference, to any added punishment or penalty by way of forfeiture of the merchandise, liquors, so brought in, or of the vehicle in which transported into the United States. Is the punishment prescribed by section 15 of

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the act of 1917 full, complete, comprehensive, exclusive, and final, and does it exclude or preclude the enforcement of the forfeiture prescribed by sections 3061 and 3062, R. S., above referred to? Section 3082, R. S. U. S. (Comp. St. § 5785), provides:

"If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

Here we have provisions imposing a fine or imprisonment and also a forfeiture for fraudulently or knowingly importing or bringing into the United States, or assisting in so doing, "any merchandise contrary to law." But I do not see that those who violate the act of 1917, by bringing in distilled spirits, can be punished under this section, as the punishment is prescribed by the act of 1917 itself. The offenders cannot be punished under both sections, and evidently it was the purpose to have those who bring in distilled spirits in violation of the act of August 10, 1917, punished under the provisions of that act and as therein prescribed. In Daigle v. United States et al., 237 Fed. 159, 163, 150 C. C. A. 305, it was held that potatoes and the vehicle in which transported were subject to seizure and forfeiture; such potatoes having been imported and brought into the United States contrary to law, the importation of such potatoes having been prohibited by the Plant Quarantine Act (Act Aug. 20, 1912, c. 308, § 7, 37 Stat. 317 [Comp. St. § 8758]), which is quoted (237 Fed. on page 162, 150 C. C. A. 308) in the opinion.

That act of itself did not provide for seizure and forfeiture of the potatoes, or of the vehicle in which transported into the United States, but did contain the following:

"Sec. 10. That any person who shall violate any of the provisions of this act * * * shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding one year, or both such fine and imprisonment, in the discretion of the court." Comp. St. § 8762.

It does not appear that any criminal proceedings had been taken against the offenders, or fine or imprisonment imposed. So far as appears, the question was not raised that the person or persons importing the potatoes contrary to law could not be punished by fine or imprisonment, and compelled also to submit to the seizure and forfeiture of the vehicles, etc., in which same were carried or transported. Nothing is said in the case on that subject.

In United States v. McKee, 4 Dill. 128, Fed. Cas. No. 15,688, the defendant had been indicted and convicted and punished for having conspired with certain distillers, in violation of the Revised Statutes of

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the United States, to defraud the United States by unlawfully removing distilled spirits without payment of the taxes thereon. He was afterwards sued in a civil action by the United States under another section of the Revised Statutes to recover a penalty given thereby of double the amount of the taxes lost by such conspiracy and fraud. The transactions giving rise to the criminal prosecution and punishment and the liability to the penalty were the same. It was held that the suit for the penalty was barred by the criminal trial, conviction, and punishment, as defendant could not be twice punished for the same offense. This case is cited, quoted, and approved in Coffey v. United States, 116 U. S. 436, at page 445, 6 Sup. Ct. 437, 29 L. Ed. 684.

In United States v. One Distillery (D. C.) 43 Fed. 846, it was held that:

"After an officer and stockholder of a corporation engaged in distilling is convicted for a violation of the internal revenue law, an action cannot be maintained to enforce the forfeiture of the corporation's property for the same offense, even though the forfeiture is resisted only by the other stockholders—following U. S. v. McKee, 4 Dill. 128 [Fed. Cas. No. 15,688]."

In United States v. Olsen (D. C.) 57 Fed. 579, it is held:

"A judgment of forfeiture entered against a vessel under Act July 5, 1884, § 10 (23 Stat. 117), for an act of the master in bringing Chinese laborers from a foreign port and landing them in the United States, in violation of section 2 of the act, cannot be pleaded by the owner of the vessel in bar to an indictment for aiding and abetting the act of the master, as forbidden in section 11 of the act. U. S. v. McKee, 4 Dill. 128 [Fed. Cas. No. 15,688]; Coffey v. U. S., 6 Sup. Ct. 437, 116 U. S. 436 [29 L. Ed. 684]; and U. S. v. One Distillery [D. C.] 43 Fed. 846, distinguished."

The Olsen Case is not necessarily in point, as all the acts of the master of the vessel which subjected the vessel to seizure and forfeiture, and on which acts the forfeiture of the vessel was based, were not necessarily those of the owner of the vessel in aiding and abetting the bringing in of the Chinese persons. The owner lost his vessel because of the unlawful acts of the master. Under the indictment found against the owner he was to be tried for aiding and abetting. The forfeiture was not incurred because of those acts of aiding and abetting, although the aiding and abetting must have been a part of the acts of the master. They must have acted in concert.

It is somewhat difficult to reconcile the Olsen Case with the McKee Case and the One Distillery Case. When a statute declares that if certain acts are done, which are made unlawful, the party doing them shall be punished on conviction by fine or imprisonment, or both, and also declares that the instrumentalities used in the commission of such offense shall also be subject to seizure and forfeiture to the United States, it well may be that indictment, conviction, and sentence do not constitute a bar to a proceeding in rem to enforce the forfeiture, inasmuch as the criminal prosecution and punishment and the proceeding in rem to enforce the forfeiture as a part of the punishment are necessarily separate and distinct proceedings, but both are pursued necessarily to enforce the penalty and punishment prescribed for the doing of the unlawful acts, viz. fine or imprisonment, it may be both,

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and forfeiture of the instrumentalities used in the commission of the offense. It is all one punishment, although in a sense cumulative.

But when we have a statute, complete in and of itself, which makes the doing of certain prohibited acts, therein specified, a crime, and such statute also prescribes the punishment to be inflicted in case of violation, and such statute makes no reference to other statutes, it is going far to say that we may go to some other prior statute which in general language provides for the forfeiture to the United States of all instrumentalities used in the commission of offenses of that character. If the forfeiture is enforced, it is in the nature of and in fact amounts to the imposition of an added punishment, not found in or provided for in the statute which makes the doing of the prohibited act a crime and which also specifies the punishment to be inflicted in case of a violation. It is settled law that when a person is accused of a crime, indicted, tried, convicted, or acquitted, as the case may be, by a court of competent jurisdiction, and punished, if convicted, or acquitted, he cannot again be indicted, tried, convicted, and punished for the commission of that offense, or again tried.

"Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense. * * * In this respect the criminal law is in unison with that which prevails in civil proceedings." Hawkins, J., in Queen v. Miles, 24 Q. B. D. 423, 431, adopted and approved by the Supreme Court in United States v. Oppenheimer, 242 U. S. 85, 88, 37 Sup. Ct. 68, 61 L. Ed. 161.

In Coffey v. United States, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684, which was an action on information against certain distilled spirits and apparatus used in the distillation of same, for the forfeiture thereof, the defendant pleaded a prior judgment of acquittal on a criminal information filed against him by the United States for the same acts, founded on the same sections of the Revised Statutes as was the proceeding in rem for forfeiture. The Supreme Court, overruilng and reversing the courts below, held that, although the particular statutes —section 3257, R. S. U. S. (Comp. St. § 5993), and section 3450, R. S. U. S. (Comp. St. § 6352)—contained each a provision for the forfeiture of the apparatus and the imposition of a fine with imprisonment in the one case (section 3257), and for a forfeiture of the goods, etc., and the imposition of a fine or penalty in the other (section 3450), and in the third case under section 3453, R. S. U. S. (Comp. St. § 6355), for a forfeiture of the goods, etc., only, that the trial and acquittal on the criminal charge was conclusive in his favor in the suit for the forfeiture. In the criminal prosecution the jury had found that the acts charged had not been committed, and, the parties being the same, the court said:

"It is true that section 3257, after denouncing the single act of a distiller defrauding or attempting to defraud the United States of the tax on the spirits distilled by him, declares the consequences of the commission of the act to be (1) that certain specific property shall be forfeited; and (2) that the offender shall be fined and imprisoned. It is also true that the proceeding to enforce the forfeiture against the res named must be a proceeding in

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rem and a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding, as was held by this court in The Palmyra, 12 Wheat. 1, 14 [6 L. Ed. 531]. Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit in rem by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit in rem. It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States, in the suit in rem. Nevertheless the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it, and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant."

This is not a holding that, if the defendant in the criminal prosecution had been convicted, the property could not have been proceeded against in and by the proceedings in rem. It having been duly adjudicated by a court of competent jurisdiction in the criminal action that defendant did not commit the acts alleged against him, it was held that that question could not again be litigated between the same parties in the action to forfeit the property, as the forfeiture, if incurred, was incurred because of the commission of the acts referred to. Gelston v. Hoyt, 3 Wheat. 246, 4 L. Ed. 381, is to the same effect. In the Coffey Case the court further said:

"The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts."

In Origet v. United States, 125 U. S. 240, 8 Sup. Ct. 846, 31 L. Ed. 743, an information in a suit in rem against certain goods seized as forfeited for a violation of the revenue laws, a verdict was rendered for the condemnation of the goods. This was necessarily a finding that the acts had been committed. The information was filed under section 12 of Act June 22, 1874, c. 391 (18 Stat. 188). That law provides that if any owner or importer, with intent to defraud the revenue, should make or attempt to make any entry, etc., by means of fraudulent or false invoice, etc., he should—

"for each offense be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited."

It was contended that the only way in which the goods could be condemned was by proceedings under indictment as an incident of the

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prosecution of the offender by indictment, and that the forfeiture of the goods, like the fine and the imprisonment prescribed, is a part of the punishment upon a conviction on a criminal prosecution, and that the forfeiture is imposed only as an addition to the fine where that is imposed, and that the merchandise could not be forfeited independently of the imposition of the fine. The Supreme Court said and held:

"But we are of opinion that this is not the proper construction of the section. The fine, or the imprisonment, or both, are to follow conviction on a criminal prosecution of the owner, importer, consignee, agent, or other person, who does the act forbidden by the section, with the intent therein mentioned. The section then goes on to say that, 'in addition to such fine, such merchandise shall be forfeited.' The sole meaning of this is that the person owning the merchandise shall lose it by forfeiture, in addition to such possible loss as may come to him by the imposition, if he is the offender, of the pecuniary fine, on the criminal prosecution against him. But the merchandise is to be forfeited irrespective of any criminal prosecution. The forfeiture accrues to the United States on the commission or omission of the acts specified. No condition is attached to the imposition of the forfeiture. The section does not say that the merchandise shall be forfeited only on the conviction of some offender, whether the owner of the merchandise or one of the other persons named in the section. The person punished for the offense may be an entirely different person from the owner of the merchandise, or any person interested in it. The forfeiture of the goods of the principal can form no part of the personal punishment of his agent."

This, it seems to me, is a holding that fine and imprisonment, or either, is the punishment for the offense, and that the enforcement of a forfeiture of the goods involved, which must be in a separate proceeding in rem, forms no part thereof. If so, then in the instant case, and other like cases, the one who brings into the United States distilled spirits in violation of the act of August 10, 1917, in a wagon, sleigh, or automobile, subjects himself to a criminal prosecution and fine and imprisonment, one or both, and this is the punishment for such offense. The wagon, sleigh, or automobile, or other instrumentalities, used by him in so bringing in the distilled spirits, will be liable to forfeiture to the United States, and such forfeiture may be enforced in a proceeding in rem under other sections of the Revised Statutes. This would not be adding to the "punishment" imposed by section 15, chapter 53, Acts 1917, as such proceeding is no part thereof.

[3] The effect of a judgment of acquittal on a criminal charge of bringing in or importing distilled spirits, contrary to law, is essentially different from the effect of a judgment of conviction on the same charge. In the one case, that of acquittal, as between the same parties, it is established once for all that the acts alleged were not committed by the one charged with the offense. This question cannot again be tried or litigated between the same parties. On acquittal there is no fine, no imprisonment, no penalty, and no forfeiture. There cannot be. In the other case, that of conviction, it is an adjudication once for all, as between the same parties, that the acts alleged were committed, and in such case the consequences prescribed by law must follow. The consequences may be a fine, or imprisonment, or both, and to this may be added, as a consequence, the forfeiture of the instrumentalities used in the commission of the offense, bringing in of the merchandise—in this case distilled spirits—contrary to, or in violation of, law. If the

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forfeiture of the merchandise or instrumentalities is a part of the punishment prescribed, it must be found in the statute fixing the punishment, in this case the act of August 10, 1917; but, if not, then authority for the seizure and forfeiture in a proper proceeding in rem may be given by and found in other statutes. So far as punishment for the violation of law is concerned, it must be presumed the one prescribed in the statute is the only one, and exclusive of all others, and a punishment prescribed in other statutes, even a general one, for bringing in merchandise contrary to law, or in violation of law, cannot be resorted to.

But punishment for the offense by fine or imprisonment may not be the only consequence that follows such a violation of law. The distilled spirits may not belong to the one who commits the offense of bringing them into the United States, but they may be forfeited by proper proceedings in rem against the owner or the thing itself. The vehicles used in so bringing in the distilled spirits contrary to law may not belong to the one who uses them in so violating the law, but they may be seized and forfeited in a proceeding in rem. If A. is accused of bringing in distilled spirits contrary to law, and he is tried for the offense and acquitted, this is no bar to a criminal prosecution against B., who did bring such spirits in contrary to law. If the instrumentalities used, as a vehicle, wagon, or automobile, belong to a third person, C., such instrumentalities may be proceeded against by a suit in rem for the forfeiture thereof under the applicable statutes found in other acts of Congress.

In United States v. A Lot of Precious Stones, etc., 134 Fed. 61, 68 C. C. A. 1, criminal indictments were found and presented against Albert Schmidt and Sara Crawford Schmidt, his wife, separately charging each with a violation of section 3082, by having fraudulently imported into the United States certain precious stones, etc. Albert Schmidt was tried on the indictment against him and acquitted. Thereupon the United States attorney moved a nol. pros. of the indictment against Sara Crawford Schmidt and same was nol. prossed accordingly. The dismissal of an indictment does not operate as an acquittal. Dealy v. United States, 152 U. S. 539, 542, 14 Sup. Ct. 680, 38 L. Ed. 545. Prior to the finding of the said indictments an information for the condemnation of said precious stones and jewels had been filed against said Albert Schmidt and Sara A. Crawford, really Sara Crawford Schmidt, founded on the same acts, and after the acquittal of Albert Schmidt, and after the indictment against Sara Crawford Schmidt was nolle prossed, the United States proceeded with the condemnation proceedings under the information against Sara A. Crawford. It was contended that the acquittal of Albert Schmidt and the nolle pros. of the indictment against Sara Crawford Schmidt, named in the information Sara A. Crawford, was a bar to the proceedings against her under and on the information. This contention was overruled. It was held that, notwithstanding the acquittal of Albert Schmidt and the nolle pros. of the indictment against Sara Crawford Schmidt, the proceedings for condemnation against her might continue, and accordingly the judgment of the lower court that the acquittal and nolle pros. barred

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further proceedings against her on the information for condemnation was reversed. This decision was rendered by the Circuit Court of Appeals, Sixth Circuit, Lurton, Severens, and Richards, Circuit Judges, and in the course of the opinion the court said:

"If there had been no indictments found against Albert Schmidt and Sara Crawford Schmidt individually, and upon the trial of the information the jury had found that Albert Schmidt was not guilty of the charge, and Sara Crawford Schmidt was, a judgment for the forfeiture of the goods seized and libeled would have followed. Since the information charges her, along with Albert Schmidt, with the fraudulent importation of these goods, and since there has been no adjudication of the question whether she was individually guilty or not, we are of the opinion that that question may still be tried in the forfeiture proceeding."

In United States v. Manufacturing Apparatus, etc. (D. C.) 240 Fed. 235, it was held by Lewis, District Judge, that:

"The criminal prosecution of a stockholder and director of a corporation under Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 (Comp. St. 1913, § 6229), for defrauding the United States of the tax on oleomargarine resulting in an acquittal, is not a bar to a subsequent proceeding under said section for the forfeiture of the oleomargarine and the manufacturing apparatus and raw materials for its manufacture owned by the corporation based upon the same alleged offense."

In Ex parte Lange, 18 Wall. 163, 168 (21 L. Ed. 872), it is held:

"If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense."

In the instant cases the question is whether or not, after the conviction of a defendant of the offense of importing distilled spirits into the United States contrary to law (and importation is absolutely prohibited under the act of August 10, 1917), and a fine, or imprisonment, or both, has been imposed as prescribed by that act, proceedings in rem for the forfeiture of both such distilled spirits so imported and the instrumentalities used in so unlawfully bringing in or importing the distilled spirits, or either, can be maintained against the party guilty of the unlawful act, and who has been convicted and fined or imprisoned, or against the property itself so used and belonging to him. In other words, after criminal prosecution and punishment for the offense by fine or imprisonment, is the prosecution of proceedings to condemn and forfeit an effort to secure and enforce an added or double punishment, and, if successful, would such condemnation operate as an added or double punishment for the same offense?

[2] When a statute creates a new offense and fixes the penalty, or provides a specific punishment, only that punishment can be inflicted which the statute prescribes. McBroom v. Schottish, etc., 153 U. S. 318, at page 325, 14 Sup. Ct. 852, 38 L. Ed. 729; Farmers', etc., Bank v. Dearing, 91 U. S. 29, 35, 23 L. Ed. 196; Oates v. National Bank, 100 U. S. 239, 250, 25 L. Ed. 580; Barnet v. National Bank, 98 U. S. 555, 558, 25 L. Ed. 212; Stafford v. Ingersol, 3 Hill (N. Y.) 38; First National Bank of Whitehall v. Lamb, 57 Barb. (N. Y.) 429; De Wolf v. Johnson, 10 Wheat. 367, 390, 6 L. Ed. 343; 10 Cyc. U. S. Rep. 1093. The act of August 10, 1917, is a new statute and creates a new offense, and prescribes or denounces the penalty or punishment

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and makes no reference to any forfeiture or to any other statute. In Oates v. National Bank, supra, 100 U. S. at page 250, 25 L. Ed. 580, the court said:

"It denounces no penalty other than a forfeiture of the interest which the note or bill carries, giving to the debtor the right to sue for and recover twice the amount of interest so paid. If we should declare the contract of indorsement void, and, consequently, that no right of action passed to the bank on the note transferred as collateral security, an additional penalty would thus be added beyond those imposed by the law itself. 'On what principle could this court add another to the penalties declared by the law itself?' De Wolf v. Johnson, 10 Wheat. 367 [6 L. Ed. 343]; Farmers' & Mechanics' National Bank v. Dearing, 91 U. S. 29 [23 L. Ed. 196]; Barnet v. National Bank, 98 U. S. 555 [25 L. Ed. 212]."

In De Wolf v. Johnson, supra, the transaction originated on a contract of loan made in Rhode Island by De Wolf to Prentiss, the payment of which was secured by a mortgage on lands in Kentucky. The question arose whether the contract was void under the usury laws of either state. The laws of Rhode Island, where the contract was made, prescribed a penalty and forfeiture of certain amounts in such cases, but the laws of Kentucky made usurious contracts void. The court held that this contract was governed by the laws of Rhode Island, and that no other penalty or forfeiture could be imposed, and that the contract could not be held void under the statute of Kentucky. The court said:

"The law of Rhode Island certainly forbids the contract of loan for a greater interest than 6 per cent., and so far no court would lend its aid to recover such interest. But the law goes no further; it does not forbid the contract of loan, nor preclude the recovery of the principal, under any circumstances. The sanctions of that law are the loss of the interest, and a penalty to the amount of the whole interest, and one-third of the principal, if sued for within a year. On what principle could this court add another to the penalties declared by the law itself?"

The court was not dealing with a case where the law of the same state by some other statute made it a crime and imposed a fine and punishment, one or both, for the act of contracting for usury, but was considering a case where the laws of one state, that where the contract was made, prescribed a certain penalty, and the laws of another, where the property was situated, prescribed another. In Farmers' National, etc., Bank v. Dearing, 91 U. S. 29, 35, 23 L. Ed. 196, the court was considering the forfeiture declared by the thirtieth section of Act June 3, 1864, c. 106, 13 Stat. 99 (Comp. St. §§ 9758, 9759), and the effect, if any, of a state statute on the same subject, and the court held (91 U. S. page 35, 23 L. Ed. 196):

"Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes"—citing Stafford v. Ingersol, 3 Hill (N. Y.) 38; and First National Bank of Whitehall v. Lamb, 57 Barb. (N. Y.) 429.

But this is not a holding or a declaration that, if there be a general statute of the United States declaring that all property brought into the United States contrary to law, and all instrumentalities used in

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bringing such property in, shall be forfeited, and by a new statute of the United States the bringing in of certain property not before excluded is prohibited, and the act of so bringing in is made a crime punishable by fine or imprisonment, that the merchandise or property and such instrumentalities so used may not be forfeited under the provisions of such former general statute. The forfeiture is no part of the punishment for the illegal act as we have seen. Origet v. United States, 125 U. S. 240, 8 Sup. Ct. 846, 31 L. Ed. 743.

The act offended against, that of August 10, 1917, bringing distilled spirits into the United States, is not a customs law or a revenue law, as the merchandise is not dutiable, and the United States has no interest in such distilled spirits, except it be to keep them out of the United States. See Boyd v. United States, 116 U. S. 616, 624, 6 Sup. Ct. 524, 529 (29 L. Ed. 746), where the court said:

"In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment."

The right of the United States to seize and forfeit the distilled spirits is because they are brought in in violation of law, and the right, if it exists, to seize and forfeit the instrumentalities used by the wrongdoer in bringing in such merchandise contrary to law must be based on the fact they are used in the commission of an offense against the United States. If the offense has not been committed, then there can be no right of seizure or of forfeiture. In the Boyd Case, supra, 116 U. S. at page 633, 634, 6 Sup. Ct. 534, 29 L. Ed. 746, the court also says:

"We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. * * * These are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them. * * * The information, though technically a civil proceeding, is in substance and effect a criminal one."

And this is again held in Stone v. United States, 167 U. S. 178, 187, 17 Sup. Ct. 778, 42 L. Ed. 127, and in the Stone Case United States v. McKee, 4 Dill. 128, Fed. Cas. No. 15,688, supra, is again referred to with apparent approval. In the cases of offending against the act of August 10, 1917, no revenue is to be collected, and the offense of bringing in the distilled spirits is made a crime, and the act itself denounces the penalty. Having been indicted and fined or imprisoned, one or both, the defendant has answered to the offense, and the proceeding, in its nature criminal, to take the property, especially the instrumentalities used, is a proceeding not against such property alone, but against the offender, and an attempt to take and forfeit his property, not because the United States has any interest in it, but for the alleged reason he used it as an instrumentality in the commission of the crime, and as to the spirits themselves it is a taking and a forfeiture to the United States because of their being in the United States contrary to law. In the Boyd Case, supra, the court (116 U. S. at page 637, 6 Sup. Ct. 524, 29 L. Ed. 746) holds, in effect, that a proceeding in rem

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for the forfeiture of property is not one against the property alone, but against the owner also.

I am of the opinion that a distinction must be made between the right of the United States to seize and forfeit the distilled spirits brought into the United States contrary to the act of August 10, 1917, and its alleged right to seize and forfeit the instrumentalities used in effecting such violation. It is settled that the United States may say that Chinese laborers may not come or be brought into the United States. Such Chinese persons, not citizens, may be seized, if they do come, and deported. The United States has, it seems to me, an equal right to say that distilled spirits shall not come or be brought into the United States. If brought in, they are here contrary to law, and may be seized and disposed of. It cannot be that, if the one who brings them in is indicted and fined or imprisoned, he may retain as his own in the United States such distilled spirits. Such punishment cannot have the effect to legalize the presence of such spirits in the hands of the wrongdoer in the United States. It is not an added punishment to seize and condemn them. But this has no application to the instrumentalities used by a citizen of the United States and owned by him in so bringing in such spirits. These are not in the United States contrary to law. There is no law forbidding their presence in the United States. The general statute referred to provides for their seizure and forfeiture only. If forfeited, it must be by virtue of some statute; and, if taken from the wrongdoer, who is the owner, it must be for the reason he used them in the commission of an offense, and, as such instrumentalities are not seized for the collection of some sum due to the United States, and for the reason it has an interest in them, it would seem the seizure must be in the nature of the enforcement of an added punishment for the offense, as the proceedings in rem to enforce the forfeiture are criminal in their nature as we have seen. Such seizure and forfeiture is clearly in the nature of an added penalty for the commission of the offense.

I am of the opinion, while the authorities are conflicting, that when a defendant has been indicted, convicted, and punished by a court of competent jurisdiction, pursuant to the provisions of section 15, c. 53, Act Aug. 10, 1917 (see, also, section 301, c. 63, Act Oct. 3, 1917, title 3, 40 Stat. 308 [Comp. St. 1918, § 8739b] War Tax on Beverages), for bringing distilled spirits into the United States, he cannot be proceeded against by proceedings in rem for the forfeiture of his vehicles used in bringing in such spirits, inasmuch as the statute is new, denounces the penalty and punishment for the offense to be imposed, and makes no reference to any forfeiture of such property, or to any other or prior statute.

As to the distilled spirits brought in contrary to law, I am of the opinion they are unlawfully in the United States, and may be seized and disposed of by forfeiture or otherwise, and that such seizure and forfeiture is not the imposition of a double or added punishment.

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HERCULES POWDER CO. v. NEWTON, Commissioner of Patents.

(District Court, S. D. New York. December 17, 1918.)

1. TRADE-MARKS AND TRADE-NAMES ⊂⊃3(4) — REGISTRATION — DESCRIPTIVE WORDS—"INFALLIBLE."
The word "infallible," as applied to smokeless powder, is descriptive, conveying the idea that the powder will always do its work, and so is not the proper subject-matter for a registered trade-mark.

2. COURTS ⊂⊃96(1)—DISTRICT COURT—WEIGHT OF DECISIONS OF DISTRICT OF COLUMBIA COURT OF APPEALS.
Before District Court will arrive at conclusion with respect to whether name "Infallible," as applied to smokeless powder, is descriptive, and not registerable, at variance with conclusion of Court of Appeals of District of Columbia upon the same matter, it should be clearly convinced that such conclusion was wrong (following Gold v. Newton, 254 Fed. 824. — C. C. A. —).

In Equity. Suit by the Hercules Powder Company against James T. Newton, as Commissioner of Patents. Bill dismissed.

Edwin J. Prindle, of New York City, for plaintiff.

Francis G. Caffey, U. S. Atty., of New York City, and Robert F. Whitehead, of Washington, D. C., for defendant.

MAYER, District Judge. The suit is brought under the provisions of section 4915 of the United States Revised Statutes (Comp. St. 1916, § 9460); the Commissioner of Patents having consented that jurisdiction be entertained by this court.

Plaintiff seeks to require the Commissioner of Patents to register as a trade-mark for smokeless powder, the word "infallible." Registration of this mark was refused by the examiner of trade-marks in the Patent Office and by the Commissioner of Patents, and, on appeal to the Court of Appeals of the District of Columbia, the decision of the Commissioner of Patents was affirmed. Both the Commissioner of Patents and the Court of Appeals of the District of Columbia examined the subject-matter with great care and placed their respective decisions substantially upon the same ground.

[1] One question is whether "infallible," when used in connection with smokeless powder, is descriptive. On this point the Commissioner of Patents said, in part:

"'Infallible' is certainly descriptive of these qualities. It is true this word does not exhaustively describe them; one word can seldom perform this function, but it is a word that will be useful in describing just the qualities that applicant says sporting powder should possess."

The Court of Appeals of the District of Columbia, in the same connection, held:

"The word 'infallible' implies something that never fails and that is certain of operation, incapable of error, and free from uncertainty or liability to failure."

The argument of counsel for the plaintiff is, first, that nothing can be said to be infallible, and, secondly, that the word "infallible," when

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used in connection with smokeless powder, cannot be said to be descriptive. This word, when thus used, seems to me to convey the idea that the smokeless powder will invariably do its work, or, putting the thought in another way, that it can be used with certainty for the purpose for which it is desired.

[2] Counsel on both sides have analyzed with care many decisions of the Patent Office and of the courts, dealing with this subject of descriptive words. Counsel for plaintiff has called attention to some decisions of the Patent Office in respect of the word "infallible," which were not called to the attention of the Court of Appeals of the District of Columbia. These prior decisions of the Patent Office must be regarded as disposed of, so far as this case is concerned, by the decision of the District of Columbia Court of Appeals.

It will not be useful to analyze at length the effect of the many decisions which deal with this question of descriptive words. It certainly can be stated that, at best, the question is debatable, and the most favorable position in which the plaintiff can be put is that another court (i. e., this court) might hold differently from the Court of Appeals of the District of Columbia. I am of opinion that that court was right in its conclusion, but, in any event, before this court would arrive at a different conclusion, it would be necessary that this court should be clearly convinced that the conclusion of the Court of Appeals of the District of Columbia was wrong. Indeed, it might well be contended that what I have just stated does not go as far as did our Circuit Court of Appeals recently in Gold et al. v. Newton, 254 Fed. 824, — C. C. A. —. In respect of the argument that the word "infallible," in connection with plaintiff's smokeless powder, has acquired a secondary meaning, it is sufficient to refer to Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365.

I quite agree with the contention of counsel for the defendant that what plaintiff asks in the case at bar is, in effect, to modify the statute, so as to make the "ten-year" period, not that next preceding the passage of the act of 1905 (Act Feb. 20, 1905, c. 592, 33 Stat. 724 [Comp. St. 1916, § 9485 et seq.]), but such a period as would cover plaintiff's use of the mark.

For the reasons thus briefly outlined, it follows that the bill must be dismissed.

EGNER v. PARSHELSKY BROS., Inc.

In re FOOTE.

(District Court, E. D. New York. June 13, 1918.)

BANKRUPTCY ⟸303(3)—PREFERENCE—KNOWLEDGE OF INSOLVENCY—EVIDENCE.

A defendant *held*, on conflicting evidence, to have had knowledge that a bankrupt was insolvent at the time it took back property previously sold to him, which rendered the transaction a preference.

In Equity. Suit by Henry Egner, trustee in bankruptcy of George P. Foote, against Parshelsky Bros., Incorporated. Decree for complainant.

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Hastings & Gleason, of New York City, for plaintiff.
H. S. and C. G. Bachrach, of Brooklyn, N. Y., for defendant.

GARVIN, District Judge. This is an action in equity, brought by a trustee in bankruptcy to set aside a transfer of shingles and building material by George P. Foote, of whom plaintiff is trustee in bankruptcy, to Parshelsky Bros., a corporation, defendant.

No question of law is involved. The court must decide whether the defendant knew or had reasonable cause to believe that Foote was insolvent at the time that the transfer was made. If this question is determined in favor of the plaintiff, the court must determine from the evidence the value of the goods transferred. The plaintiff produced Isaac Parshelsky, an officer of the defendant, who testified, among other things, that he had taken back the goods with the consent of the bankrupt. James French, an employé of the expressman who took the goods to the railroad station, testified that there were over 400 bundles of shingles and some trim. The evidence indicates that $1 per bundle was the fair market value of the shingles. Parshelsky testified that other articles to the extent of $22 were also taken. The bankrupt, who was to some extent corroborated by his wife, testified that he stated to Parshelsky that he was going into bankruptcy before the petition was filed.

The defense called Isaac Parshelsky, who testified that Foote had never mentioned bankruptcy, and that he supposed he was perfectly solvent when he took back the articles in question; that he took them, indeed, at Foote's request. The defense offered also the testimony of one Blumenthal, an employé of the defendant. This testimony had been taken de bene esse.

I have concluded to give judgment in favor of the plaintiff. It is quite true that the defense offers the testimony of two witnesses who positively contradict the testimony given by plaintiff with respect to knowledge of insolvency. I observed carefully the various witnesses who appeared and their manner of giving their testimony.

Personal observation is sometimes of great assistance in determining whether or not a witness is telling the truth. There are some things that enter into the attitude of a witness as he testifies, and which have a pronounced bearing on the testimony he gives, which do not appear at all in the written transcript of the record of the proceedings.

The witness Foote impressed me as one who was telling the truth, and it is my conclusion that the defendant actually knew of the financial condition of the bankrupt at the time of the transfer.

A decree will be entered against the defendant, ordering and adjudging that the defendant deliver to the plaintiff the shingles and building material obtained from the bankrupt, and that in default of such delivery the defendant be ordered to pay to the plaintiff the value thereof, $422.

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ELLEN v. JOHNSON.

(District Court, E. D. New York. May 28, 1918.)

HABEAS CORPUS ⊜16—ACTION OF DRAFT BOARD—REVIEW BY COURTS.

Where a local draft board, upon the facts stated in a registrant's questionnaire, found him subject to service and gave him a classification, which was affirmed by the district board, a court cannot on habeas corpus review its action in refusing to reopen the case.

Habeas Corpus. Petition on behalf of Abraham Ellen for writ directed to Evan M. Johnson, Commander of the National Army at Camp Upton, N. Y. Writ denied.

Russell, Gilroy & Schehr, of New York City, for plaintiff.

Melville J. France, U. S. Atty., of Brooklyn, N. Y., for defendant.

GARVIN, District Judge. An application has been made by Morris Ellen, based upon a verified petition, for a writ of habeas corpus, directed to the United States army officer in charge of the military cantonment at Camp Upton, N. Y., and to each and all of his deputies, requiring him and them to bring and have Abraham Ellen, the son of the applicant, before this court, upon the ground that he is unlawfully deprived of his liberty. The petition presented by the applicant shows that Abraham Ellen registered, and that in the first draft he received a discharge as an alien; that when the second draft came on the registrant duly filled out his questionnaire, and claimed exemption as an alien; that on said questionnaire, without sufficient evidence and irregularly, the local board declared the registrant eligible under class 1. The petition sets forth further, on information and belief, that the report of the local board on the questionnaire shows that the local board had no evidence before it to justify its findings, and that it had the evidence before it to show that the registrant was an alien. The petition further sets forth that the registrant came to this country on March 6, 1916, is a native of Russia, and has never taken out his first papers, and therefore is an alien.

The answering affidavit shows: That the registrant filed his questionnaire with local board and made the following answer to question 8: "Q. 8. Has either of your parents been naturalized in the United States? A. Yes." That the minute of the local board on said claim for deferred classification was as follows: "The local board classifies the registrant as shown on the cover sheet hereof (1–A) because it finds that his parent had been naturalized." That an appeal was taken to the district board of the city, which unanimously classified the registrant in 1–A, because it found that the registrant h failed to establish his claim to exemption on the ground of alienst That thereafter the registrant filed an affidavit, in which he set f that his father was not a citizen, and that his father had not dec his intention of becoming a citizen until some time after the trant had become 21 years of age. He therefore requested th case be opened, and that he be allowed to establish the claim o

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ship, and produce before the board his father and mother, neither of whom, according to his claim, are citizens of the United States. He further presented an affidavit, made by his father, in which applicant under oath stated that he had received his final papers on June 7, 1917, but that the registrant was 23 years of age, and therefore was not a minor at the time of this naturalization. The local board declined to open the case.

No such situation is here presented as justifies interference by the court. The case is not brought within the rule of Angelus v. Sullivan, 246 Fed. 54, at page 67, 158 C. C. A. 280, at page 293:

"The civil courts can afford relief from orders made by such boards in any case where it is shown that their proceedings have been without or in excess of their jurisdiction, or have been so manifestly unfair as to prevent a fair investigation, or that there has been a manifest abuse of the discretion with which they are invested under the act."

It is clear that the local board found as a fact, after taking the proof offered by the registrant, that he was not entitled to the deferred class.

The application for a writ of habeas corpus is denied.

In re FRANKLIN BREWING CO.

(District Court, E. D. New York. June 17, 1918.)

BANKRUPTCY ⇐305 — JUDGMENT ⇐691 — PERSONS BOUND — BONDHOLDERS REPRESENTED BY MORTGAGE TRUSTEE.

Holders of bonds of a corporation secured by trust mortgage are bound by the decree in a suit in the bankruptcy court by trustees in bankruptcy of the corporation against the mortgage trustee adjudging the bonds void, and such court has power to enforce the decree by requiring their surrender.

In Bankruptcy. In the matter of Franklin Brewing Company, bankrupt. On motion by trustees for order directing surrender of bonds of bankrupt. Motion granted.

See, also, 252 Fed. 324.

Samuel Evans Maires, of Brooklyn, N. Y., for petitioners.

Henry F. Cochrane, of Brooklyn, N. Y., for respondents.

GARVIN, District Judge. This is a motion made by the trustees in bankruptcy of the Franklin Brewing Company, bankrupt, for an order directing Henry Doscher, John Doscher, Charles Doscher, Gesine Engel, Mathilda C. Behre, Caroline Candidus, and the People's Trust Company to forthwith surrender up and deliver to the trustees 450 alleged coupon bonds made, issued, transferred, and delivered to the several persons mentioned. These bonds were secured by a trust mortgage made by the bankrupt to the People's Trust Company as trustee for these bondholders. After the adjudication herein the trustees in bankruptcy brought an action against the People's Trust Company, asking that this mortgage be set aside and canceled on the ground that it was illegal, invalid, and void. Where-

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upon a decree was made by this court in the said suit in favor of the trustees and against the People's Trust Company, decreeing that the said bonds were illegal, invalid, and void as against the trustees in bankruptcy. This decree has been affirmed by the Circuit Court of Appeals. The holders of the bonds, having been represented by the trustees of the mortgage issued to secure the bonds, are bound by the decree. Beals v. Illinois Railroad Co., 133 U. S. 290, 295, 10 Sup. Ct. 314, 33 L. Ed. 608; Richter v. Jerome, 123 U. S. 233, 246, 8 Sup. Ct. 106, 31 L. Ed. 132; Shaw v. Railroad Co., 100 U. S. 605, 611, 25 L. Ed. 757; Kerrison, Assignee, v. Stewart, 93 U. S. 155, 160, 23 L. Ed. 843.

The decision of the court in the suit setting aside the mortgage contains the following words:

"At the time this mortgage was executed neither the People's Trust Company nor any other person or persons paid to the Franklin Brewing Company any cash money for the mortgage; nor did any person or persons pay any money, furnish any labor, or give property to that corporation for either the mortgage or bonds in question."

Section 55 of the New York Stock Corporation Law (Consol. Laws, c. 59) reads:

"*Consideration for Issue of Stock and Bonds.*—No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation."

These alleged bonds, therefore, are void, and I am of the opinion that this court has the power to enforce the effect of the decision in the action to set aside the mortgage.

Charles Doscher submits an affidavit in which he alleges on information and belief that the bonds may be necessary as evidence in any controversy arising between the legatees of Claus Doscher and the executors thereof. An order, therefore, may be entered, directing Henry Doscher, John Doscher, Charles Doscher, Gesine Engel, Mathilda C. Behre, Caroline Candidus, and the People's Trust Company to forthwith surrender up and deliver to Louis Karasik, Christopher L. Meyerdirks, and Thomas W. Maires, as trustees in bankruptcy of the Franklin Brewing Company, all of the 450 alleged coupon bonds made, issued, and delivered to the said persons, which were secured by the said mortgage of $450,000.

This order will contain a provision requiring the said trustees, upon canceling the said bonds, to retain them in their possession, so that they may be available in any litigation between the legatees of Claus Doscher and the executors thereof, as evidence.

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Ex parte TINKOFF.

(District Court, D. Massachusetts. January 2, 1919.)

No. 1662.

1. ARMY AND NAVY ⊂=20—SELECTIVE SERVICE ACT—EXEMPTIONS.
Where petitioner was admittedly within the class of persons liable for service under the Selective Service Act, he was within the jurisdiction of the draft boards, and his induction into the army was not void, even though his claim for exemption on account of the dependency of his wife was improperly denied.

2. ARMY AND NAVY ⊂=44(2)—OFFENSES—DISCIPLINE—PERSONS SUBJECT.
Where petitioner, admittedly liable for service under the Selective Service Act, was inducted into service, his claim for exemption being improperly denied, he is subject to punishment for violation of army discipline.

At Law. In the matter of the petition of Paysoff Tinkoff for a writ of habeas corpus. Petition dismissed.

The United States Attorney, for the United States.
Defendant, pro se.

MORTON, District Judge. [1] The petitioner was admittedly within the class of persons liable for service under the Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 76). He was therefore within the jurisdiction of the draft boards. His only complaint is that he was not granted exemption because of the dependency of his wife on him for support. His claim therefor was heard and denied by the draft tribunals. He reported for service and was inducted into the Army in January, 1918. While in the Army he absented himself without leave and is now held by the Army authorities upon that charge.

[2] His induction into the Army was not void—although, if illegal, it might be set aside on proper proceedings. While in the Army the petitioner was bound to obey orders and observe its discipline. Neither his claim that he had been wrongfully held for service, nor his proceedings in the law courts, relieved him of that obligation, nor from the liability to punishment for disregarding it. The case is covered by In re Romano (Dist. Ct. Mass. January 10, 1918) 251 Fed. 762.

Petition dismissed without prejudice to petitioner's right to file another petition.

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THE RINDJANI.

ADAM et al. v. GRIEP et al.

(Circuit Court of Appeals, Ninth Circuit. January 6, 1919.)

No. 3128.

TREATIES ⊂=11—PROVISIONS—JURISDICTION—CLAIMS OF FOREIGN SEAMEN.

Under Convention, between United States and the Netherlands May 23, 1878, art. 11, providing that the consular authorities of each nation shall have charge of controversies between masters and crews of vessels of their respective countries "to the exclusion of all local authorities," a court of admiralty of the United States, while given jurisdiction of suits for wages by Rev. St. § 4530, as amended by Seamen's Act March 4, 1915, § 4 (Comp. St. § 8322), is without jurisdiction of claims of Dutch seamen, who had left a Dutch vessel, for cost of transportation to Holland.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Frank H. Rudkin, Judge.

Suit in admiralty by Cornelius Griep and others against the Dutch steamship Rindjani; William Adam, master, claimant. Decree for libelants, and claimant and others appeal. Modified.

The libelants and intervening libelants, 17 in number, shipping in Holland on the Dutch steamship Rindjani, filed their libel for wages, alleging that under shipping articles signed at Rotterdam January 12, 1917, they shipped for a voyage to Batavia and return to Holland; that after sailing to Batavia, the master, in breach of the contract and without their consent, proceeded to San Francisco, where they demanded to be paid off and furnished with transportation back to Rotterdam, which demand being refused they demanded payment for one-half their then earned wages since the commencement of the voyage; and that in consequence of the refusal of both demands they as matter of law became entitled to the payment of all of their earned wages. Each asked for an award specifically covering the wages claimed, and prayed for the issuance of a monition, etc., and for a decree for the payment of the alleged wages due, with interest and costs, and that the ship be condemned and sold to pay the same, and that the respective libelants have such other and further relief as they were entitled to receive, including the surrender of passports, "and the issuing of proper certificates of discharge to each of said libelants, and transportation to said Rotterdam, or the equivalent thereof."

The interlocutory decree adjudged both the libelants and intervening libelants entitled to recover the balance of wages due them, as fixed by the shipping articles, "together with wages during the period necessarily employed in returning to the Netherlands, and the cost of transportation thither" —the case being referred to a commissioner to make the necessary computations from the then record and such further proofs as might be taken to enable him to ascertain the respective amounts.

The proctor for the libelants having, by stipulation, waived all claims for wages accruing subsequent to the filing of the respective libels, the commissioner found that 9 of the libelants had been overpaid in the aggregate amount of $62.60, and that the aggregate amount of wages still due 7 of the remaining libelants was $89.45, and that the amount of the cost for transportation of the 17 men from San Francisco to Rotterdam was $159.50 each. The amount of wages claimed by all of the libelants aggregated $1,040.20. The judgment in favor of the libelants was in the aggregate amount of $2,738.35, made up of the award of $2,711.50 representing the equivalent of the cost of their transportation from San Francisco to Rotterdam, and $26.85,

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the aggregate amount of the unpaid wages, being the difference between the amount of the wages unpaid and the overpayments.

E. B. McClanahan and S. H. Derby, both of San Francisco, Cal., for appellants.

F. R. Wall, of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). It is undisputed that the court below had jurisdiction over the claims of the libelants respecting their wages by virtue of the last proviso of section 4530 of the Revised Statutes, as amended by the Seamen's Act of March 4, 1915 (38 Stat. pt. 1, p. 1165 [Comp. St. § 8322]), which proviso reads:

"That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

It is strenuously contended, however, for the appellants, that as regards the claim for the transportation of the libelants from San Francisco to Rotterdam, embracing $2,711.50 of the total amount of the judgment, the court was, in the first place, without jurisdiction, and that to that extent the judgment should be reversed, and the case remanded to the court below, with directions to dismiss all of the libels in so far as they concern such transportation; and secondly, that, even conceding jurisdiction in the court, the case shows that all of the libelants secured other employment at San Francisco on other vessels shortly after leaving the Rindjani, and were, therefore, not entitled to transportation back to Rotterdam.

The shipping articles in question provide for:

"One voyage (or journey) from Rotterdam to Java, and thence to such other places as the master * * * shall decide, thence to return to a port in the Netherlands."

The case shows that at the time the articles were signed the voyage contemplated by all concerned was from Rotterdam to Batavia and way places, and thence back to the Netherlands. But before the ship arrived at Batavia, certain Dutch ships were torpedoed by German submarines, and upon reaching Batavia the master was instructed to go to San Francisco by way of Singapore, Hongkong, Nagasaki, Yokohama, and Honolulu, and from San Francisco back to Java.

Respecting the question of jurisdiction, it appears that the contract was made in Holland, was to be performed on a Dutch vessel, and that all of the parties to the action are Dutch. Apart from the contention of the appellants that by the Dutch law the construction of the shipping articles is a matter over which the consul general of the Netherlands is given exclusive jurisdiction, it is insisted that by treaty between this country and the Netherlands the decision of the questions arising under the contract was vested in the consul general. If so, it is, of course, needless to inquire into the provisions of the Dutch law.

In so far as the right of the libelants to transportation from San

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the voyage to San Francisco constituted a clear breach of the contract of shipment which entitled them to discharge at the latter city. It is practically conceded that the first objection made by any of the libelants to that voyage occurred after the ship left Honolulu for San Francisco, and that after various talks between the captain of the ship and the men it was agreed that the right of the question should be submitted to and determined by the consul general of the Netherlands at San Francisco when the ship should reach that port; and so it was. We extract from the testimony of that officer as follows:

"Q. Will you now tell briefly of the meeting which you had at your office on that Saturday morning between the crew and the master of the Rindjani? * * * A. Well, at that meeting I followed the usual procedure by stating first to the captain and to the members of the crew that I did not represent the owners, neither did I represent the captain nor the members of the crew, but that I acted entirely in an impartial capacity, and if there was a dispute between the members of the crew and the captain, and they both desired to submit it to me, I would be willing to act as judge under the laws of the Netherlands, to sit as judge and if possible adjust their differences, to which they all agreed.

"Q. What was then done or said? * * * A. Well, I told the boys to take plenty of time and state all their grievances and tell me why they desired to break their contract with the captain, and several spoke, sometimes at the same time, and sometimes there were one or two who acted more or less by agreement as the spokesmen, and I inquired whether or not they had any cause for dissatisfaction on account of the food that was being furnished, and on account of the treatment received from the officers; but the boys declared themselves entirely satisfied as to that, and then I also inquired whether or not they were dissatisfied with the wages they received, and they said, 'No,' they were not, they were satisfied with the wages which they obtained, and then I inquired whether or not it was a fact that they desired to have American wages and were dissatisfied with Dutch wages. They said, 'No;' on the contrary, they had been paid a great deal more than had been agreed upon, as presents or a bonus. Then I wanted to know under those circumstances why they wanted to desert the ship, and they said they were afraid, they were afraid of being torpedoed, and I asked them if that was the only cause and they said, 'Yes;' and I remember then saying that it was almost unbelievable that Hollanders, who had been seafaring people for centuries back, would desert their flag while the English and French sailors took their chances on the places infested by submarines, while they were purposely placed on a safe run. But they stuck to their story and simply said they were afraid they would be torpedoed on account of the ship carrying articles which Germany has declared contraband, and under those conditions they did not care what was going to be paid or how it was going to be paid; they wanted to leave the ship.

"Q. What was the final result of that conference? * * * A. Well, at that time the final result was that I told them, as long as they had submitted their differences to the consul, that I could not accept that excuse for breaking their contract, and it was therefore my judgment that they were bound to stand by the ship and their captain.

"Q. Do you know whether, Mr. Torchiana, there was any subsequent action taken by these members of the Rindjani crew? A. Well, I know that afterwards the ship was libeled.

"Q. Do you know whether they left the ship or not? A. Yes— Oh, yes; they left the ship against the decision I gave, and then the captain declared them deserters, and articles of desertion were made up and forwarded to the Netherlands' authority in the home country.

"Q. Were those articles prepared in your office? A. Yes.

"Q. Who forwarded them to the home government? * * * A. They were forwarded through the consular mail to the Netherlands.

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"Q. Have you a copy of the notifications of desertion or whatever you call the document? A. I have a memorandum of that, the office memorandum.
"Q. Is it a permanent record of your office? A. Yes."

The convention between the United States and the Netherlands of May 23, 1878 (21 Stat. 662), provided in its article 11 as follows:

"Consuls general, vice consuls general, consuls, vice consuls and consular agents shall have charge of the internal order on board of the merchant vessels of their nation, to the exclusion of all local authorities. They shall take cognizance of all disputes and determine all differences which may have arisen at sea, or which may arise in port, between the captains, officers, and crews, including disputes concerning wages and the execution of contracts reciprocally entered into. The courts or other authorities of either country shall on no account interfere in such disputes unless such differences on board ship be of a nature to disturb the public peace on shore or in port, or unless persons other than the officers and crew are parties thereto.
"The consuls general, vice consuls general, consuls, vice consuls and consular agents shall be at liberty to go, either in person or by proxy, on board vessels of their nation admitted to entry, and to examine the officers and crews, to examine the ships' papers, to receive declarations concerning their voyage, their destination and the incidents of the voyage; also to draw up manifests and lists of freight or other documents, to facilitate the entry and clearance of their vessels, and finally to accompany the said officers or crews before the judicial or administrative authorities of the country to assist them as their interpreters or agents."

In its sixteenth article it provided that the convention should remain in force for five years from the date of the exchange of ratifications (July 31, 1879), and further provided that:

"In case neither of the contracting parties shall have given notice twelve months before the expiration of the said period, of its desire to terminate this convention, it shall remain in force for one year longer, and so on from year to year, until the expiration of a year from the day on which one of the parties shall have given such notice for its termination."

So far as appears, that treaty had not been abrogated, but was in force, at the time the consul general of the Netherlands passed upon the controversy between the present libelants and the captain of the Rindjani, since no provision of the Seamen's Act of March 4, 1915, already referred to, has any bearing on the point now under discussion.

The provisions of article 11 of the convention, above set out, are in effect the same as those of article 10 of the treaty between the United States and the King of Prussia of May 1, 1828 (8 Stat. 382), which was the subject of consideration in The Elwine Kreplin, 9 Blatchf. 438, Fed. Cas. No. 4,426, in which case it was held that that treaty required that the matter then in dispute—a matter of wages in that case—was one for the determination of the consular officer, and that the United States courts had no jurisdiction of it.

That ruling was followed by Judge Deady in the case of The Marie (D. C.) 49 Fed. 286, in the case of The Burchard (D. C.) 42 Fed. 608, in The Welhaven (D. C.) 55 Fed. 80, and in other cases there cited.

Our conclusion is that the court below had no jurisdiction over the question as to the right of the libelants to transportation from San Francisco to Rotterdam, and that it is therefore unnecessary to consider whether, if it had such jurisdiction, the libelants would be en-

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It results that the case must be and is remanded to the court below, with directions to so modify the judgment as to deny the cost of transportation of any of the libelants or intervening libelants from San Francisco to Rotterdam, for lack of jurisdiction over that subject.

CASTLE v. LEWIS, Sheriff.

TULK v. SAME.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1918.)

Nos. 5073, 5074

1. HABEAS CORPUS ⟸45(3)—FEDERAL COURTS—JURISDICTION.
When a person is in custody under process of a state court for an alleged offense against the laws of the state, and it is claimed that he is held in violation of the Constitution or of a law or treaty of the United States, or for an act done or omitted pursuant to a law of the United States, the federal courts, under Rev. St. §§ 751–753 (Comp. St. §§ 1279–1281), have plenary jurisdiction to inquire into the cause of such confinement by means of habeas corpus and to discharge the petitioner.

2. HABEAS CORPUS ⟸111(1)—FEDERAL COURT—DISCHARGE.
While the federal court or judge has the jurisdiction and power, under Rev. St. §§ 751–753 (Comp. St. §§ 1259–1281), to inquire into the cause of and to discharge one confined under the process of a state court, who claims that he is held under the circumstances above stated, the time and method of the exercise of that power are within the wise judicial discretion of the court or judge, in view of the certainty or uncertainty with which the facts are established, in view of the nature of the case, of whether it involves an alleged violation of the Constitution or a confinement for an act done in pursuance of a law of the United States, of whether it is a case of urgency, where a failure to discharge the prisoner immediately will or may substantially delay the enforcement of the laws of the United States or seriously interfere with the operation of its government or the administration of its affairs, or it is a case which really involves only the question whether the issues presented shall first be tried in the federal or in the state court.

3. HABEAS CORPUS ⟸45(4)—FEDERAL COURTS—JURISDICTION.
If an officer or soldier of the United States is in custody under the process of a state court for an alleged offense against the laws of a state, for an act which he claims was done by him in his official capacity in pursuance of the laws of the United States, such as the shooting of a person he was trying to arrest, and at the close of the hearing under the writ of habeas corpus the facts are admitted or clearly proved, either that his confinement is in violation of the Constitution or of a law or treaty of the United States and that the state court is without jurisdiction to try him for the offense charged against him, or that he had authority from the United States to arrest persons guilty of the offense for whose commission he was trying to make an arrest, that he had reasonable cause to believe and did honestly believe that the person he sought was guilty of the offense for which he was trying to arrest him, that in attempting to make the arrest he acted within the scope of his authority and used no more force than he honestly and reasonably believed was necessary in order to make the arrest, and that the case is one

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of urgency, in which the delay of a trial by the state court will seriously interfere with the enforcement of the laws of the United States or the operation of its government, the court or judge may and should immediately discharge the prisoner without waiting for such a trial.

But, if the case does not fall within one of the exceptional classes of cases above enumerated, the general rule and settled practice is for the court or judge to refuse to interfere by writ of habeas corpus with the custody of the state court until after the trial of the prisoner in that court, although it has the power and jurisdiction to discharge earlier.

4. ARREST ⟸63(4)—FELONY—ARREST WITHOUT WARRANT.
While an officer may arrest for a felony without warrant he may not so arrest arbitrarily, and it is indispensable to a justification of arrest of one actually innocent, that the circumstances were such that a person of ordinary ability would have believed that the party was guilty.

5. HABEAS CORPUS ⟸85(1)—EVIDENCE.
Where federal officers shot one of a party in attempting to arrest such persons in Osage county, Okl., for suspected violation of laws relating to intoxicating liquor, evidence *held*, in habeas corpus proceedings in the federal court, to show that none of the party, in the presence of the officers, committed the offense of introducing intoxicating liquor into the county.

6. INDIANS ⟸38(5)—INTRODUCTION OF INTOXICATING LIQUORS.
The prima facie presumption of the unlawful introduction of intoxicating liquor into Indian Territory, etc., declared by Act May 18, 1916, § 1 (Comp. St. § 4144a), may be rebutted by evidence to the contrary.

7. HABEAS CORPUS ⟸113(12)—APPEAL—PRESUMPTION.
It is a prima facie presumption of law that the finding of the trial judge in habeas corpus proceedings, who heard and saw the witnesses, was correct.

8. ARREST ⟸68—FORCE.
Conceding that petitioners were authorized to arrest without warrant for introducing intoxicating liquor into Oklahoma, that authority includes the lawful power to use only such force as an ordinarily prudent and intelligent person, with knowledge and in situation of arresting officer, would have deemed necessary.

9. ARREST ⟸68—FORCE—EXTENT.
Where federal officers desired to arrest several suspected of introducing intoxicating liquor into Oklahoma, *held* that, if persons were known to live in vicinity, etc., officers were not warranted in shooting into automobile in which such persons were riding, and taking the risk of, and actually killing, one of the party.

10. HABEAS CORPUS ⟸111(1)—DISCHARGE—DISCRETION.
In a proceeding under Rev. St. §§ 751–753 (Comp. St. §§ 1279–1281), for habeas corpus to secure release of federal officials, who killed one whom they were attempting to arrest on theory he and his companions were guilty of introducing intoxicating liquor into Osage county, Okl., *held*, that refusal to discharge such officers from custody of state officials, to which they had been committed for violation of state law, was not an abuse of discretion.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Petitions by D. F. Castle and by Sam W. Tulk for writs of habeas corpus and for a discharge from the custody of Seth M. Lewis, Sheriff of Osage County, Okl. From judgments dismissing and denying the petitions, petitioners appeal. Affirmed.

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T. J. Leahy and Corbett Cornett, both of Pawhuska, Okl. (C. S. Macdonald, of Pawhuska, Okl., on the brief), for appellee.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. These are appeals from judgments of Hon. John H. Cotteral, United States District Judge, that the petitions of D. F. Castle and Sam W. Tulk, for writs of habeas corpus and for a discharge from the custody of Seth M. Lewis, sheriff of Osage county, Okl., be dismissed and denied.

An information was filed in the district court of Osage county by the county attorney of that county, which charged that Castle, Tulk, and William Bryant, on April 25, 1917, shot and murdered Charles Mosier. Castle and Tulk had been arrested and arraigned, had pleaded not guilty, and, in default of bonds of $5,000 each, fixed by the court, had been committed to the county jail in the custody of Lewis, the sheriff of the county. Thereupon Castle and Tulk presented to Judge Cotteral petitions for writs of habeas corpus, in which they alleged that they were on April 25, 1917, officers of the United States, duly authorized under the laws thereof to arrest persons for the offense of introducing whisky into Osage county, Okl., which was Indian country; that on that day Charles Mosier, Henry Mays, Roy Tinker, and Charles Roberts were engaged in transporting whisky in an automobile in the presence and within the knowledge of the petitioners into Osage county, which was Indian country, in violation of the laws of the United States; that the petitioners in the discharge of their official duty endeavored to arrest these violators of the law; that they called upon them to halt and to submit to arrest, but they refused and fled; that while they were fleeing the petitioners fired several shots from their guns at the departing automobile, to disable it, so that they could arrest its occupants; that they did not intend to shoot or injure Mosier; and that whatever acts they did were done in the discharge of their official duties as officers of the United States and by authority of its laws. Upon the filing of these petitions Judge Cotteral issued orders upon the sheriff to show cause why writs of habeas corpus should not be issued, and why Castle and Tulk should not be discharged from his custody. The sheriff answered that he held them under a commitment issued by the district court of Osage county, Okl., which commanded him to confine them in the county jail under the charge of murdering Mosier, until they should be legally discharged therefrom. Upon the presentation of this response the cases went to final hearing, testimony that occupies 107 pages of the printed record was introduced, and the court dismissed the petitions and refused to discharge the petitioners upon the merits of their cases.

[1] When a person is in custody under the process of a state court for an alleged offense against the laws of such state, and it is claimed (a) that he is in custody in violation of the Constitution, or of a law or treaty of the United States, or (b) for an act done or omit-


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ted to be done by him in pursuance of a law of the United States, the District Courts of the United States and the judges thereof have plenary jurisdiction to inquire into the cause of such confinement by means of the writ of habeas corpus, and to discharge the petitioner if his detention is in violation of the Constitution or of a law or treaty of the United States, or if he is in custody for an act done or omitted to be done in pursuance of a law of the United States. United States Revised Statutes, §§ 751, 752, 753 (2 United States Compiled Statutes 1916, §§ 1279, 1280, 1281); Ex parte Royall, 117 U. S. 241, 248, 6 Sup. Ct. 734, 29 L. Ed. 868.

[2] It does not follow, however, from the grant of this jurisdiction, that the duty is imposed upon the court or its judges to discharge the petitioner in every case immediately after the hearing, even if the court or the judge is of the opinion that the confinement is unwarranted. The injunction of the statute is to hear each case on the writ of habeas corpus summarily and thereupon "to dispose of the party as law and justice may require." This direction leaves to the wise judicial discretion of the court, or judge, the time and mode in which the granted power shall be used. That discretion should be so exercised "in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution" (117 U. S. 251, 6 Sup. Ct. 740, 29 L. Ed. 868), in the light in each case, of the nature of that case, whether it involves an alleged violation of the Constitution or a confinement for an act done in pursuance of a law of the United States, whether it is a case of urgency where a failure to discharge the petitioner immediately will or may substantially delay the enforcement of the laws of the United States, or seriously interfere with the operation of its government or the administration of its affairs, or a case which really involves only the question whether the issues presented shall be first tried in the federal court or in the state court, and in the light of the clearness and certainty with which the material facts are established, whether they are admitted or proved beyond doubt, or are involved in uncertainty and the subject of conflicting testimony which naturally invokes the verdict of the jury.

[3] If an officer or soldier of the United States is in custody under the process of a state court for an alleged offense against the laws of a state for an act which he claims was done by him in his official capacity, in pursuance of the laws of the United States, such as the shooting of the person he was trying to arrest, and at the close of the hearing under the writ of habeas corpus the facts are admitted or clearly proved (a) that his confinement is in violation of the Constitution or of a law or treaty of the United States, and that the state court is without jurisdiction to try him for the offense charged against him (Ex parte Siebold, 100 U. S. 371, 376, 25 L. Ed. 717; In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55; In re Waite [D. C.] 81 Fed. 359, 362, 371, 372; Campbell v. Waite, 88 Fed. 102,

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107, 31 C. C. A. 403; In re Loney, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. Ed. 949; In re Fair [C. C.] 100 Fed. 149), or (b) that he had authority from the United States to arrest persons guilty of the offense for whose commission he was trying to make an arrest, that he had reasonable cause to believe and did honestly believe that the person he shot was guilty of the offense for which he was trying to arrest him, that he acted in attempting to make the arrest within the scope of his authority and used no more force than he honestly and reasonably believed was necessary in order to make the arrest, and that the case is one of urgency in which the delay of a trial by the state court will seriously interfere with the enforcement of the laws of the United States or the operations of its government, the court or judge may and should immediately discharge the petitioner without waiting for such trial (Ohio v. Thomas, 173 U. S. 276, 283, 19 Sup. Ct. 453, 43 L. Ed. 699; United States v. Fuellhart [C. C.] 106 Fed. 911, 914; In re Laing [C. C.] 127 Fed. 213, 217; United States v. Lipsett [D. C.] 156 Fed. 65). The cases, however, which present such facts, are exceptional, and the general rule and settled practice of the courts and judges of the United States, in cases which do not fall within the classes just enumerated, is to so exercise their discretion, in view of the delicate relation of the national and the state courts, as to refuse to interfere by writ of habeas corpus with the custody of the state court, at least until after the trial of the petitioner therein. Ex parte Royall, 117 U. S. 241, 251, 6 Sup. Ct. 734, 29 L. Ed. 868; Drury v. Lewis, 200 U. S. 1, 6, 8, 26 Sup. Ct. 229, 50 L. Ed. 343; In re Lincoln, 202 U. S. 178, 181, 182, 26 Sup. Ct. 602, 50 L. Ed. 984, and cases there cited. The judge below, after hearing the evidence in the cases in hand, was of the opinion that they fell under the general rule, and in the exercise of his discretion he refused to discharge the petitioners before their trial in the state court, and the question now presented is: Was his action erroneous or an abuse of his discretion?

The only ground on which Castle and Tulk alleged in their petitions that they were entitled to a discharge from the custody of the state court was that they were officers of the United States, who had the authority under its laws, and upon whom the duty was imposed thereby, to arrest persons introducing whisky into Osage county in their presence, that Mays, Tinker, and Roberts were such persons, that the petitioners tried to arrest them, that they fled in an automobile, that it was necessary for the petitioners, in order to arrest the occupants of the automobile, to fire their guns at it, that they did so for that purpose, with no intent to shoot or injure its occupants, and that all their acts were done in their official capacity, in pursuance of the laws of the United States.

[4, 5] Conceding, without deciding, that the petitioners were authorized under the laws of the United States to arrest without a warrant persons who upon reasonable grounds they honestly believed were committing in their presence the offense of introducing intoxicating liquors into Osage county, that they tried to arrest Mays, Tinker, and Roberts as such persons, that the latter fled, and that the peti-

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tioners fired at the automobile in which they went to stop it, so that the petitioners could make the arrest, the burden was still upon them to prove, by at least a fair preponderance of the testimony, three other facts, in order to entitle them to their discharge: First, that they had reasonable cause to believe and honestly did believe that Mays, Tinker, and Roberts were introducing intoxicating liquor into Osage county in their presence; second, that the petitioners honestly and with reason believed that, in order to arrest them therefor, it was necessary for the petitioners to fire their guns at the departing automobile which held them, and to take the chance of shooting its occupants; and, third, that the confinement the petitioners are suffering and will be likely to endure while their cases proceed to trial and disposition in the state courts will so seriously interfere with the enforcement of the laws of the United States or with the operations of its government that these are cases of emergency or urgency, which justify and require a departure from the general rule and a discharge of the petitioners before their trials in the state court.

Henry Mays was a livery driver, who lived at Pawhuska, in Osage county, with his wife and two children, owned his automobile, and carried passengers for hire. He had lived in Pawhuska for many years. Tinker was a young man 24 years old, who had lived in Pawhuska all his life, and was on April 25, 1917, a soldier. Mosier was a young soldier, who had lived in Pawhuska many years. Roberts was a young soldier. About 2 o'clock in the afternoon of the day of Mosier's death, he hired Mays to take himself, Tinker, and Roberts into the country. After they had been seated in the automobile, Mosier asked Mays to drive them to Charles Johnson's place, which was in Osage county, about nine miles east of Pawhuska. Mays did so. There Mosier and Tinker bought three quarts of whisky, and returned to the car, and Mays, Mosier, Tinker, and Roberts started therein back to Pawhuska. When they were about five miles east of their homes, they passed Lewis, the sheriff, and his car, which was on the road, and Castle, Tulk, and Bryant, who fired their guns at Mays' car and killed Mosier. Mays and the other occupants of his car did not go out of the county that day, and they were not introducing liquor into the county. Some time in the afternoon of that day Lewis had information that intoxicating liquors were expected into Osage county. He testified that he—

"just had information that there was a car of whisky coming in, probably two cars. Q. Didn't have any information as to who it was going to be? A. No, sir; I did not. I didn't know."

He told Castle and Tulk he had this information, and invited them to go in his automobile with him out on the Bartlesville road, which was the main travelled road east from Pawhuska, over which Mays had gone, and over which many automobiles passed daily, and over which intoxicating liquors were usually brought into Osage county. Lewis was, and had been for at least five years, acquainted with Mays, Mosier, and Tinker. Castle testified that he had known Mays for five years, that he had arrested him once for introducing liquor, that he had found liquor in his car, and that Mays had a reputation

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of hauling liquor; but Mays testified that he had never been convicted of introducing liquor, and that he had not been hauling it. The officers went out on the Bartlesville road about four or five miles, and then, as Tulk testified:

"We laid in wait—got off into the lane there running north and south, and we laid in wait until we seen the car approaching."

They then took their car out onto the road, and as Mays' car approached they recognized Mays and his car, and as he passed them, and also after he passed them, they fired into the car, and after the car had gone a few rods past Lewis' car a shot struck and killed Mosier. The facts which have been recited thus far are undisputed. Some of the officers testify that as Mays' car approached them one of the occupants broke a bottle over the side of the car which they thought was whisky. The living occupants of Mays' car testified that no bottle was so broken before they passed the officers. Mays' car was running quite fast as it passed the car of Lewis, and Lewis' motor was also running. Mays testified that his brake was out of order, so that he could not have stopped quickly, if he had received notice to do so, but that he received no such notice. The officers testified that they held up their hands and called upon Mays to stop. The living occupants of Mays' car testified that they saw no motion and heard no call to stop, and that all they heard was a command from one of the officers as they passed, to kill them all, that Mosier then cried out, "For Christ's sake get out from here, they are going to kill us all," and Mays speeded up his car, and Mosier was shot.

The officers testified that none of them gave the command to kill; they also testified that they honestly believed that the occupants of Mays' car were introducing liquor into Osage county; and their counsel argue that they had reasonable ground for that belief, because the road on which Mays was driving was the road over which liquor was usually brought into the county, because the possession of intoxicating liquor in that county is prima facie evidence of its unlawful introduction (Act May 18, 1916, c. 125, § 1, 39 Stat. 124 [Compiled Statutes 1916, § 4144a]), and because some of them testified that they saw a bottle they thought contained whisky broken over the side of the car as it approached, and Lewis had information that one or two loads of whisky were coming into Osage county. But the fact is proved, without contradiction, that the occupants of Mays' car were not introducing liquor into Osage county. The alleged breaking of a bottle of liquor over the side of the car before it passed the officers is denied, and it is not established by the preponderance of the testimony. There is no evidence whatever who gave Lewis his information that liquors were to be introduced into the county, and he testified that he had no information that the occupants of Mays' car were expected to introduce it. If, therefore, his information justified the arrest of the occupants of Mays' car and the shooting into it, it would have equally justified the arrest of the occupants of any other car that happened first to come along the road at like speed with that of Mays' car, while these officers were lying

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in wait. In Chandler v. Rutherford, 101 Fed. 774, 778, 43 C. C. A. 218, 221, this court, commenting on a similar situation said:

"It will be observed, however, that no offense had been committed in the deputy marshal's presence when he attempted to arrest the plaintiff, and that such knowledge as he had of an offense having been committed was derived wholly from hearsay. * * * When an officer seeks to justify an arrest without a warrant under a statute like the one now under consideration, and the act for which the arrest was made was not committed in his presence, it is manifest that he must show that he acted on information such as would justify a reasonable man in believing that the particular person arrested was guilty of a felony."

Section 5654 of the Revised Laws of Oklahoma of 1910, provides that a peace officer may, without a warrant, arrest a person:

"First. For a public offense committed * * * in his presence. * * * Third. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it."

The general rule is that, while an officer may arrest for a felony without a warrant under certain circumstances, he may not so arrest arbitrarily, or on a mere belief or suspicion that the party he arrests is guilty of the felony. It is indispensable to a justification, when the party he arrests or seeks to arrest is actually innocent, not only that the officer honestly believed or strongly suspected that the person he arrested or sought to arrest was guilty of the felony, but also that the facts and circumstances within his knowledge were such that a reasonable person of ordinary ability and intelligence, knowing those facts and circumstances and acting without prejudice or passion, would have believed or strongly suspected that the party arrested, or the party whom the officer sought to arrest, was either guilty of the felony or implicated in it. 5 Corpus Juris, 416, § 461, and notes and authorities there cited. In the case in hand the evidence is undisputed, not only that the occupants of Mays' car did not, in the presence of the officers, commit the offense of introducing liquor into Osage county, for which the petitioners alleged in their petition they were seeking to arrest them, but that they were not guilty of committing an offense at all.

[6, 7] The prima facie presumption of the introduction of the liquor which arose by virtue of the statute, which was enacted to throw the burden of proof upon the trial of cases for the introduction of the liquor upon those in possession of the liquor in the first instance, was met and swept away by the undisputed evidence of all of the witnesses upon the subject that Mosier and Tinker obtained the liquor on that day within the county, and that none of the occupants of the car introduced any from without it. The issue, whether or not, at the time of the attempted arrest and shooting, the officers had any knowledge that there was whisky in the car, is conditioned by conflicting testimony, the preponderance of which is not with the officers. In this state of the evidence the judge below failed to find that the facts and circumstances within the knowledge of the officers at the time of their attempted arrest and shooting were such that a reasonable person of ordinary intelligence and ability, knowing these facts and circumstances, would have been led to believe or

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strongly to suspect that any of the occupants of Mays' car were guilty of the offense of introducing whisky into Osage county. There is a prima facie presumption of law that the finding of the judge who heard and saw the witnesses was correct, and a careful reading and consideration of the evidence has failed to satisfy that in making that finding the judge fell into any error of law or made any mistake of fact.

[8, 9] The next question is: Was there any error of law or mistake of fact, in that the judge failed to find under the evidence that the petitioners were acting within the scope of their authority in shooting into Mays' car and taking the chance of killing some of its occupants. Conceding, for the purpose of considering this issue only, that the petitioners were authorized to arrest the occupants of Mays' car without a warrant for the felony of introducing liquor into Osage county, that authority included the lawful power to use such force as they then had reasonable cause to believe, and in the exercise of their sound discretion they did honestly believe, was necessary to make the arrest; but it included the right to use no more, and the use of any greater force was beyond the scope of their authority, unauthorized, and without justification. Here, too, the measure of necessary force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary. 5 Corpus Juris, 424, § 59; 1 Bishop's New Criminal Procedure, § 159. The officers testified that as Mays' car approached them they raised their hands and called "Halt!" The living occupants of Mays' car testified that they saw no motion and heard no call to stop. The officers and occupants of Mays' car testified that the former fired the first shot into the side of Mays' car as it passed them; the living occupants of the car testified that as they passed all they heard was a command to kill them all as the shooting commenced. The officers testified no such command was given, but the witnesses agree that the shooting continued for some time after the car passed, and that from eight to twenty shots were fired. Several of these shots struck the automobile; some passed through the back of it above the seat; some passed over it, and struck in the road ahead of it, as it was going up a hill. The officers testified that they fired into the machinery below the body of the car and at the tires, for the purpose of stopping the car, and that they did not intend to injure the occupants.

The officers knew Mays, Mosier, and Tinker; they recognized them, or some of them, as Mays' car approached, and recognized that the car was Mays'; they knew that they lived in Pawhuska, toward which city they were going, and that they had lived there for many years. Mays was a married man, and had two children there. The occupants of Mays' car had no weapons, and had not resisted arrest; they testified they did not know that the officers wanted them to stop or wanted to arrest them until after the shooting. They were not fugitives from justice; they were not violent men; they were not itinerants or strangers. So it is that the evidence as to the sayings and doings of the parties when Mays' car passed the officers

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presents a substantial conflict as to what was said and done by the officers, that invokes the consideration of a jury, and the facts that all the occupants of the car, except Roberts, were known by the officers to be settled residents and citizens of Pawhuska, and that they were going towards their homes there, whence the officers themselves came, render it difficult to conclude that a person of ordinary prudence and intelligence, knowing the facts and circumstances which these officers knew, could have had cause to believe, if he were in their situation, or could have honestly believed, that he could not have accomplished the arrest of the occupants of Mays' car in Pawhuska, which was only five miles away, or that it was necessary, in the exercise of sound discretion, in order to make their arrest, to fire into the automobile and take the dangerous chances of injuring or killing some of its occupants. The judge below was unable to reach that conclusion, and no error or mistake in his finding here is discovered.

[10] The single question remains: Was the judge below guilty of an abuse of his discretion in concluding that these were not such cases of urgency as required him to discharge the petitioners before their trial in the usual course of procedure in the state court? The contention that every case wherein an officer of the United States, in custody under an order of a state court for trial for an alleged offense against the laws of the state, claims that the act charged against him was as done or omitted by him while acting in his official capacity in pursuance of a law of the United States, is such a case of urgency as requires a federal court or judge to discharge the officer upon hearing of the writ of habeas corpus before his trial in the state court, is answered by the decision of the Supreme Court in Drury v. Lewis, 200 U. S. 1, 6, 8, 26 Sup. Ct. 229, 50 L. Ed. 343. The time and mode of disposing of such officers is subject to the discretion of the federal courts and judges.

The petitioners were committed to the custody of the sheriff on the charge of murder, and were so held in custody in default of bonds of $5,000 each, fixed by the state court. These facts constitute the only evidence or pleading that these were cases of urgency, that the enforcement of the laws of the United States or the operations of the national government would be injuriously delayed, or seriously or at all disturbed, by reason of their confinement, or the delay of their discharge until after their trials by juries in the regular course of the proceedings of the state court, and under these circumstances this court is unwilling to hold, in view of all the facts and circumstances to which reference has been made, that the judge below was guilty of any abuse of discretion in his refusal to discharge them before such trials.

Let the judgments and orders in these cases, which dismissed the writs of habeas corpus and denied the applications for the discharge of the petitioners from the custody of the sheriff, be affirmed, with costs.

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DES MOINES UNION RY. CO. et al. v. CHICAGO, MILWAUKEE & ST. P. RY. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 23, 1918. Rehearing Denied October 28, 1918.)

Nos. 4885, 4886.

1. RAILROADS ⊂=80—TERMINAL PROPERTY—CONVEYANCE TO TERMINAL COMPANY.

Articles of incorporation of a terminal railroad company, organized by three railroad companies, each of which owned property and franchises in a city, to take over and operate such property for terminal purposes, construed in connection with a prior contract between the railroad companies for joint use of the property, and with subsequent conveyances of the same to the terminal company in exchange for its bonds, *held* to vest the latter with the entire legal title, leaving the interest of the railroad companies therein only that represented by their stock.

2. RAILROADS ⊂=118—POWER TO TRANSFER PROPERTY—CONVEYANCE TO TERMINAL COMPANY.

The rule that public carriers may not impair their public usefulness by vitally maiming their lines has no application to conveyances by railroad companies of terminal portions of their lines to a terminal company, whereby a more efficient and economical operation of the property is secured.

3. RAILROADS ⊂=19—ILLEGAL AMENDMENT OF CHARTER—ESTOPPEL.

Where an amendment to the articles of incorporation of a terminal company, although not legally adopted, was acquiesced in by the parties in interest all of whom took part in its adoption, and was treated as valid and in force for 17 years, during which time some acquired additional interests from others, the latter are, as between them, estopped to question the validity of the amendment.

4. RAILROADS ⊂=139—CONTRACTS WITH TERMINAL COMPANY—CONSTRUCTION.

Under contracts between three railroad companies and a terminal company organized by them, providing that, after deducting the amount received from other companies for use of the terminal property, the cost of its maintenance and operation should be paid monthly by the three companies, such companies *held* entitled to a surplus accumulated by the terminal company from sums so received from outside companies for rentals and switching charges and not applied on cost of maintenance and operation all of which was charged to and paid by the three companies.

Hook, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the Southern District of Iowa.

Suit by the Chicago, Milwaukee & St. Paul Railway Company and others against the Des Moines Union Railway Company and others. From the decree, both parties appeal. Modified.

Burton Hanson, of Chicago, Ill. (J. C. Cook, of Cedar Rapids, Iowa, on the brief), for complainant Chicago, M. & St. P. Ry. Co.

J. L. Minnis, of St. Louis, Mo., for complainant Wabash R. Co.

J. L. Parrish, of Des Moines, Iowa, and F. W. Lehmann, of St. Louis, Mo. (W. E. Miller, of Des Moines, Iowa, on the brief), for defendants.

Before HOOK, SMITH, and STONE, Circuit Judges.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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STONE, Circuit Judge. This is a bill by the Chicago, Milwaukee & St. Paul Railway Company and the Wabash Railroad Company against the Des Moines Union Railway Company, Frederick M. Hubbell, Frederick C. Hubbell, and F. M. Hubbell & Son. The complainants are railways passing through the city of Des Moines, requiring the use of terminal and depot facilities. Defendants are a terminal company at Des Moines and the individual owners of five-eighths of its outstanding capital stock. Complainants, except for eight qualifying shares, own the other three-eighths of such stock, the Wabash one-eighth, and the Milwaukee two-eighths. Complainants are now using the facilities of the terminal company under a 30-year contract, dated May 10, 1889, but related back to May 1, 1888, and expiring May 1, 1918. As holders of the stock control in the terminal company, the Hubbells have declared that, if complainants desire to use the terminals after the above date, they can do so only under such contract as may be made therefor. Believing that they have (aside from stock holdings) controlling interests and rights in the terminal property, complainants have brought their bill. The main object of the suit is to have determined the rights of the three companies in respect to the terminal property and operation. A subsidiary, but not unimportant, controversy is present regarding the right to several hundred thousand dollars accumulated from rentals, privileges and switching service by the terminal company, not arising from the use by nor service to the complainants.

The complainants allege that they are the real owners of the terminal property, and that defendant company simply holds the title in trust for them, or that the terminal ownership is subject to an easement in their favor, which gives them the right to use the property in perpetuity for terminal purposes, upon payment of the actual cost of operation, maintenance and taxes. The claim of the defendants is that the defendant company is the sole owner of the entire title to the terminal property, and also that complainants are estopped from questioning such title.

The decree of the court below adjudged that the defendant company had complete title to the terminal property, and that complainants had no interest therein, except as stockholders of the defendant company. But the court held that, growing out of provisions in that company's articles of incorporation, it owed to complainants and their successors a corporate obligation to furnish them terminal service upon equitable terms, and that such obligation was paramount to any obligation to serve other roads. From this latter provision in the decree defendants have prosecuted a cross-appeal. As to the accumulated earnings, the court below held that this fund belonged to the defendant company, and that the complainants had no interest therein, other than as shareholders in the defendant company. Complainants have appealed from the entire decree.

The determination of the main controversy is the definition of the legal effect of certain instruments and acts of the parties or their predecessors in interest. The determination of the right to the ac-

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cumulated earnings depends upon the construction of the contract (dated May 10, 1889) under which the parties are now operating.

The Main Controversy.

[1] A brief history is essential to any proper understanding and determination of the case. As to that part of their respective railways entering Des Moines, the Milwaukee is the remote successor of the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, while the Wabash is the remote successor of the Des Moines & St. Louis Railway Company. Prior to 1881 the Wabash, St. Louis & Pacific Railway Company was the owner of a railway line extending from St. Louis northwesterly to Albia, Iowa, about 68 miles southeasterly from Des Moines. J. S. Polk, J. S. Clarkson, F. M. Hubbell, and J. S. Runnells were at the same time interested in a short narrow-gauge line, the Des Moines Northwestern Railway Company, extending northwesterly from Waukee, a town about 15 miles westerly from Des Moines. Desiring to connect these lines at Des Moines, the Wabash and the above individuals entered into a contract December 8, 1880, providing for the organization by these individuals of a new company, the Des Moines & St. Louis Railway Company, and the building by it of a standard-gauge line from Albia to Des Moines, with funds furnished by the Wabash Company. On the same day the Wabash Company entered into contract with the Des Moines Northwestern Railway, with the expressed object of increasing and securing the "through" traffic of that line. This it sought to do by agreeing to furnish funds for the extention of that line northward and westward, and by agreeing to provide a connection from Waukee with the contemplated Des Moines & St. Louis Railway tracks to be laid in Des Moines. In April, 1881, yet another company, the St. Louis, Des Moines & Northern Railway Company, was organized by the above individuals, and soon began constructing a narrow-gauge line from the northwest to Des Moines. A part of this line formed a link between Waukee and Des Moines, over which the Northwestern shortly thereafter secured running rights.

During the year 1881 and thereafter, the acquirement of right of way in Des Moines and the construction work there proceeded; the land being taken in the name of James F. How, James F. How, trustee, G. M. Dodge, St. Louis, Des Moines & Northern Railway Company, or the Des Moines & St. Louis Railway Company; that taken by How, or How, trustee, being paid for by the Wabash.

With the three lines entering or about to enter Des Moines and the land being acquired for terminals, the time and necessity for some terminal arrangement had arrived. The contract of January 2, 1882, was executed by the three railways and by the individuals (Dodge and How) in whose names part of the land had been taken. This contract is the basis of complainants' claims upon the main issue in the case. They contend that titles and rights defined therein remain unchanged

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in essentials. Defendants claim later departures radically affected such titles and rights as are to be found in the contract.

This contract, omitting signatures, was as follows:

"This agreement, made at the city of New York, the 2d day of January, 1882, by and between the Des Moines & St. Louis Railway Company, the Des Moines Northwestern Railway Company, and the St. Louis, Des Moines & Northern Railway Company, and the several individual signers hereto, witnesseth:

"First. The companies above named are engaged in the construction of railways converging at the city of Des Moines, and have heretofore agreed upon the purchase, construction and maintenance at their joint expense for terminal facilities in the city of Des Moines to be held and used in common as hereinafter provided.

"Second. In pursuance of said agreement, various purchases have been made of real property in the city of Des Moines in the name of James F. How, individually, James F. How, trustee, and Grenville M. Dodge, and certain additional property has been appropriated by the Des Moines & St. Louis Railway Company, and the construction of buildings and other improvements upon said premises has been begun.

"Third. It is mutually agreed by the parties above named, that the expense incurred by the purchases and improvements above mentioned and such others as may be hereafter made, shall be borne in the proportion of one-half by the Des Moines & St. Louis Railway Company and one-quarter by each of the other two companies above named. It is understood that a depot company may be organized and may take permanent charge of the property upon the terms herein set forth, and that said company may issue and deliver to the companies, parties hereto, its mortgage bonds to the amount of their respective portions of the cost of the said purchases and improvements.

"Fourth. The title to said property shall be and remain in a trustee to be named by agreement by said companies, but subject to the joint use and occupation of all of said railway companies upon the terms herein described.

"Fifth. The individual signers hereto hereby declare said purchases to have been made in their names upon the trusts above referred to, and agree to quitclaim and convey the same to said trustees upon demand and reimbursement.

"Sixth. The Des Moines & St. Louis Company shall at all times be charged with the police control, supervision and maintenance of said property, and the expense thereof shall be apportioned between it and the said other two companies, the apportionment to be determined by the use thereof which they shall respectively make as evidenced by the wheelage; payment of the sum required to be made monthly to the Des Moines & St. Louis Railway Company, within 10 days after rendition of an account stated.

"Seventh. The control of said property by the Des Moines & St. Louis Railway Company shall not extend to a determination of the character and extent of improvements to be now or hereafter put upon the same, but differences between the parties under this head shall be settled by arbitration.

"Eighth. It is understood and agreed that spur tracks shall be built connecting the said terminal grounds with such manufactories and other sources of trade in and about the city of Des Moines as afford sufficient opportunity for profit by so doing, and that all of said tracks shall be adapted for use for both broad and narrow gauge trucks: Provided that in case either of said companies shall deem the construction of any of said tracks as not advantageous to its business, the question of constructing said track, and which of the parties hereto shall pay therefor, shall be determined by arbitration.

"Ninth. Taxes and assessments levied upon said property shall be charged to maintenance account.

"Tenth. In the event that any company, whose railroad does not extend to Des Moines, shall effect an arrangement for running its trains into Des Moines over the railroad of either of the parties hereto, such company shall be entitled to the use of all of said terminal facilities upon the payment of a fair sum for rental and its proportion of the maintenance account, the rental

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to inure to the companies hereto in the same proportion as the original outlay, and the sum due from such company for maintenance account to be determined in the same manner as the sums due from the other companies, parties hereto. Railroad companies whose roads extend to Des Moines, may be admitted to the use of said facilities by agreement of all the companies parties hereto.

"Eleventh. All differences arising under this agreement shall be referred to arbitration; one of said arbitrators shall be chosen by the Des Moines & St. Louis Railway Company, another by the St. Louis, Des Moines & Northern Railway Company, and the third by the two thus selected. The judgment of any two of the said arbitrators shall be final. If the matters of difference shall be between the Des Moines & St. Louis and the Des Moines Northwestern, then the second arbitrator shall be chosen by the Des Moines Northwestern, and not by the St. Louis, Des Moines & Northern.

"Twelfth. It is mutually understood that the grounds so to be held in common by the companies, parties hereto, are all east of Farnham street in the city of Des Moines, and that no grounds west of Farnham street have been acquired under this agreement."

An analysis of this contract shows a statement of the occasion and object of the contract; provisions for the title, the use and occupation, the maintenance, and the improvement of the property; and for arbitration.

The occasion and object of the contract is stated to be to provide for the common holding and use by the three companies of the property and improvements then or thereafter acquired or constructed for terminal facilities.

As to title, the property was "to be held in common" (paragraph twelfth) through the medium of a trustee to be selected by the companies, in whom the title should "be and remain * * * subject to the joint use and occupation of all of said railway companies upon the terms herein described" (paragraph fourth). If outside railways effected arrangements to enter Des Moines over any of the three lines, they should, beside a portion of the maintenance cost, pay a fair rental "to inure to the companies hereto in the same proportion as the original outlay" (paragraph tenth). The individual "signers hereto" declared the property acquired in their names to have been "upon the trusts above referred to," and agreed "to quitclaim and convey the same to said trustee upon demand and reimbursement" (paragraph fifth). Payment for the property was to be borne by the three companies, in proportions of one-half by the Des Moines & St. Louis and one-fourth by each of the other companies, with a provision that, if a depot company should be organized and should take permanent charge of the property, "said company may issue and deliver to the companies, parties hereto, its mortgage bonds to the amount of their respective portions" of expenditures for the property (paragraph third).

The use and occupation of the property was to be "joint" (paragraph fourth), under the "police control" and "supervision" of Des Moines & St. Louis (paragraph sixth). Industrial spur tracks, which might be built, should be adapted to both standard and narrow gauge (paragraph eighth). There was provision for the use of these terminal facilities by outside companies. If such company did not extend to Des Moines, but should effect an entrance by a running arrangement over any of these three lines, such company should be en-

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titled to the use of all the terminal facilities upon payment of a fair rental and its proportion of the maintenance account. Other railways might "be admitted to the use of said facilities by agreement of all the parties hereto" (paragraph tenth).

The maintenance of the property, including taxes and assessments (paragraph ninth), was to be in charge of the Des Moines & St. Louis, the expense to be divided on a wheelage basis and paid monthly to said company on rendition of accounts therefor (paragraph sixth). Any other company entitled to use the terminals under paragraph tenth to bear its wheelage proportion (paragraph tenth).

Regarding future improvements, the contract provided they must, in character and extent, be such as agreed upon by the three companies, or, if a disagreement, such as determined by arbitration (paragraph seventh and eighth); the cost of such to be paid, one-half by the Des Moines & St. Louis, and one-fourth by each of the other companies (paragraph third), except that arbitration might settle which of the companies should pay for industrial spur tracks, the construction of which had been opposed by one of the companies as not advantageous to its business (paragraph eighth).

Obviously, the only purpose of including the individuals, Dodge and How, in the contract, was to control the title taken in their names. They figure in the future of the plan, as outlined by the contract, only for the purpose of conveying their title "to said trustee upon demand."

Also, there is mention of a "depot company." Under the influence of a knowledge of what was afterwards done, there is danger of exaggerating this reference. Clearly it was rather incidental. Its physical location in the contract is significant of the place it occupied in the minds of the parties at the time in connection with the contract. The contract is carefully drawn by skilled draftsmen, who set off in brief, clean-cut, numbered paragraphs the different subjects of the contract. If the "depot company" had bulked large in their contemplation at that time, or if it was to form any essential part of their then plan, it is strange it did not receive some separate and distinct consideration. In fact, it occurs in the paragraph which sets forth the proportions in which the companies are to bear the expense of acquiring and improving the terminal property. Its obvious connection with that idea is that it contains the only suggestion of any method of reimbursement for such outlay. In our judgment, that was the only reason for mentioning, in the contract, the matter of such a company. Even as expressed, while it shows that the subject of such a company had been considered, it also reveals that either the project had not reached the stage of completion and concurrence, or that everything regarding it was purposely left in complete abeyance, in so far as this contract is concerned. The expression is that such a company "*may* be organized, * * * *may* take permanent charge of the property, * * * *may* issue and deliver to the companies * * * its mortgage bonds. * * * "

As to the companies, the contract not only declared some existing property rights, but attempted to define for the future the rights of title and usage of the terminal property. The title contemplated was

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a trust. The legal title to be "in a trustee to be named by agreement of said companies." The beneficial estate to be in the three companies in proportion to the parts each contributed to the payment therefor. While this proportional interest is not set forth in so many words, it is necessarily inferred from the combined circumstances that the companies were to pay therefor and for improvements thereto in proportions of one-half, one-fourth, and one-fourth (paragraph third), and that the only possible source of profit then contemplated or provided for (rental from any tenant companies) was to inure to the three companies in the same proportion (paragraph tenth). But there was to be no proportional limitation of usage. There was to be a "joint use and occupation of all of said railway companies" (paragraph fourth). Nothing in the entire contract hampers the complete independent individual occupation and use of all the terminal facilities at all times by each of the companies except the two provisions that the occupation and use shall be "joint" (paragraph fourth), and that the Des Moines & St. Louis shall be charged with the "police control and supervision" thereof (paragraph sixth). It was apparently intended that each company should do its own terminal work with its own men and equipment. The only other precedence given either of the companies was the necessary one of "maintenance," with which the Des Moines & St. Louis was also charged (paragraph fourth). In short, the three companies gave up independence of title and of action in the occupation and use of the property only in so far as was absolutely necessary to what they then considered a safe joint occupation and use.

But whatever may have been the importance of a depot company in the minds of the contracting companies at the time the contract was executed, such (defendant herein) was incorporated under the Iowa statutes on December 10, 1884. However, conveyances to this new company, and acceptance by it, affecting the existing terminal property, although first authorized by resolutions of the four companies January 1, 1885, did not begin until November 7, 1887, nor end until April 28, 1888. The actual management of the property by the terminal company did not commence until May 1, 1888, up to which time the companies occupied and used it in common under the 1882 contract.

What effect upon the title, control, use, and occupation of this terminal property had the formation of this terminal company and these conveyances of the property formerly owned, occupied and used by the railway companies under the 1882 contract? This involves consideration (in the light of attendant acts and circumstances) of the articles of incorporation of the terminal company, the resolutions of the four companies in reference to the conveyances, the conveyances themselves, and an attempted amendment of the articles of incorporation.

The only official action taken by any of the railway companies concerning and prior to the incorporation of the terminal company was a resolution of the board of directors of the Des Moines Northwestern Railway Company on December 9, 1884 (the day preceding the incorporation). This resolution declared "it is desirable that a corporation be

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organized for the purpose of taking and holding" the property covered by the 1882 contract. It then chose its representatives "to act for this company in the organization of such corporation, and they are selected to act as two of the directors of said proposed corporation so to be organized for the purpose of carrying out the objects of said contract of January 2, 1882." December 10, 1884, all of the parties to the 1882 contract met for the purpose of incorporating the defendant company, Gen. G. M. Dodge appearing both for himself and for the St. Louis, Des Moines & Northern, two individuals representing the Northwestern, and two the Des Moines & St. Louis. The sole business of the meeting was the passage of resolutions referring to the articles of incorporation. The resolution of adoption declared "that for the purpose of carrying out the objects and purposes of the agreement heretofore, to wit, on the 2d day of January, 1882, made and entered into by and between the Des Moines & St. Louis Railroad Company and others (which is set out in full in the following articles of incorporation)," the articles be adopted as follows:

"Articles of Incorporation of the Des Moines Union Railway Company.

"Whereas, the Des Moines & St. Louis, the Des Moines Northwestern, and the St. Louis, Des Moines & Northern Railway Companies have been engaged in the construction of railways converging at Des Moines, Iowa, and have secured certain franchises, purchased certain realty and made certain improvements thereon—which they have heretofore agreed should be secured, purchased, made and maintained upon certain agreed conditions, at their joint expense—in accordance with a contract made and entered into by and between said companies and Grenville M. Dodge and James F. How, trustee, bearing date January 2, A. D. 1882, and which contract is in words and figures as follows, to wit: [Here the contract was set forth.]

"Whereas, each of said railway companies and said parties has expended large sums of money in purchasing and improving the property aforesaid, and in the construction of suitable buildings for the use of said companies; and

"Whereas, it was provided in the contract aforesaid that a depot company might be organized to take permanent charge of the property, and it was the understanding of the parties that such company might acquire, operate and maintain said property in such manner as best to serve the interest of the parties hereto:

"Now, therefore, for the purposes aforesaid, as well as for those hereinafter expressed, the undersigned hereby associate themselves in a body corporate, and adopt the following:

"Articles of Incorporation.

"Article 1.

"The name of the corporation shall be the Des Moines Union Railway Company, and its principal place of transacting business shall be Des Moines, Iowa.

"Article 2.

"The general nature of the business to be transacted shall be the construction, ownership, and operation of a railway in, around and about the city of Des Moines, Iowa, including the construction, ownership and use of depots, freight houses, railway shops, repair shops, stockyards and whatever else may be useful and convenient for the operation of railways at the terminal point of Des Moines, Iowa, as well as the transfer of cars from the line or depot of one railway to another, or from the various manufactories, warehouses, storehouses, or elevators to each other or to any of the railways or depots there-

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of, now constructed or to be hereafter constructed, in or around said city of Des Moines, and such corporation shall possess all the powers conferred upon corporations for pecuniary profit by chapter 1 of title 9 of the Code, and the amendments thereto. All the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2d day of January, A. D. 1882, by and between the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, Jas. F. How, trustee, and Grenville M. Dodge. The said company shall have the right to lease or otherwise dispose of the use of any part of its franchises to any other railway company—provided that the assent in writing of the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company shall be necessary before any such lease or disposition can be made to any other than the parties above named.

"Article 3.

"The capital stock of this corporation shall be one million ($1,000,000.00) dollars, which shall be divided into shares of one hundred ($100.00) dollars each, and shall be paid in at such times and in such manner as the board of directors may determine, and the board are authorized to receive in payment therefor the property and franchises in the city of Des Moines, now held by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, trustee, Jas. F. How, and Grenville M. Dodge.

"Article 4.

"The affairs of the company shall be managed by a board of eight directors, who shall be elected annually, by the stockholders, on the first Thursday of January of each year. The provisional board of directors, who shall hold office until the first Thursday in January, A. D. 1886, shall consist of Jas. F. How, A. L. Hopkins, A. A. Talmage, J. S. Runnells, J. S. Polk, F. M. Hubbell, G. M. Dodge, C. F. Meek.

"Four members of the board shall be nominated by the Wabash, St. Louis & Pacific Railway Company, two members by the Des Moines Northwestern Railway Company and two members by the St. Louis, Des Moines & Northern Railway Company, and no stockholders shall be eligible for membership of the board unless so nominated.

"The fact that a candidate has been duly nominated shall be certified to the stockholders' meeting of this company by the secretary of one of the respective companies aforesaid and such certification shall be conclusive.

"The provisions herein with respect to nomination for the board of directors shall apply to and be enjoyed by any grantee or assignee of either of the railway companies aforesaid. No contract, lease, or other agreement, amounting to a permanent charge upon the property of the corporation, shall be entered into by the board unless the same shall have been first approved by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, or their assigns, and shall have been submitted to a meeting of the stockholders, duly called, and shall have been approved by more than three-fourths of all the stockholders; and it shall not be within the power of the board of directors to create any limitation whatsoever upon any of the franchises of the corporation, except the same shall have been submitted to and approved by the stockholders as hereinbefore provided.

"The directors shall elect, from their number, a president, vice president, secretary and treasurer. All vacancies arising from the death or resignation of a member of the board shall be filled by the board.

"Article 5.

"The president, vice president, secretary and treasurer shall possess the powers and discharge the duties of like officers of similar corporations, subject to the limitations imposed by these articles. The officers, hereby con-

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stituted, who shall hold their places until the first Thursday in January, 1886, or until their successors are duly chosen, shall be as follows: President, G. M. Dodge. Vice president, Jas. F. How. Secretary and treasurer, F. M. Hubbell.

"Article 6.

"The private property of stockholders shall be exempt from liability for corporate debts and undertakings.

"Article 7.

"The highest amount of indebtedness to which the corporation may at any time subject itself shall be the amount authorized by law.

"Article 8.

"Meetings of the board of directors may be called by the president, or, in case of his absence or disability, by the vice president, and shall be called upon request preferred in writing by two members of the board.

"Article 9.

"These articles may be amended by a vote of more than three-fourths of all the stock in favor thereof, at a meeting of the stockholders thereof, of which a notice containing the proposed amendments shall be mailed to each stockholder at his address, as disclosed by the transfer books of the company. Notice of such proposed meeting shall also be given by publication for three successive weeks in some newspaper of general circulation—published in the city of Des Moines, Iowa.

"Article 10.

"This corporation shall commence on the 5th day of December, A. D. 1884, and continue 50 years, with the right of renewal."

That the creation and entrance of the terminal company into the arrangements of the parties had a marked influence is certain. Here was a creature of the companies, brought into being for the cardinal purpose of taking, by some sort of title, this terminal property, improving, maintaining, and operating it. No title was conveyed in the articles of incorporation. Had nothing further been done the title, control, and operation of the terminal property would have been unaffected. But these articles are valuable as throwing light upon the intention of the parties as to the place that company was to have in their terminal plans. These articles contain provisions in addition to such as would have been necessary in the mere creation of a terminal company—to such as would have been employed by outsiders, whose only purpose was to engage in a terminal business. It is in these exceptional provisions that the particular intention of these parties is to be found. The articles include what may be called a "preamble," which, after reciting the occasion of the 1882 contract, the contract in extenso, and the expenditure of money in pursuance thereof, makes its sole reference to the terminal company as follows:

"Whereas, it was provided in the contract aforesaid that a depot company might be organized to take permanent charge of the property, and it was the understanding of the parties that such company might acquire, operate and maintain said property in such manner as best to serve the interest of the parties hereto"

—declares that "for the purposes aforesaid, as well as for those hereinafter expressed, they associate themselves in a body corporate, and

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adopt the following articles of incorporation." The clear statement in this preamble reference is that the parties intend the terminal company "to take permanent charge of the property" and "to acquire, operate, and maintain said property" in such manner as best to serve their interests.

In what we may call the articles proper we find certain provisions which reveal the intention of the railway companies, not only to keep the stock ownership (seemingly contemplated in the authority given the board of directors "to receive in payment therefor the property and franchises in Des Moines, now held" by the railways and individuals, parties to the 1882 contract), but to exercise a control over the property and over the actions of the terminal company beyond such as would spring from stock ownership alone. Our immediate inquiry has no concern with the legality of these exceptional limitations, if attacked in a proper way, but, taking them as they are, what light do they throw upon the intention of the parties?

Such control may be roughly classified into three kinds: (a) The requirement that the board of directors should be nominated by the three companies, treating the Wabash as identical in interest with the Des Moines & St. Louis (A–4); (b) requirements relating to the disposition of the use of any part of its franchises to any other railway company (A–2), to the creation of any limitation upon such franchises (A–4), and to the creation of any permanent charge upon the property (A–4); and (c) a broad requirement that all of the powers of the corporation shall be exercised "in accordance with the terms and spirit" of the 1882 contract (A–2).

The first of these three classes (a) shows the method of controlling the board of directors. Aside from any previous contract, the railways might want a provision perpetuating in them the choice of directors, and the only connection in thought with the 1882 contract suggested by this requirement is in the circumstance that each railway company was to choose directors in proportion to their interest in the property under that contract. If the selection of directors were to depend entirely upon the vote of the stock, there was no assurance that two of the railways might not combine their votes and exclude the third from any voice in the active management. Therefore they sought to assure, not only complete control of the board, but the same representation upon the board as each of them was to have in the property under the existing contract; the idea also doubtless being in their minds that the stock which paid for that property would be similarly divided.

The second requirement (b) shows the method intended to preserve the control of the railway companies over the property and franchises acquired by the terminal company. Without the previous approval of the three railway companies, no disposition of the use of any part of its franchises could be made to any other railway company, nor could any permanent charge be placed upon its property.

Passing from these specific provisions, looking toward the control by the railway companies of the management, franchises and property of the terminal company, we approach the general requirement

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(c) that "all the powers" of the terminal company shall be exercised "in accordance with the terms and spirit" of the 1882 contract. What does this mean? Evidently a limitation upon the exercise of the corporate powers. Subject to the limitations above discussed, those powers were such as ordinarily belonged to a corporation organized under the Iowa Code for pecuniary profit to construct, own, and operate a terminal railway, with all of its attendant depots, warehouses, shops, etc. What, then, were the further limitations carried by this reference? How was the free exercise of these powers of the terminal company in constructing, owning, and operating a terminal to be limited by the terms or spirit of the contract? The terms and intent of the contract as to *construction* were that there should be only such improvements and extensions as were agreed upon by all the three railways, or settled by arbitration, and to be paid for (except as to certain industrial spurs) by the three on the basis of their contemplated interests in the property of one-half, one-quarter, and one-quarter. The contract terms and intent as to *ownership* were a trust. The contract terms and intent as to *operation* were that each company should do its own terminal work under the police control and supervision of the Des Moines & St. Louis. Under the contract the cost of *maintenance* (including taxes and assessments) was on a wheelage basis. Under the contract *the use of the facilities by other roads* was to require agreement of all three roads, except that any other road entering Des Moines over the tracks of any of the three railways might use them on payment of rental to the roads and a wheelage part of the maintenance.

It is clear that all of these terms and intentions neither were intended to nor could survive the introduction of the terminal company. It is also clear that some of them were to remain active. It is impossible from the two instruments alone (contract of 1882 and articles of incorporation), read in the light of their history, to draw a line in this particular which is at all points clear and definite. Some things, however, seem distinct. Touching *operation*, it is conceded by all parties to this suit that the plan of the contract that each of the railways should do its own terminal work over tracks in joint use was dangerous and unworkable. Doubtless this was one of the main underlying necessities for a terminal company, which could, with its own engines and men, do all of this terminal work. Each of the companies was to have terminal facilities, but in a different method from that covered by the contract. The idea of a joint usage, in the sense of a right in each of the three railways to make an individual usage of the same property during the same period, had been found unsatisfactory and abandoned for the better plan. The contract plan of operation was to be replaced in its entirety.

As to *ownership*: No title or interest in the property owned or held by all or any of the parties to the contract passed or was affected by the articles of incorporation. It is quite clear, however, in the articles, that the parties intended in the future to turn over that property to the terminal company. What was to be the character of the title or interest they intended to convey? There is no dispute

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in this case that as much as the bare legal title was to go. Was the full beneficial interest also to pass? When the parties made the 1882 contract, which provided for a trust, they also revealed therein that a terminal company had been under discussion. In an almost incidental way that matter was mentioned in connection with payment for the property covered by the contract. This mention was that such a company "may issue and deliver to the companies parties hereto its mortgage bonds, to the amount of their respective portions of the costs of said purchases and improvements." Why issue and deliver the bonds, unless they carried value? Why issue and deliver them, except for some value in return? In short, the idea in the contract was compensation or reimbursement. The compensation or reimbursement was to be for money paid out for the legal title and the beneficial interest in the property. The only thing which the parties then had in view to give value to a mortgage and its bonds was this same property. Clearly the parties had considered before and at the time of the contract that the plan first to be tried might give way to that of a terminal company, and that such company might acquire the entire title to the property. Coming to the articles, we find no change in this conception. The preamble recited that—

"It was the understanding of the parties that such company might *acquire*, operate, and maintain said property in such manner as best to serve the interest of the parties hereto."

Nothing is said regarding the use of mortgage bonds, but article 3, dealing with capital stock, authorized the directorate of the new company "to receive in payment therefor the property and franchises in the city of Des Moines now held by" the parties to the contract. What other than the beneficial interest in this property could have constituted in any real sense "payment" for the stock? Article 4 required the consent of all three companies before any "permanent charge" could be placed *by the terminal company* upon the property. Thus the plan, so far as revealed by the articles, seemed to remain as suggested in the contract, with the additional idea of a payment in stock; in short, the complete title to go to the company, with the terms of payment not definitely settled, but suggestions of the value in bonds up to the outlay (in the contract) and of the capital stock of the company (in the articles).

As to *maintenance*: There is but one direct statement, and that is the one from the preamble quoted above. As to where the funds are to be secured therefor, there is no suggestion, unless we can infer that the plan of the contract is to prevail, or that indebtedness may be incurred therefor.

As to the *use by other railways:* There is the provision that the company shall have no right, without the prior written consent of the three railways, "to lease or otherwise dispose of the use of any part of its franchises to any other railway company."

Summarizing, the intention of the parties, as revealed by the articles of incorporation, shows a development of the terminal plan, changing, but not entirely abandoning, that of the 1882 contract. The continuing influence of that contract is evident, though the limits of that

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influence are not in all respects clearly defined. As to operation, it is evident that the general agency thereof was to be entirely different from that contemplated by the contract, but there is lack of certainty as to the influence of the contract over the action of this new agency. As to title the intention is clear. As to improvement and maintenance there is indistinctness.

The conduct and acts of the parties during the next few following years gradually clarified, crystallized, and consummated the entire plan. The intention that the entire title to the property should pass to the terminal company had been suggested in the 1882 contract and adhered to in the articles of incorporation of that company. It was to be further emphasized in resolutions of the four companies relating to the transfers of the title. It was to be consummated in those conveyances. The plan as to improvements, maintenance, and operation of the property in the hands of the terminal company, which had been so dimly outlined in the charter requirement that the powers of the terminal company should be exercised "in accordance with the terms and spirit" of the contract, obviously needed further and clearer definition. The 1882 contract was most general in its provisions, and it applied to a situation in which a terminal company had no place. No one could determine what the "terms and spirit" of the 1882 contract meant as applied to the management of the terminal company. Very soon after the terminal company took control of the property, the parties dispelled this uncertainty by a supplemental contract, explaining clearly what they meant in that regard by the "terms and spirit" of the 1882 contract. This was the contract of May 10, 1889, related back to the date the terminal company took control (May 1, 1888), and covering a term of 30 years. It completed in a workable manner the terminal plan. While all-important in the other branch of this case, this last contract is no more than a side light upon the main controversy, which pivots upon the character of title in the property conveyed to the terminal company.

The first step toward a transfer of title was the action by stockholders' meetings of the four companies, all held January 1, 1885. At these meetings the railway companies (each reciting that the terminal company had been "organized as contemplated and provided in the aforesaid contract, to acquire, hold, use, and enjoy the real estate, property rights, and franchises in the city of Des Moines * * * of the aforesaid railway company and signatories of said contract acquired and held thereunder, and to carry out the purposes of the said contract") ratified and accepted the articles; undertook "to discharge all the obligations imposed upon it by said contract in order to make effective the purposes of" the terminal company; and authorized its proper officers—

"upon the issuance to it of the share of the bonds and stock of said Des Moines Union Railway Company, to which it may be entitled under said contract to convey, assign, and transfer to said company all its right, title, and interest of whatever name and character, in and to the real estate, franchises, choses in action, and rights in possession or contingent to all the property in the city of Des Moines east of Farnham street in said city now held, enjoyed, or claimed by either or all of the signatories of said contract

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of January 2, 1882, or any agent or trustee thereof, purchased, acquired, or held in pursuance of said contract."

Upon the same day the terminal company, at the first meeting of its board of directors, appointed a committee—

"to confer with the several parties to said contract and agree with them severally upon the terms and price at which they will respectively assign, transfer, and convey said railroad property and franchises to this company, and procure from them, and each of them, such conveyance and transfers as may be necessary to fully invest this company with the title, control, and management of said properties as provided for in said contract of January 2, 1882."

It also directed the issue of not to exceed all of its fully paid capital stock and not to exceed 500 bonds, of $1,000 each, secured by mortgage on "all of said property so to be conveyed to this company or thereafter to be acquired." This stock and these bonds were "to enable this company to pay for the property and to maintain, operate, and improve the same, and purchase other property necessary to carry out its objects, and remove any and all liens or incumbrances thereon, and pay off all just claims against the same." With the provision that, when the above committee "shall have agreed with the said several parties to said contract as to the amount of bonds and stocks of this company necessary to be delivered to them, and each of them, in payment for said railroad property and franchises," and shall have delivered the same "on receipt of the conveyances and assignments of said property so to be made to this company," the remainder of the bonds and stock shall be issued from time to time as needed only for the above purposes. Deeds in compliance with these resolutions were not made until beginning with November 7, 1887, and ending April 28, 1888. Nor did the terminal company take possession and operate that property until May 1, 1888, after the last of these deeds, although two of the three railway companies had at these same January 1, 1885, meetings, voted to at once "transfer the management and operation of its property in Des Moines" to the terminal company, expressly leaving the settlement as contemplated by the other resolution to be arranged later, and although the terminal company at its meeting that day assumed to take immediate charge. It is not shown in the record why there was this delay in executing the deeds, although counsel suggest it lay in the confusion attending the passage through financial difficulties of the Wabash & Pacific, the largest single force in the terminal arrangement.

November 1, 1887, the terminal company, at a stockholders' meeting called "for the purpose of considering the question of amending the articles of incorporation of this company, and issuing bonds of the company for the purpose of raising money to purchase, construct, and improve its railway and property," increased its capital stock to $2,000,000 (without changing the authorization to receive therefor the properties in payment), and authorized the issue of not over $800,000 bonds, "secured by mortgage or deed of trust on the property of this company, and the same or the proceeds thereof to be used in purchasing and paying for its property and improving the same, and build-

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ing its railways, depots, roundhouses, and shops, and making other improvements."

Within a week later the directorates of the four companies passed practically identical resolutions in reference to the transfer of the property taken in the names of Dodge and of How. The substance of these resolutions was a request to How and to Dodge "to transfer to" the terminal company the property so held upon receipt of stipulations to deliver to each of them as soon as practicable "first mortgage bonds of that company to the amount of the money advanced for the payment of said property and improvements with interest on same and taxes paid thereon" and the capital stock of the company; the stock to go one-fourth to Dodge and three-fourths to How, the latter to transfer the stock and bonds coming to him to the purchasing committee of the Wabash "in lieu for the money advanced by said company to make the purchase of above property and improvements, and the payment of taxes for this company."

In addition the Des Moines & St. Louis authorized its officers to execute a deed to the terminal company, "conveying to it all its real estate, rights of way, franchise, roadbed, and other property of said company lying and being in the city of Des Moines, east of Farnham street," no matter how acquired; this being done "for the purpose of carrying out the contract of date January 2, 1882."

On the same day, upon receipt of formal notices of the above resolutions passed by the railway companies, the terminal company, at a directors' meeting, accepted the above action of the railway companies, authorized the delivery of the stock and bond warrants, the execution of the mortgage, and issue of bonds.

All of the above resolutions were passed at stock or directorate meetings of the companies. The entire membership of the terminal company was selected by the railway companies and undoubtedly simply registered their will. The resolutions emphasize and confirm the statements made above as to the intention of the railways (revealed in the contract and the articles) that the *entire* title should pass to the terminal company and be paid for by stock and bonds of that company.

In pursuance of the resolutions, How and Dodge delivered deeds. There were three from How, covering different pieces of property. The first two were identical in form. Omitting legal description of the property they were as follows:

"James F. How, Trustee, to Des Moines Union Railway Company.

"Deed.

"Whereas, the property herein described was from time to time purchased with the moneys and funds of the Wabash, St. Louis & Pacific Railway Company, a corporation; and whereas, for its convenience the legal title to said property was conveyed to me in trust; and whereas, said property was acquired and held for the purpose and upon the terms set forth in a certain contract made and entered into on or about the 2d day of January, 1882, between the Des Moines & St. Louis Railway Company, the Des Moines Northwestern Railway Company, and the St. Louis, Des Moines & Northern Railway Company, G. M. Dodge, James F. How, and James F. How, trustee, and which contract was consented to by said Wabash, St. Louis & Pacific Railway Company; and whereas, I have heretofore, at the request of said Wa-

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bash, St. Louis & Pacific Railway Company, stated and declared in writing that I held the legal title to the real estate hereinafter described in trust for said Des Moines & St. Louis Railway Company and said Des Moines Northwestern Railway Company; and whereas, the board of directors of said Des Moines & St. Louis Railway Company and the board of directors of said Des Moines Northwestern Railway Company did, on or about the 8th day of November, 1887, pass certain resolutions containing among other things the following, to wit:

" 'Whereas, James F. How has, prior to 1881 and since then, purchased certain property and made expenditures on same as trustee for this company, the money expended for said property being furnished by the Wabash, St. Louis & Pacific Railway Company; and whereas, under an agreement with this company and the Wabash, St. Louis & Pacific Railway Company and others, it was intended that said property standing in the name of James F. How, trustee, should be transferred to the Des Moines Union Railway Company under certain conditions: It is hereby resolved that James F. How is requested by this company to transfer to the Des Moines Union Railway Company the property above referred to' :

"Now, therefore, know all men by these presents: That I, James F. How, trustee, as aforesaid, of the city of St. Louis, state of Missouri, in consideration of the premises, and of the sum of one dollar to me in hand paid by the Des Moines Union Railway Company, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents I do hereby grant, bargain, sell, and convey, unto the said Des Moines Union Railway Company the several lots or pieces and parcels of ground situated, lying, and being in the city of Des Moines, county of Polk, state of Iowa, particularly described as follows: * * *

"To have and to hold all and singular the several pieces and parcels of real estate aforesaid, with all the appurtenances thereunto belonging, unto the said Des Moines Union Railway Company, a corporation, and its assigns forever. It is expressly understood, however, that I only undertake to convey such title as I may have in said premises, and that I only undertake to warrant and defend against those claiming through and under me."

The third deed substantially differed only in that the conveyance recited it to be by How "as trustee aforesaid." The deed from Dodge was an ordinary quitclaim. A few lots which had been taken in the name of the Northern were quitclaimed by a deed which conveyed the described lots—

"together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest in the above-described property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances, to have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said parties of the second part and assigns forever."

Other property which stood in the name of the Des Moines & St. Louis was conveyed by general warranty deed. All of these deeds were recorded, so far as this record shows, on April 26, April 27, or May 1, 1888. The mortgage authorized was dated November 1, 1887, acknowledged February 13 and 28, 1888, and recorded May 21, 1888 (three weeks after record of the last of the above deeds on May 1). There was never any deed from the Northwestern, which had no property standing in its name.

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It is unprofitable to trace the different later steps connected with and leading up finally to the payment for the property by bonds covering the actual expenditures and stock totaling 4,000 shares ($400,000). With the passage of these deeds and consideration ends the history of the title. All of these transactions result as follows: An intention on the part of all parties that the entire title shall go to the terminal company; payment by that company of the full consideration therefor ultimately agreed upon; deeds designed to convey that full title.

[2] But it is said that, if the railways did so convey all interest in these necessary parts of their roads, such action would be void. The rule invoked is that public carriers will not be permitted to contract away their public usefulness by vitally maiming their lines. Rules of law extend no further than the basic reasons upon which they rest. The usefulness, if not the necessity, of terminal companies is established. That they must, as a general proposition, own their properties in order to raise funds to improve, maintain, and operate them efficiently, is certain. The more efficiently and economically a railway can procure terminal facilities, the better and cheaper its services to the public should be. The conditions and compensation for use of such terminals by the railways are subject to public control, so that the railways cannot be denied or unreasonably restricted in such usage. The public service is protected. It should be bettered by such a terminal arrangement. Therefore the rule invoked by plaintiffs has no application to disposition of terminal portions of a railway to a terminal company.

It is urged that the terminal company has, by its own statements, declared that it had no beneficial interest in the property. The statements intended are contained in reports made by that company to the Executive Council of Iowa for the years 1888, 1889, 1890, 1892, and 1893. In these reports the company stated that it was "simply a representative company, acting as an agency" for the railway companies, "performing all necessary work for them, and charging each at actual cost, its due proportion thereof incurred." These reports were made for purposes of taxation. During all of these years, except 1892 and 1893, the entire income was applied in reduction of the bills of the railway companies, and for those 2 years it should have been so applied under the terms of the 30-year contract, dated May 10, 1889; so that, in fact, it had no income which properly remained as its own. Again, if the use of the term "representative" is to be emphasized, it would be met by the terms "tenant" and "lessee," applied to the railway companies, in a contract dated July 31, 1897. This latter contract was between the terminal company and the complainants, or their predecessors. It applied to and affected the contract of 1889, under which the companies are and have been operating since very shortly after the terminal company began to control the property.

It is contended that complainants retained through the articles of the terminal company an interest in and control over the property. As we have endeavored to show above, no interest was retained in the property through these articles of incorporation. The title was un-

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disturbed and unaffected until the deeds transferred it. However vocal the articles of incorporation and the resolutions of the different companies may have been of the intention of the parties, these expressions passed into effective action only in the deeds. But the articles did provide for a direct control over the property by the railway companies. This was through the requirement that the prior consent of the railways was necessary before leasing or disposing of the use of any part of its franchises, or before placing any permanent charge upon the property, and the requirement that the railways, not the stock, should name the entire directorate. This control was purely contractual in its nature, and neither sprang from nor gave rise to any legal estate or interest in the property itself, affecting the full and complete title of the terminal company. When the deeds passed, the terminal company held the complete legal and equitable title to the property, though it had by contract restricted its freedom to lease, dispose of, or incumber it.

[3] The above control was later relinquished. April 8, 1890, there was an attempt to amend the articles. The result of the proposed amendments would have been to take from the railways, as such, all of the control given by the original articles, to substitute therefor a character of veto control by one-eighth of the stock, and to provide that, not all, as formerly, but 4,000 shares, of the capital stock should be paid the railway companies, in addition to the bonds then already issued, as the full purchase price of the property deeded by the railways. The railways contend that they were invalid, because not properly adopted, and that, even if valid, they could not alter the relations between the railways and the terminal company, because such were based upon contractual rights which had become vested, and which the railways had not by formal corporate action consented to be altered.

The claim that the amendments were never properly adopted is well taken, but not open to complainants. The exact rights of any one to any of the capital stock were not determined definitely until the contract of May 10, 1889, and no stock had been issued at all up to the date of the attempted amendments. However, the company had maintained an organization from its incorporation, December 10, 1884. This was not difficult, as the articles themselves provided for the nomination of the entire board by the railway companies, no other party had any interest in this terminal company or property, and it was not active in the control and operation of the property until May 1, 1888. But when the corporation undertook to amend its fundamental law, that could be legally done only by the stockholders. There was no stock issued; there was only a right to stock through the contract of 1889. This contract provided (section 26) for the issuance of the entire authorized capital of $2,000,000 (20,000 shares), 10,000 shares to the St. Louis Company and 5,000 shares to each of the other two companies. It appears from the same section of the contract that each company was to stock-qualify its own terminal company directors. With the three companies entitled to all the stock, and with none of it issued, the eight men (in person or by proxy), who had been selected by these companies as their choice for directors, met in a stockholders'

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meeting, claiming to represent one share of stock each. There is a statement in the minutes of that meeting that the railway companies "were also present" in the person of three of these men, who were respectively president or vice president of each of the railways. It is not stated or claimed that such alleged representatives were there holding the proxies of the stock to which their respective companies were entitled, or that as such representatives they participated in any way in the meeting. Nor is it claimed that any of them had any authorization from his company (unless such adhered to his official position) to so be present or to represent it. At such a meeting the amendments were duly passed. Formal requisites of the Iowa law as to publication, etc., of corporate amendments were met.

Articles of incorporation have a dual character; they are at once a grant of authority and a contract. The matter of authority is between the state and the incorporators alone. The matter of contract, while always and primarily between the state and the incorporators, may include third parties, either actual or in prospect. Hawthorne v. Calef, 2 Wall. 10, 17 L. Ed. 776; Curran v. Arkansas, 15 How. 304, 14 L. Ed. 705; Woodruff v. Trapnall, 10 How. 190, 13 L. Ed. 383. The relation between such third parties and the incorporators, or their combined entity, the corporation, is purely contractual. It possesses no different or higher attributes because its terms find expression in an instrument to which the state is also a party. Such contracts are subject to the ordinary rules of law governing contracts. It is, of course, evident that such third parties and the corporation could not alter such contract in any manner that would affect the rights of the other party, the state. Although there are additional reasons why this should be so where the state is a party to this character of contract, yet neither can two of three parties to any contract so alter their contractual relations as to affect the third without its consent. No reason appears why in this, as any kind of tri-party contract, two of the parties may not at will alter or annul any of such contract rights, if such action affects them alone.

With such power to change their rights, the question becomes whether or not the terminal and railway companies have altered or annulled the rights arising from the contract contained in the articles of incorporation. They took no formal corporate action accepting or ratifying these attempted changes in their contractual relations with the terminal company. But all of the individuals who acted at this purported meeting of stockholders of the terminal company were chosen by the three railway companies and certainly were merely their instruments. There can be no question that the controlling, executive officers of the railway companies were fully aware of and approved the action of the meeting; that Hubbell was encouraged to purchase the bonds and stock; that the value of the stock was solely prospective during the existent operating contract; and that this value has largely increased, as the worth of the terminals grew and the contract term diminished. Although the 1889 contract had provided for distribution between them of the entire capital stock of 20,000 shares, they accepted, after the amendments, distribution of 4,000 shares provided

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therein. Before the amendments there had been no stock issued, but the corporate organization had been maintained by eight directors chosen by the three railways in accordance with and in the proportions prescribed in the original articles. After the amendments the directors were elected by the outstanding stock, and, in fact, they were not all representative of the railways; no attempt was made by the railways, as such, to exercise the very valuable right of naming, in certain proportions, the directors. The amendments provided that no stock beyond the 4,000 shares should be issued, except by consent of more than seven-eighths of the stock. This provision has been observed. This was a very vital provision, bearing upon the value of the issued stock. It cannot be disputed that the virtual veto of further issue was for the benefit of Hubbell, who then owned one-eighth of the stock (bought less than two months before), and to whom the Wabash purchasing committee at that very time was endeavoring to sell another eighth (later consummated). At that time the terminal company was under contract with the railway companies to apply all of its surplus earning to a reduction of their service bills, thus, during the life of that contract, depriving the stock of all chance of dividends. That contract had then 28 years to run. Yet 3 days before this purported meeting of the terminal stockholders the Wabash purchasing committee offered Hubbell $100,000 of terminal bonds and one-eighth of the stock for $115,000 and accrued bond interest. This sale was consummated after the amendments had been adopted.

The truth seems to be that the purchasing committee of the Wabash was desirous of realizing upon these bonds and stock by sale to Hubbell, who was the dominating influence in the other two railways; that Hubbell was willing to purchase if the control of the railways, as such, given in the articles was removed; the articles were amended, removing Hubbell's objection; the purchase was made. For 17 years thereafter the railways acted in perfect harmony with the articles as amended. During all of that time there was no questioning of their validity. Not until this suit was filed in 1907 was there any such attack. The doctrine of laches comprehends and controls the situation. Neither as shareholders nor as parties contracting with the terminal company can the railway companies thus sleep upon their rights and then in a court of equity enforce such against others who have, to their knowledge, acted upon the belief that such rights did not exist, and have acquired and hold property which has enormously increased in value in the interval. These amendments took away all control by the railway companies, as such, over the action of the terminal company. This would include the rights of approval by them of usage, transfer, or permanent incumbrance of the property, nomination of directors, and all influence of the 1882 contract as embodied in the articles of incorporation. All of these provisions in the articles were for the exclusive benefit of the railways, and they could and did part with them.

Finally, it is urged that it cannot be supposed that these railway companies would bring into being a creature, put into its hands such ownership and control over their property, and endow it with such

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powers that it and not they could command the situation. Such a supposition is improbable and here unnecessary. There is nowhere any indication that the railways intended any such result, and yet such, in our judgment, is the result. This unexpected outcome was the product of several circumstances. A very short trial convinced the railways that the 1882 contract plan was not safe nor practical in the use of the terminals. Under that plan as much control as they deemed proper had been vested in that one of them (Des Moines & St. Louis Railway Company) which was most largely interested in the property. The necessity of some neutral outside agency was evident. A close corporation, in which stock and representation on the directorate was assured in proportion to their ownership of the property, naturally suggested itself. The opportunity for reimbursing themselves for outlay in connection with the property was attractive. This could be done through bonds of a terminal company, and yet leave the free use and entire control of the terminals. Such bonds must have value behind them, and there was no other value possible except the property; also, they must acquire the stock of such company and must make payment therefor in value. So they created this agency; they circumscribed its powers with restrictions which made their control of it as complete as legally possible; they contracted among themselves, limiting the transfer of stock by any of them. They thus took every precaution consistent with the objects they had in mind which prudent men could devise to make their control over their creature complete and permanent. They then transferred to it their property and felt secure.

For years so complete was this mastery that no stock of the terminal company was issued, although it had acquired the property, issued its bonds thereon, and had sole control over the operation of the terminals. But financial difficulties enmeshed the Wabash, the then holder of the largest interest (one-half) in the stock and bonds. One avenue of relief was through disposition of a considerable portion of such stock and bonds to an individual (Hubbell), who was then influential in the two other railways. Such a sale would seem in effect a mere rearrangement of the interests of the three companies in the terminal company. But it was a vital condition of that purchase, required by the purchaser, that the complete control of the railways over the terminal company should be lessened, so that the purchaser might protect his interests. This was done. It was the severance of those bonds in which lay the control of the railways, as such, over the terminal company. Thereafter, through successive acts, natural enough, and at the time apparently harmless, this removal of control was more completely confirmed; the ultimate result being the entire emancipation of the terminal company from outside government. In course of time a majority of the outstanding stock had passed legitimately and for value to the Hubbells; also they had disposed of their interests in the railways (Northern and Northwestern) to the Milwaukee, retaining for themselves the terminal company holdings. These last two concurring factors inserted into the situation for the first time an unforeseen diversity of interests between the railways and the terminal company.

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Thus the railways themselves had, through a series of acts and circumstances extending over many years, gradually let slip from them that exclusive ownership and control which they had at the beginning so much valued and so carefully guarded. The proprietorship and mastery of the entire terminal property, rights, and franchises are represented by the outstanding stock and bonds of the terminal company. All of such stock and bonds are now held by the complainants, or passed through their ownership or that of their predecessors and were parted with for value. They have not lost their property. They have the stock and bonds, or the value they received for them. They have parted with all control not given by the stock or bonds.

Our determination upon the main contention in this case is that complainants, except as bond and stock holders, have no interest in the property of the terminal company and no voice in the control and management of that company.

Surplus Earnings.

[4] In connection with the management and operation of the terminal properties, sources of income arose aside from the contributions made by the three railways. These sources were switching charges and rental of parts of its property or of privileges in connection therewith. Accumulations of this character now total several hundred thousand dollars. Complainants base claim therefor upon the contract entered into between the terminal company and the railway companies, dated May 10, 1889. The terminal company replies that the contract does not include such moneys. The determination turns, therefore, upon the meaning of that contract. A subsequent contract of July 31, 1897, does not affect this controversy. Those portions of the 1889 contract pertinent to this point are as follows:

"Section 3. Each of said parties of the second part, for itself and its assigns, agrees to pay to said party of the first part a sum of money to be ascertained as follows, to wit:

"(1) There shall be ascertained the amount required to pay 5 per cent. interest upon the mortgage bonds of the party of the first part, one-twelfth of which, less any deduction hereinafter provided for, shall be payable monthly as hereinafter specified.

"(2) At the expiration of each month, or as soon thereafter as practicable, there shall be ascertained the expenses of maintaining and repairing the property of the party of the first part, including the maintenance and repair of tracks, depots, roundhouses, engine houses, etc., during the preceding month. And in like manner there shall be ascertained the taxes, general or special, levied upon or against said property and paid during the preceding month, or to be paid during the next succeeding month, and the insurance, if any, paid during the preceding month, or to be paid during the next succeeding month.

"(3) There shall be likewise ascertained the costs and expenses of every nature connected with the operation of said terminal station, freight and passenger depots, depot grounds, roundhouses, transfers and other properties, which is to include every item of expense or disbursement incurred or made by the party of the first part not hereinbefore mentioned, except the expenses specified in section 9 hereof.

"Section 4. Having so ascertained the monthly aggregate of all the items and sums mentioned in the preceding section, there shall be deducted therefrom the amount, if any, which other railway companies may be under obliga-

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tion to pay by virtue of contracts for the use of said property, or parts thereof, for the preceding month, and the remainder shall be paid by the parties of the second part in the proportion that the wheelage of each of said parties bears to the entire wheelage of all said second parties during such preceding month; and it is expressly understood and agreed that in computing wheelage, three narrow-gauge cars shall be taken as the equivalent of two standard-gauge cars, and that the term 'wheelage' as used in this contract means that three narrow-gauge cars are to be accepted as the equivalent of two standard-gauge cars.

"Section 5. If the amount, or any part of the amount, due from any other railroad company or companies for the use of said property or any part thereof, shall not be paid when due, then the sum so due and unpaid shall also, on demand of said first party, be paid to it by said second parties on a wheelage basis as hereinbefore defined."

Section 9, referred to in the above quotation, relates to a different basis of dividing roundhouse expenses and does not alter the meaning of the quotation.

The plaintiffs contend that these "surplus earnings" are made up of items which under the above provisions should have been credited upon their monthly bills. Defendants claim that the only character of credit items intended by these provisions were such as were paid by some other railway by virtue of a contract for the use of the property, and that these items fall without that definition. This latter contention is a strict construction of the exact wording of the contract. It is not in our judgment a fair construction of the spirit of the agreement. This conclusion is based both upon the history of the transaction and upon the meaning to be given this precise language when read in connection with the entire contract.

After the railways had, in April, 1888, transferred the property to the terminal company it was in a position to proceed to carry out its purposes. All of the parties (this for practical purposes at that time meant the three railway companies) evidently realized that something more was needed to definitely define and control the relations of the four companies toward each other. One witness testifies that the moving considerations which led to this agreement were that the 1882 contract had made no provision defining how the interest upon the bonds should be paid, and that the railways thought that roundhouse services should not be paid for on a wheelage basis. Doubtless these two items were in the minds of the parties, but it is quite evident that there was something of greater importance. The very general statement in the articles of incorporation that the terminal company was to exercise all of its powers "in accordance with the terms and spirit of the aforesaid contract entered into on the 2d day of January, A. D. 1882," was too vague to serve as a practical definition of the rights of the parties, or as a guide to the terminal company in the conduct of the business of the railway companies. Besides it was vitally necessary to settle the terminal stock rights of the railways. Therefore the parties wisely determined, as set out in the preamble of the 1889 contract, that—

"for the protection of the parties hereto and their assigns, it is important that the rights, duties, and liabilities of each in regard to the whole subject-matter of said terminal facilities, including their use, care, control, rental, taxes, expenses, renewals, insurance, and repairs, shall be stated and defined."

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The contract of 1882 had provided a plan for financing the terminal project. This plan contemplated that the railway companies would provide the terminal properties; that the expenses of control, supervision, maintenance (including taxes) and (generally speaking) improvements should be met by them on a wheelage basis. They expected at that time to procure the service at cost and divide that cost in accordance with actual usage. This idea that the terminal service for which they were taking all these steps would be furnished them at cost passed into the 1889 contract. For several years after that contract became effective the monthly bills rendered by the terminal company and paid by the railway companies set forth specifically these items of rentals and switching charges from outside sources as credits upon the expenses, of which the balance was divided between the three railways on a wheelage basis. February 11, 1891, a directors' meeting of the terminal company ordered—

"that the rents collected for the use of the company's real estate, and the switching charges paid in, be credited on the bills of the different tenant companies occupying this company's terminals, giving to each company its share ascertained by wheelage."

About a year later, January 7, 1892, the same body ordered a discontinuance of this practice. By its terms this discontinuance was intended to be temporary, and was for the purpose of providing a fund "with which to purchase supplies and pay current bills which come in before it receives its monthly revenue from the tenant companies." When the auditor of the Wabash noticed the absence of such credits from the bill for the month preceding the above last order he inquired of the terminal company superintendent, who wrote as follows:

"Replying to yours of the 1st inst., in regard to the allowance for switching, rentals, etc., that should be made on our bills for the months of December and January, I have to say, that at a meeting of the executive committee, held January 7, 1892, it was decided not to distribute these collections for a period of time, until the Des Moines Union Railway Company could accumulate a small fund for working capital. I presume this will continue in effect until January, 1893. You will be furnished each month a statement showing the amount of this rental, *and your proportion of the same* [italics ours], so you can make a charge against the D. M. U. Railway and carry it on your books, as you see fit, for future adjustment."

Also, in the annual report made by the terminal company to the Executive Council of the state of Iowa for taxation purposes for the years 1888, 1889, 1890, 1892, and 1893 was the statement that the terminal company was "simply a representative company, acting as an agency for" the railway companies, "performing all necessary work for them, and charging each at actual cost its due proportion thereof incurred." The report for 1894 differs in some other, but not in this, respect, except that it includes another railway, and says that it "performs certain services for these companies, and collects from them as rental, and for such services, the aggregate amount of its expenses, which expenses are paid by the several railwav companies in proportion to the use of the property and services rendered, as provided by contracts existing between this company" and the other companies. Thus the history of this provision of the contract, and of the view

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taken of it by the parties themselves before any antagonistic motives or interests had intervened, shows that all revenue of the terminal company was to be credited on the bills of the railway companies. A careful consideration of the entire contract itself leads to the same conclusion.

Therefore the surplus earnings should be returned to the railway companies. For that purpose an accounting should be taken to determine what sum should go to each, calculated upon monthly wheelage basis.

Usage After May 1, 1918.

When the present operating contract is ended, the rights of the parties respecting the use of the terminals by the railways are those which spring from their nature as carriers and their physical and business relation to each other as carriers in and entering a large terminal. These are that the terminal company must furnish its full terminal facilities in so far as reasonably necessary and required by the railways, and they will pay therefor such reasonable sum as may be agreed upon between the terminal company and each of the railways, or, in default of such agreement, as may be fixed by the proper public tribunal.

Conclusion.

The decree should be modified. It should state the complete title to this property in the terminal company, and that the only interest of the railways in the property or the management of the corporation is such as flows from stock ownership, that the surplus earnings belong to the railways, and a master should be appointed under instructions to ascertain the part due each upon a wheelage basis.

It is so ordered.

HOOK, Circuit Judge (dissenting in part). I concur in the award to plaintiffs of what is called the surplus earnings of the terminal company, not only for the particular reason given, but also for a broader one, arising from the other branch of the case.

I am unable to agree to the foregoing opinion upon the main controversy, and will state my reasons in a general way. The railroad companies organized the terminal company, and invested it with the legal title to their property, including integral parts of railroad lines and appurtenant franchises, solely for the more convenient and better performance of their public duties. It is open to question whether the most important of the conveyances could lawfully have been made, except for that specific purpose. That purpose was fundamental, not temporary or casual, and it determined the character of the terminal organization. The terminal company was not incorporated by individuals as an independent enterprise for personal profit, and its stock was not put upon the market as that of a financial venture. The contract of 1882 between the railroad companies foreshadowed the terminal company in express words, and when that company was chartered it took the place of the individual trustee provided for by the contract. That fact is too plain for discussion. The change to a cor-

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porate trustee was solely for reasons of convenience. It was one of method or form, but not of underlying, essential substance.

As regards the legal title to the property, the terminal company became the trustee of the railroad companies that organized it and of such others as might thereafter be admitted to joint beneficial ownership. The beneficiaries, present and future, were what are commonly called proprietary or constituent companies. Each of them owed a duty to the others that it would not at any time so deal for itself or with its own proprietary interest as to impair or destroy the joint relation among them or the character of their common organization. Not only did the terminal company hold the legal title as trustee, but in the operation and maintenance of the property it was an agency of the proprietary companies for the performance of their railroad functions. This was accurately expressed in a sworn declaration by one of the individual defendants in 1892 when president of the terminal company. He averred that it was "simply a representative company, acting as an agency at Des Moines for the Wabash Railroad Company and the Des Moines, Northern & Western Railway Company, performing all necessary work for them, and charging each, at actual cost, its due proportion for the expense thereby incurred." The Des Moines, Northern & Western was the successor of two of the original proprietary companies.

In both aspects of its position towards the proprietary companies the terminal company was in a high sense their trustee, and according to salutary principles it was bound to maintain the integrity of that relation. Being itself a corporation, its fiduciary obligations and disabilities rested equally upon its officers, through whom alone it could act. The limitations upon the right of a person in such a capacity to act for his personal benefit with respect to the subject of the trust are familiar. Never are they less than that the dealing must be open, avowedly at arm's length, and without connivance or concealment. The individual defendants, one or the other, or both, were, at all the times material in this case, officers and directors of the terminal company. The conclusion of my Brothers, briefly stated, is that by a series of transactions occurring in a long course of years the original character of the terminal company was gradually changed into that of an independent corporation, and that the control of it was lost by the railroad companies and was acquired by the individual defendants, who were its officers. But they say:

"There is nowhere any indication that the railways intended any such result, and yet such, in our judgment, is the result. This unexpected outcome was the product of several circumstances."

In other words, the proprietary companies were not cognizant of the trend of the circumstances, and the result held to follow, though unexpected, and not intended by them, is enforced, because of a legal presumption of intention of natural consequences of acts, regardless of intention in fact. The circumstances relied on do not appear to me to have the significance attributed to them; but, were it otherwise, the presumption should not be so broadly applied to the case of a trust, the destruction of which is claimed by those subject to the disabilities

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of trustees dealing for themselves. The excerpt quoted above touches the quick of this controversy. In my opinion the various transactions thought to produce a result so unexpected and unforeseen should be severally examined in the light of the surroundings at the time they occurred. If in one aspect they were then consistent, or not apparently inconsistent, with the frequent and studied declarations of the object of the terminal organization, and that view was then reasonably entertained by the railroad companies, that view should prevail in a court of equity, rather than a shrewder one tending to a conclusion in favor of participants who were bound in good conscience to the contrary.

An argument is made upon the issue by the terminal company of bonds on the property and the necessity that it should have had the title to enable it to make the mortgage. Of course it had to have title as complete as the giving of the mortgage required, but there is nothing in that inconsistent in any degree with the existence of a trust relation between it and the proprietary companies. The mortgage is still afoot, and in this case no rights are asserted under it. Its effect upon the question before us is not different from that of a joint mortgage by the proprietary companies upon properties severally owned by them, but committed to a common use, or that of an authorized mortgage by an individual trustee named under the contract of 1882. The proprietary companies were fully justified in believing that the changes and amendments in the charter, etc., of the terminal company, now relied on as making for its complete independence, were for the sole purpose of giving it the conventional dress of a corporation that has put forth an issue of bonds. That was why suggestions originating within the terminal company were so readily agreed to by them, and that is why the result so contrary to their vital interests, now held to follow, was unforeseen.

I question whether property and rights of great value are lost in that way, except in circumstances concededly not present here. The very suggestion that a great railroad system, like the Wabash, for example, had unintentionally and unexpectedly lost its proprietary interest and right to use extensive terminals in a large city, to the establishment and upbuilding of which it was a party, and to which it had contributed property acquired for railroad purposes by eminent domain and public grant, is so unusual as to impose upon those who make it a heavy burden of law and fact. Questions like these naturally suggest themselves: Who got the property of the railroad company, and deprived it of its right of entrance into the city? How did they do it? What were their relations to the railroad company? Who represented the railroad company in such an important matter, and what authority did they have?

After the conclusion is reached that the terminal company had by gradual action thrown off its trust character and had become independent, attention is directed to the transactions in its stock. The power asserted by the individual defendants to control the terminal company and thereby to exclude the plaintiffs from the use of the terminals rests upon their possession of five-eighths of the issued capital stock.

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There is, however, abundant proof that the stock of that company was intended only to represent the interests of railroad companies actually using the terminal facilities and as a method of apportionment among them. The stock was not intended as a source of personal or individual profit apart from railroad use. Stock ownership and terminal use were inseparable. I know of no public policy or rule of law against such a status of corporate stock or its enforcement as between the parties who established it. If it were formally expressed in the corporate charter, the world would have to take notice. But as between the parties themselves, those participating and having actual knowledge, internal evidence may disclose it. It should always be in mind that in this case there are no innocent purchasers relying upon public records. The contract of 1882 specified the proportional interests of the three original railroad companies, and foreshadowed the organization of the terminal company to take the place of an individual trustee. In 1884 the terminal company was organized for the expressed purpose of carrying out the contract. My Brothers see in the articles of incorporation some evidence of a departure from the trust and the beneficial relations, but it seems to me that the intention to maintain them was asserted and reasserted as definitely and positively as words would permit.

While, as customary, the charter made provision for a capital stock, the connection between the distribution and future ownership of such thereof as might be issued and the railroad use of the property was manifested, not only in that instrument, but afterwards in many ways by both the railroad companies and the terminal company. The limitations of an opinion will not admit of a recital of this evidence in detail. It is in the record, and there is much of it. In 1887, three years after the terminal company was incorporated, when the parties began to convey to it the legal title, the directors of the predecessor of the Wabash Company adopted a resolution directing its president and secretary to execute a deed conveying "all its real estate, rights of way, franchise, roadbed, and other property of said company lying and being in the city of Des Moines, east of Farnham street, whether the same was acquired by grant from the city of Des Moines, or by purchase or condemnation," and, it was added, "this resolution being offered for the purpose of carrying out the contract of date January 2, 1882," etc. One of the individual defendants, as secretary of the directors' meeting, recorded the adoption of the resolution. The Wabash Company was then the real party in interest. The conveyance executed by the officers so authorized, the individual defendant being one of them, was in form a warranty deed, but certainly the resolution of authority fixed the effect of the conveyance for the parties and those who afterwards dealt with knowledge of the facts. Mere executive officials of a railroad company cannot, upon their own initiative, convey away parts of its road and franchises. And, were it necessary to be determined here, it would be an interesting question how far its representatives in a terminal company, organized and holding title like the one here, could do so by consenting to a vital change of its character, or even by a disposal of its stock, without express au-

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thority of their principal manifested in the usual corporate way. The 30-year contract of May 10, 1889, between the terminal company and the proprietary companies, was authorized as supplemental to the contract of 1882, and in a preamble it was recited that in pursuance of its charter it acquired and owned a railway. The charter was that of 1884 into which the contract of 1882 was written.

One other matter bearing on this phase of the case may be mentioned. The effort to purchase stock began in 1888. The property of the Wabash Company, including a half interest in the terminal stock not yet issued, was then in a transitional state in a foreclosure proceeding, being held by a purchasing committee. One of the defendants wrote Mr. Ashley, the president of the Wabash Company, and also a member and the secretary of the purchasing committee, saying he had been asked whether half of that stock interest, one-fourth of the whole, could be bought. Mr. Ashley replied favorably, adding:

"But I have always supposed that it would be necessary to confine the sale to such railway companies as would be interested in the station."

Also:

"Was there not an understanding or agreement as to the sale of the stock when the terminal company was formed, and would it not be prejudicial to the interest of the whole to part with the stock to outsiders?"

The defendant replied, agreeing with him and mentioning some railroads in whose interest inquiries had been made. The purchase was made in 1890. It was in 1892 that the other individual defendant made the sworn statement that the terminal company was "simply a representative company, acting as an agency" for the railroad companies. About two months after the first sale, the purchasing committee sold an additional eighth of the stock to the defendant. In a letter during the negotiations Mr. Ashley wrote him:

"It must be understood, of course, that a one-eighth interest in the capital stock shall be sufficient to represent a proprietorship in the company according to the understanding we had when you were here."

The phrase "proprietorship in the company" is not commonly used to describe the stock of an ordinary corporation. Moreover, the defendants, being substantially interested in the proprietary companies, other than the Wabash, had been endeavoring to induce other railroads to come into the terminal company. They were, one or both, also officers of the terminal company. It would naturally be assumed that in dealing with them they were acting in the railroad and terminal interest, as distinguished from that in which they now assert control. The record shows that it was common practice in correspondence to address them personally on subjects of corporate concern. In fact, the three-eighths of the stock bought from the Wabash purchasing committee was transferred to and became the property of the Des Moines Northern & Western Railway Company, into which the two other companies were merged. That was in 1892. The Des Moines Northern & Western then owned seven-eighths of the terminal stock and the Wabash one-eighth. As has already been observed, the terminal company was declared in that year to have been simply a rep-

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resentative agency. Early in 1893 a similar declaration was made on behalf of that company. The Des Moines Northern & Western was financially dominated and officially controlled by the individual defendants. In the fall of 1893 their company pledged five-eighths of the terminal stock to them as collateral to some indebtedness. In January, 1894, the pledged stock was by agreement applied as part payment to a small amount, and they have since held it.

The next annual sworn statement on behalf of the terminal company to the Executive Council of the state of Iowa illustrates the transforming effect upon the character of the corporation which a mere transfer of its stock is supposed to have. In February, 1894, it was declared that the terminal company was the owner of the property; that it leased it to the railroad companies, performed services for them, and collected a rental. My Brothers, adopting that theory, say that the ultimate result was the entire emancipation of the terminal company from "outside government." According to the decision, the proprietary companies became outsiders, without right, after the expiration of the operating contract of 1889, to use the terminals, contrary to the will of the holders of five-eighths of the stock, except upon the order of some public administrative board in Iowa, if there be one with jurisdiction. I do not think the stock in the hands of the defendants should be destroyed, or its true value in the scheme or plan of the terminal organization impaired, but that it should be actively operative and profitable only when transferred to and held by railroad companies which use the terminals and contribute in that way to the object of their creation. There are four or five other important railroad systems entering Des Moines, besides those of the plaintiffs.

There is little conflict in the evidence. The difference between my Brothers and myself is not so much about the facts as their significance. They put emphasis upon the corporate cover of the terminal company and perceive a drift to complete self-sufficiency and independency from the very moment of incorporation. But the doctrine of a corporate entity separate and apart from the persons composing the corporation is after all a mere legal fiction, established for convenience and to serve the ends of justice. It does not go beyond that. In equity the shell artificially assumed is not impermeable. The court will look through it and regard the kernel, and whenever justice requires will hold the stockholders as the corporation. That is being constantly done in equity in determining public rights as affected by the corporate association of particular individuals and the rights of the individuals among themselves and with respect to their organization.

But, however the above may be, it seems to me that the less measure of relief granted by the trial court cannot be denied the plaintiffs. It is that they were entitled to a continued use of the terminal properties and that the court would determine the terms and conditions if the parties were unable to agree. That is the matter of defendants' appeal. Whenever a definite right claimed by a railroad company to use specific property of another is of contractual origin, as where it

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is a condition of the franchise of the owner or is founded upon conventional agreement, the question of the existence of the right and its extent and limitations is a justiciable one, and the claimant may invoke the aid of a court of equity for its establishment and enforcement. Similarly, when the right is upon reasonable terms and conditions, the court may determine them if the parties do not agree. Both phases of this subject have been so decided in the cases, familiar in this circuit, of the Union Pacific Bridge, at Omaha, and the Wabash right of way and tracks, at St. Louis. If the right of use exists, reasonable terms and conditions are implied, in the absence of recital or stipulation about them. In view of the admitted history of the terminal company, the plaintiffs, merely as minority stockholders, have a right to the use of the terminals and upon reasonable terms. The right is not of that general nature which requires an appeal to some administrative board for the enforcement of the public policy of the state applicable to all railroad companies, but is essentially contractual. It could not reasonably be said that, had the contract of 1889 not been made, two of the original companies holding a majority of the stock might have excluded the third from the use of the terminals and defeated its appeal to the courts. The individual defendants have no greater right or power.

UNITED STATES, for Use of R. HAAS ELECTRIC & MFG. CO. et al., v. TITLE GUARANTY & SURETY CO. et al.

(Circuit Court of Appeals, Seventh Circuit. December 10, 1918.)

No. 2618.

1. UNITED STATES ⊂=67(3)—BONDS OF CONTRACTORS FOR PUBLIC WORKS—REMEDIES OF PERSONS FURNISHING LABOR OR MATERIALS—"FINAL SETTLEMENT."

   Where a public building had been completed, accepted, and occupied by the government, and the public works officer in charge had prepared a "final voucher," which, when certified by the contractor, was approved by the proper department officer, such approval constituted the "final settlement" of the contract, within the meaning of Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923).

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Settlement.]

2. UNITED STATES ⊂=67(3)—BONDS OF CONTRACTORS FOR PUBLIC WORKS—RIGHTS OF PERSONS FURNISHING LABOR OR MATERIALS.

   There may be a final settlement between the government and a contractor for public work, which fixes the rights of creditors who furnished labor or materials under Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923), although full payment is not then made, and the balance may be subject to change.

3. UNITED STATES ⊂=67(3)—BONDS OF CONTRACTORS FOR PUBLIC WORKS—RIGHTS OF PERSONS FURNISHING LABOR OR MATERIALS.

   Although final payment of a contractor for public work is by the terms of the contract to be determined by the Secretary of the Navy, the "final

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settlement," to fix the rights of creditors of the contractor under Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923), may be made by some other officer acting for the government.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the United States for the use of the R. Haas Electric & Manufacturing Company and others, against the Title Guaranty & Surety Company and others. From a judgment of dismissal, plaintiffs bring error. Reversed.

Almon W. Bulkley, of Chicago, Ill., counsel for plaintiffs in error.

Charles Y. Freeman, of Chicago, Ill., counsel for defendants in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. Defendant in error executed its bond to the United States conditioned, among other things, that the contractor "shall promptly make payments to all persons supplying it labor and materials in the prosecution of the work" in constructing the main hospital building of the naval training station at Great Lakes. The R. Haas Electric & Manufacturing Company "and other parties similarly situated," for whose benefit this action was brought, were creditors of the contractor, Noel Construction Company, having furnished labor and material for which they had not been paid.

[1] Plaintiff alleged that more than six months had expired since the "completion and final settlement of the contract," which allegation was denied by defendant, and upon determination of this issue the decision turns.

The action was begun December 5, 1912. The building was "completed" January 16, 1912. Plaintiff asserts that a "final settlement" of the contract occurred on April 6, 1912. On this date the acting chief of the Bureau of Medicine and Surgery of the United States Navy approved what the civil engineer of the United States Navy termed the final voucher. In this letter bearing date March 29, 1912, the engineer wrote as follows:

Re Voucher #31. March 29, 1912.

Sirs: There is forwarded herewith final voucher, less the five per cent. reservation to be withheld for a period of one year, under contract M. & S. No. 1, for the construction of the hospital building at this station. This final voucher covers all additions and deductions under the contract.

It is requested that this voucher be signed in the usual manner, after the certificate "Certified correct and just, payment not received," and then returned to this office, as additional signatures from this office must be attached previous to transmittal to the department.

To this letter the construction company made reply on April 1, 1912, notifying the Public Works Office that the voucher had been executed and returned as requested. This voucher, No. 31, reached the De-

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partment of the Navy and was approved on April 6, 1912, by the acting chief of the Bureau of Medicine and Surgery.

The summary of this final voucher was as follows:

Extension of items	$233,409.49
Deductions	222.71
	$233,186.78
Less 5 per cent. reservation to be withheld until January 16, 1913..	11,659.34
	$221,527.44
Less amount previously paid	209,468.52
Amount due	$ 12,058.92

Unless this voucher constitutes a final settlement, it is admitted the action was prematurely brought.

In determining whether a "final settlement" occurred on this date, we cannot overlook the plain purpose of the Act of August 13, 1894, c. 280, 28 Stat. 278, as amended by the Act of February 24, 1905, c. 778, 33 Stat. 811 (Comp. St. § 6923), which was to make more certain the payment of claimants furnishing labor or materials to the government contractors. The title of the original act reads:

"An act for the protection of persons furnishing materials and labor for the construction of public works."

And a part of the amended act reads:

"That hereafter any person * * * entering into a formal contract with the United States for the construction of any public building, * * * shall be required, before commencing such work, to execute the usual penal bond, * * * with the additional obligation that such contractor * * * shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work," etc.

It is apparent, therefore, that the purpose of the act and the object of the bond given in the present case was to secure to the plaintiffs in error and others similarly situated the prompt payment of their claims. Illinois Surety Co. v. John Davis Co., 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206.

Three significant provisions of the act herewith numerically numbered are:

(1) "If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor * * * shall be, and are hereby, authorized to bring suit in the name of the United States * * * for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution."

(2) "Provided, that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later."

(3) "And provided further, that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later."

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Claimants' embarrassment, if their present position be untenable, is obvious from a reading of provisions (1), (2), and (3). If no final settlement occurred on April 6, 1912, but did occur as claimed by defendant on December 30, 1912, then no action was maintainable until six months thereafter or until July, 1913. Such an action, however, would have been barred because of the second proviso, (3). For claimants must file their claims within one year of the completion of the work and not later. If suit could not be begun until June, 1913, as defendant contends, and the work was completed, as admitted by the parties, on January 16, 1912, it is apparent that no claims could have been filed within the period specified by the act.

Appreciating the object of the act, courts have given a construction to the term "final settlement" that is in harmony with its purpose. Robinson v. United States, 251 Fed. 461, — C. C. A. —; Illinois Surety Co. v. Peeler, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609; United States v. Robinson, 214 Fed. 38, 130 C. C. A. 432; United States v. Illinois Surety Co., 226 Fed. 653, 141 C. C. A. 409; American Bonding Co. v. United States, 233 Fed. 364, 147 C. C. A. 300.

In the present case the building had been completed and the government had accepted the work and occupied the building prior to the date the final voucher was made out. The voucher was prepared by the public works officer who represented the government in the construction of the building. He termed his statement a "final voucher." Before sending it to the government he secured from the contractor a certificate of its correctness. It was then examined and approved by the acting chief of the bureau in charge of the construction.

Made under these circumstances, when the building was fully completed, accepted, and occupied by the government, at a time when the parties were concerned only in a final settlement of the contract, it is difficult to avoid the conclusion that the date of the approval of this voucher constituted the date from which the six months period ran.

[2] True, there was withheld, as is customary in most contracts of this character, five per cent. of the contract price for a period of one year from the date of the completion of the building. Obviously "final settlement," as that term is used in this statute, did not mean final payment. Illinois Surety Co. v. Peeler, supra. For otherwise the provision in reference to filing claims within one year would necessarily defeat the purpose of the act in all instances excepting only the creditor who first began suit.

It is contended, however, that subsequent to April 6th the government withheld payment of the balance shown by voucher 31 because the building was not completed within the time specified in the contract. There being no necessary connection between final settlement and final payment, this fact is not of much significance. There may be a final settlement between the government and the contractor so as to fix the rights of the creditor under this act notwithstanding the balance may be subject to change.

While there is room for legislative action in the way of an amendment to avoid the defeat of the purpose of the act through inability to give effect to provision (2) heretofore quoted because of the appli

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cation of provision (3) also quoted, we find no embarrassment in reaching our conclusion upon the facts in this case. We conclude that in cases where the government has clearly indicated that it has no claim against the surety, a final settlement within the purview of this act has taken place. Robinson v. United States, supra. The approval of the corrected voucher No. 31 in our opinion indicates a determination by government officers that the government was not a claimant to any part of the proceeds of the bond.

[3] Defendant, however, further contends that the approval of voucher No. 31 was not by a government official authorized to bind the government in the respect last indicated, and reference is made to various provisions of the contract to show that the Secretary of the Navy was alone authorized to make the final settlement.

Examination of the contract indicates that the public works officer, the official who prepared the voucher, was the supervisor of construction on the ground; that the commandant determined the amount of the payments as the work progressed, payments being made by the Navy Department based upon these monthly estimates, 10 per cent. being withheld, excepting, however, that before final payment was made a release to the United States executed by the contractor should be filed with the department. We have been unable to find any paragraph in the contract which lodged the exclusive authority to make final settlement with the Secretary of the Navy. Such references to him as appear are not inconsistent with the action of the chief of the bureau in charge of this construction work.

Even though the final payment as between contractor and the government was to be determined by the Secretary of the Navy, the "final settlement" as used in this statute might well be made by some other official acting for the government.

Under all the facts in this case, we conclude that a final settlement occurred April 6, 1912, and the action was therefore not prematurely brought.

The judgment is reversed, and cause remanded, with directions to proceed in accordance with the views expressed in this opinion.

E. I. DU PONT DE NEMOURS & CO. v. BRISCO.*

(Circuit Court of Appeals, Fourth Circuit. December 5, 1918.)

No. 1656.

1. MASTER AND SERVANT ⟸121(1)—FACTORY ACT—CONSTRUCTION—GUARDING VATS.

Under section 2 of the Factory Act of Virginia, that "all vats * * * shall be properly guarded," the place and manner of the guarding must be such as will at least reasonably safeguard employés while engaged in their habitual work and in their necessary passing to and from it.

2. MASTER AND SERVANT ⟸289(22)—ACTION FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Evidence *held* to justify submitting to the jury the question of the contributory negligence of an injured employé in failing to remove an obvious danger at his place of work.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied, 248 U. S. —, 39 Sup. Ct. 257, 63 L. Ed. —.

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In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Action at law by George C. Brisco against E. I. Du Pont de Nemours & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles E. Plummer and J. Gordon Bohannan, both of Petersburg, Va., for plaintiff in error.

John B. Minor and David H. Leake, both of Richmond, Va. (Robert E. Scott, of Richmond, Va., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. This is a personal injury case. The defendant in error was plaintiff below, and plaintiff in error defendant. They will be so styled here. The plaintiff worked for defendant. He was hurt in what is called the "save-all" or "catch-all" compartment of its gun cotton plant. Every 30 minutes, from the adjoining tub room, a quantity of hot water and steam was discharged into the "save-all." Not infrequently, so much steam was so liberated that plaintiff had to get out more or less rapidly. On one of these occasions, while trying to do so, his foot slipped and his leg went down into a vat filled with hot water, somewhat impregnated with acid. He was badly scalded, and his injuries are perhaps permanent.

The plaintiff says he was hurt because defendant did not give him a safe place in which to work. There was evidence from which the jury might have found that in this respect he was right. The defendant sets up assumption of risk and contributory negligence. The learned judge below withdrew the former of these defenses from the consideration of the jury, because he thought that the uncontradicted evidence showed that the plaintiff's hurt was a direct consequence of defendant's failure to guard the vat, as is required by a penal statute of Virginia. If the enactment is applicable, the ruling was right. Pocahontas Consolidated Collieries Co. v. Johnston, 244 Fed. 368, 156 C. C. A. 654.

The "save-all" room was 30 feet by 80. Of this, 22 or 23 feet by 74 was occupied by a vat or tank, which was without any permanent covering, except the roof of the building. Along one long and one short side there were platforms—the shorter some 6 feet wide and the larger, although usually referred to in the testimony as the "8-foot platform," was according to the presumably accurate measurements furnished by the defendant, 7 feet in width. The vat was filled to the depth of 2 or 3 feet with the acid-impregnated water, which at intervals was discharged into it from the tub room, and in which cotton had been boiled. Some of the cotton came over with the water. The plaintiff was employed to fish it out with a long-handled wooden rake, and after the water had partially drained out of it, but before it had become dry, to place it into buckets or pails, carry it to the tub room, and put it back into the tubs for reboiling.

In constructing the room, no arrangement was made for safeguarding the employés from such accidents as that which caused the

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plaintiff's injury. Indeed, it does not appear that any thought was given to that subject. The 6-foot platform along one end of the room slanted up from one corner of the building, where it was 3 feet or more above the surface of the water, to the other corner, in which it was as much as 6 feet from that surface. The other much longer platform was, as already stated, some 7 or 8 feet wide, and sloped slightly downwards towards the vat. It was about 3 feet above the water. The work of fishing out the cotton does not appear ever to have been done from this platform, nor, so far as the record discloses, was it intended to be used for that purpose. It stood perhaps 6 feet above the bottom of tank, to which the cotton tended to settle, so that a man standing on it would have had to use a rake with a handle 10 or 12 feet long.

Neither of these platforms was guarded in any manner. Transversely over the top of the tank, at intervals of a few feet, were laid 4x6 stringers, with the narrower side up. From time to time, the workmen employed in this room laid planks from one of these stringers to another, usually putting two or three planks side by side. As a rule the platform thus made extended across the center of the tank for nearly its entire length; but, as the planks were not fastened to anything, their position was changed from time to time by the plaintiff, who, for some months before the accident, had been the only person employed in this room, and indeed the only person who spent any appreciable time in it. He stood on this temporary platform, called in the record the "drainage platform," or with one foot on it, and the other on one of the stringers, and with his rake pulled up the cotton and deposited it upon the temporary platform, upon which he was standing. According to some of the defendant's witnesses, plaintiff's predecessors, if not the plaintiff, occasionally stood astraddle over the water, with one foot on one stringer and the other on another. No attempt was ever made to think out or provide a safer method of working. When plaintiff was driven out of the room by the occasional inrush of steam, he had at first to run across one of these 4-inch stringers to the sloping platform, climb up three feet to it, run along it to the 6-foot platform, and then to the exit which opened from the latter. He himself put some planks across two stringers, so that on such occasions he could step from one plank to the other and so reach the sloping platform, and he persuaded one of the carpenters to construct for him some steps which enabled him to get upon that platform more easily and quickly.

There is not a hint in the record that the defendant ever gave a moment's thought to diminishing the risks of the persons who, from time to time, were successively employed in this room. The fact is all the more remarkable because, as the defendant's witnesses testify, it had been the habit, before plaintiff was sent to do the work in this place, to have it done by aged persons or cripples. Doubtless the explanation is to be sought in the pressure under which the responsible heads of these great munition factories were then as now working. The plant was in continuous operation, upon the three-shift system of 8 hours each. Plaintiff was on duty from 7 a. m. to 3 p. m. each day,

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but as he could readily enough get out in 8 hours all the cotton which came into the vats in 24, the "save-all" was unoccupied from 3 p. m. to 7 a. m. in each 24-hour period.

As 3 o'clock approached on the day preceding the accident, plaintiff, as he testified, found that the tubs in which he regularly should have put the cotton he then had upon the drainage platform were full. It was not safe to allow the cotton to become dry, as in that condition it might cause explosion or fire. He had accordingly been instructed not to leave it on the platform when he quit work. He testified that, having this in mind, he went to the superintendent or foreman and reported the difficulty to him. He says he was then told that such official would see about it. That there was any such conversation is more or less directly denied by the foreman in question, but as the cotton would not, in fact, in 16 hours dry sufficiently to be at all dangerous, nothing happened, and when he came back at 7 on the morning of the accident the cotton was where he had left it the afternoon before. He testified that he then went to another foreman and reported the situation, and that the latter told him that workmen would be sent to get the cotton off the drainage platform, and instructed plaintiff in the meanwhile to take some more planks and construct with them another temporary platform on the side of the room most remote from the sloping platform. This account is also contradicted with greater or less positiveness. At all event, the plaintiff left the cotton piled up on one section of the drainage platform, and constructed, as he says he was told to do, another temporary platform in the location already mentioned, and from it proceeded with his usual task of raking up the cotton from the bottom of the vat.

At 7:30 a. m. there was one of those discharges of hot water and steam which made it necessary for plaintiff to get out of the room as quickly as he could, and by filling the air with mist the getting out was made somewhat more than usually dangerous. He went from his latest platform to the drainage platform by walking or running along one of the 4-inch stringers. When he reached that platform, his direct course was obstructed by the pile of still wet cotton, and as he went around or through it, his foot slipped, his leg plunged down into the water, and the harm was done.

[1] The defendant argues that it would have done no good to guard the vat, because it says the guards would have been around the outside of the tank, and it was not there that the plaintiff fell, and that it was impracticable to guard the drainage platform upon which the plaintiff slipped, or the stringers which he habitually traversed, and upon which he occasionally worked. Such an argument misconceives the whole purpose of the statute. The enactment (section 2 of the Virginia Factory Act [Laws 1914, c. 16]), declared that "all vats * * * shall be properly guarded." That does not mean necessarily that the guards shall be on the outside of the vat. They should be there if guards at that place are needed to attain the purpose of the Legislature, namely, the protection of the workmen; but the place and manner of the guarding must be such as will at least reasonably safeguard em-

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ployés while engaged in their habitual work and in their necessary passing to and from it.

Plaintiff claims that, as the statute requires some things to be done "whenever practical," and omits the quoted words when commanding that vats be guarded, the purpose of the lawmakers was to require such guarding, no matter how difficult it might be.

We are not called upon in this case to express any opinion as to the merits of that contention. Whatever be the answer which may ultimately be given to it, we are persuaded that no employer, who requires or knowingly permits employés habitually to work or pass where there is no protection against falling into open vats, can, upon any construction of the statute, escape from liability, unless he shows at least that the vat could not have been so constructed, and the method of work could not have been so arranged, as to permit the furnishing of such safeguards.

The only evidence offered upon the subject by the defendant is that the temporary platform and the stringers actually used in this vat could not have been readily guarded. Employers may not on such easy terms grant themselves indulgence for sinning against a statute intended for the protection of the lives and limbs of those who work for them.

[2] The defense of contributory negligence rests principally on defendant's contention that plaintiff should have forked the wet cotton from the drainage platform over to the sloping platform. Defendant offered evidence that plaintiff had been told that whenever the drainage platform was full, and there was no room in the tubs for the cotton on it, he should put the cotton on the sloping platform. He denies that he ever had such orders. Defendant replies that, whether he had or not, the sloping platform was there in plain view, and he must have seen for himself how easy it would have been to get the dangerous accumulation of wet cotton off the drainage platform, and with that cotton off the latter platform would have been a safer place than it was, and doubtless the cotton could have been so arranged on the sloping platform that it would not have increased greatly any risk the plaintiff might have been compelled to take in escaping over a portion of it, as he necessarily had to do when he had occasion to leave the room in a hurry.

In view of the contradictory testimony as to the instructions he had received, and the statement of the foreman, made, as plaintiff testifies, less than half an hour before the accident, that workmen would be sent to remove the cotton from the drainage platform, the question of contributory negligence was properly left to the jury under instructions which sufficiently stated the applicable law.

The defendant may not complain of the rejection of some of its offered prayers on this subject. They were either covered by what the court did say, or were properly refused because they attempted to segregate and recite some, but not all, the material facts in evidence.

No error appearing, the judgment below is affirmed.

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BERNSTEIN v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. December 5, 1918.)

No. 1652.

CRIMINAL LAW ⊂=1003—SENTENCE—FIXING DATE OF EXECUTION OF SENTENCE AFTER DATE ORIGINALLY FIXED.

The time when a sentence of imprisonment shall commence, although specified in the same entry, is properly no part of the sentence, and may be changed by the court at a subsequent term, if for any reason execution of the sentence has been delayed.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Criminal prosecution by the United States against Samuel Bernstein. On appeal by defendant from orders denying writ of habeas corpus and petition for release from sentence. Affirmed.

Robert H. Talley, of Richmond, Va., for appellant.

Hiram M. Smith, Asst. U. S. Atty., of Richmond, Va. (Richard H. Mann, U. S. Atty., of Petersburg, Va., on the brief), for the United States.

Before KNAPP and WOODS, Circuit Judges, and McDOWELL, District Judge.

KNAPP, Circuit Judge. On April 11, 1916, the appellant, Bernstein, convicted in the court below of violating certain provisions of Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, was sentenced to pay a fine of $1,000, and to be imprisoned "in the penitentiary at Atlanta, in the state of Georgia, for the period of 18 months from this date." He sued out a writ of error, and was released on bail pending review by this court, which affirmed the judgment in the following December. 238 Fed. 923, 151 C. C. A. 657. In the meantime, and presumably upon conviction of some other offense, he was sent by the United States District Court for the Eastern District of Missouri to a prison or jail in that state for a term which did not expire until nearly 2 years after the date when he was sentenced to Atlanta for 18 months. Upon his discharge from confinement in Missouri, he was taken into custody by the marshal for the Eastern District of Virginia under the prior sentence. He at once demanded to be released on the ground that the time specified in that sentence had long before expired, and he could not be further detained or imprisoned thereunder. At the same time he presented to the court below his petition for a writ of habeas corpus ad subjiciendum, in which he sets forth his contention as follows:

"Your petitioner contends and insists that such judgment and sentence is now inoperative and void because the time therein specified, to wit, 18 months from the date thereof, has now expired, petitioner, after such sentence and until lately, having been confined in prison under sentence of another federal court, to wit, the United States District Court for the Eastern District of Missouri, at St. Louis, the confinement being in the Missouri jail

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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at St. Charles, and he cannot, therefore, be held for further confinement or imprisonment thereunder, the time of the imprisonment pronounced by such sentence having actually run out and expired on the 11th day of October, 1917, and there being no further imprisonment ordered or set forth in said judgment and sentence, and the court being without authority or power to resentence petitioner, the term at which he was convicted and sentenced having long since expired."

The court below refused the writ prayed for, and thereupon "resentenced" Bernstein to pay a fine of $1,000 and to be imprisoned "in the penitentiary at Atlanta for the period of 18 months." He appeals from the refusal to grant the writ, and from the resentence.

The question raised by appellant is not new and has been frequently answered. It may be assumed, as he contends, that a court is without power, in the absence of statutory authority, to alter or amend a final judgment in either a civil or criminal case after the expiration of the term at which the judgment was rendered, unless during that term there was some reservation of subsequent control. But it has been repeatedly held that the naming of a date when the sentence shall be executed, or the period of imprisonment begin, is not a part of the sentence proper, and therefore such date may be changed after the term expires. In a legal sense, the sentence is the punishment fixed for the offense of which the accused has been convicted, and any order respecting the time of its infliction is but the award of execution or a direction to the clerk for framing the mittimus. Such an order or direction is said to be, not a judicial, but merely a ministerial, act, to which the rule invoked by appellant does not apply. In 12 Cyc. 784, the distinction is thus stated:

"After the term is passed at which the original sentence was imposed, the court has as a general rule no power to modify, amend, or revise it, particularly if the new punishment is in excess of the original sentence. Changes in the sentence, however, which do not alter the punishment, but only change the time and place of its infliction, may be made at a subsequent term."

In 16 Corpus Juris, 1304, it is said:

"As a general rule, the time for imprisonment to commence or to be inflicted is no part of the judgment or sentence proper, and according to the weight of authority, in the absence of a statute requiring it, the time when the imprisonment is to begin or end need not be specified in the sentence; it being sufficient to state merely its duration."

The Supreme Court says, in Holden v. Minnesota, 137 U. S. 483, 495, 11 Sup. Ct. 143, 148 (34 L. Ed. 734):

"The order designating the day of execution is, strictly speaking, no part of the judgment, unless made so by statute."

And again, in Schwab v. Berggren, 143 U. S. 442, 451, 12 Sup. Ct. 525, 528 (36 L. Ed. 218):

"Besides, it is well settled that the time and place of execution are not strictly part of the judgment or sentence, unless made so by statute."

True, these were capital cases, as was Nicholas v. Commonwealth, 91 Va. 813, 22 S. E. 507, where the death penalty was fixed by statute, and the court had no discretion. But as respects the power of a

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court, after the expiration of the term at which sentence was imposed, to change the date of its execution, or the date when its execution shall be commenced, we perceive no difference in principle between the case where a specific penalty is fixed by statute, and the case where limits are named within which the court may exercise its discretion; and for the reason that when sentence has once been pronounced in the latter case it becomes the same in legal effect as though that sentence had been prescribed by statute and no other could be imposed. As was said in Hollon v. Hopkins, 21 Kan. 638:

"The time fixed for executing a sentence, or for the commencement of its execution, is not one of its essential elements, and strictly speaking is not a part of the sentence at all. * * * The essential portion of a sentence is the punishment, including the kind of punishment and the amount thereof, without reference to the time when it is to be inflicted."

Directly in point, for the facts are strikingly similar, is State v. Cockerham, decided in 1842, 24 N. C. 204, in which the Supreme Court of North Carolina said:

"The time at which a sentence shall be carried into execution forms no part of the judgment of the court. The judgment is the penalty of the law, as declared by the court, while the direction, with respect to the time of carrying it into effect, is in the nature of an award of execution. In this case the judgment was that the defendant be imprisoned 2 calendar months, and the words, which follow in the record, 'from and after the 1st of November next,' direct the time of executing the judgment. The entry, indeed, would have been more formal, had the judgment and the mandate for carrying it into effect been separate and distinct. But, however informal, it can be understood, in conformity to the law, as consisting of distinct parts, and therefore ought to be so understood. Upon the defendant appearing in court and his identity not being denied, and it being admitted that the sentence of the court had not been executed, it was proper to make the necessary order for carrying the sentence into execution."

It follows from these decisions, with which we are in accord, that the court below had full power to make the order of April 8, 1918, which requires appellant to serve the sentence imposed upon him 2 years before. Although the order so recites, we think it inaccurate to say that he was "resentenced," since the court made no change in the original sentence, but merely changed the previous direction as to the time when imprisonment should begin. When the order is so considered, as properly it should be, the other contentions of appellant are made to disappear.

Affirmed.

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JONES et al. v. GENERAL FIREPROOFING CO.

(Circuit Court of Appeals, Sixth Circuit. February 13, 1919.)

No. 3051.

PATENTS ⊂=165—CONSTRUCTION OF CLAIMS—IMPORTING ELEMENTS NOT SPECIFIED.

The rule that an element expressly specified in one claim of a patent should not be read into another in which it is not specified is intended to apply only where such element alone differentiates the two claims.

On motion for rehearing and to reopen. Denied.

For original opinion, see 254 Fed. 97, — C. C. A. —.

Before KNAPPEN and DENISON, Circuit Judges, and SESSIONS, District Judge.

PER CURIAM. An application for rehearing demonstrates inaccuracy in the opinion filed, and necessitates further discussion.

It was the theory of the opinion that the diagonally edged support is the essence of the invention, and that the language of the claims which we sustained justifies, and the whole case requires, the conclusion that such support should be implied as an element in these claims. It is now pointed out that this diagonal support is expressly specified in certain other claims not in suit, and hence that it should not be read into claims where it is not named. The rule invoked does not go to the extent which requires its application here. We suppose the reason of the rule is that each claim is supposed to have a distinguishing characteristic, and that no construction should be unnecessarily adopted which would cause two claims to be identical. From this reason, it follows that the prohibition is directed, not broadly against importing into one claim a specific limitation expressed in another, but, when stated with precision, is aimed against importing a limitation of that character when, by it alone, the two claims come to be different. If we apply the rule thus stated to the present case, and, for example, to claim 3, and compare it with claim 2, which bears the closest resemblance to claim 3, we must concede that claim 2 expressly calls for the diagonal support by saying "the edge of the support being arranged at an angle to the direction of the feed," while claim 3 includes it only by the implication arising from the call for feeding the sheet lengthwise and expanding the sheet by drawing it away from the plane of the support, thus employing the support with the diagonal edge; but we further observe that claim 2 calls for "means for continuously drawing the sheet over the edge of the support," while claim 3 calls for "means for drawing it away from the plane of the support," and that claim 3 specifies, while claim 2 does not, "means for continuously feeding the sheet lengthwise." These distinctions may not be very substantial; but the draftsman intended them to have distinguishing effect, and we are not inclined to overlook them for the sake of compelling what we think a substantially wrong result. With respect to

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this particular question, there is even less objection to importing this same element—the diagonal edge—into claim 9. There is no other claim closely similar to 9 which contains the limitation in express form.

In this connection, two models have been submitted with the rehearing application which are designed to show that a structure can be made fully responding to claim 3 and yet having no diagonal edge support. As to that model which illustrates the progressive operation, it is to be observed, first, that for the missing diagonal support it provides an approximate substitute in the form of two points of support diagonally disposed; and, second, that the claim by its terms fairly contemplates expansion as the sheet is drawn off the support; while in the model the sheet "passes off the same" (the support) mostly unexpanded. We are not satisfied that there was error in our construction of the claim in this respect.

The opinion stated that claim 9 [1] was not rejected on reference to Pitkin; and hence we gave no consideration to the alleged limiting effect of such rejection. This statement was not accurate. Claim 9 was not rejected on reference to Pitkin at the same time that several other claims were, nor was claim 9 amended to distinguish from Pitkin by inserting the "drawing" feature; but at a later time, and when claim 9 had taken the same form as when issued, excepting that it did not contain the word "marginal," it was so rejected, and the word "marginal" was then inserted to avoid the reference. It follows that the phrase "holding a longitudinal marginal portion of the unexpanded sheet in a fixed plane" must be deemed to have been adopted by Curtis in the sense necessary to distinguish his device from Pitkin, and if, when used in this sense, it will also distinguish the patented machines from the defendant's, the claim cannot be so construed as to cover the defendant's device. Pitkin held an entire sheet upon the plane surface, except as the edges were forced away; he, therefore, by inclusion, held a "longitudinal portion" of the sheet. Curtis gripped and held both longitudinal edges of his sheet and began his expansion at the center. However, claim 9 we think clearly intended to refer to and cover the treatment of one-half of the Curtis sheet. It was foreseen that, without departing from the basic principle, one margin only might be held and the other margin proceed into expansion. Other claims refer specifically to the holding of both margins, and we do not doubt that claim 9 was intended to describe the handling of one-half of the sheet shown by the drawings, without including the simultaneous, similar handling of the other half. Hence, it is apparent that in the Curtis device, as in the defendant's, one entire longitudinal margin of the sheet is firmly held while expansion progresses upon the other side; while, in the Pitkin machine, the whole central part is held while both sides are expanded. It is true enough that if we draw an imaginary line through the center of the Pitkin sheet and consider it as

[1] Claim 9: "The machine for expanded previously slitted sheet metal wherein are combined means for feeding the sheet longitudinally and continuously, with means for holding a longitudinal marginal portion of the unexpanded sheet in a fixed plane and means for deflecting the adjacent longitudinal portion of the sheet from said plane and simultaneously expanding it."

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two units, as we do in the Curtis sheet, we will find that Pitkin holds one longitudinal margin of each half sheet; but, to do this, we must put a construction upon Pitkin not recognized either by Curtis or by the Patent Office; because, if they had viewed Pitkin in that light and if they also intended—as we think they certainly did—that claim 9 should refer to one-half of the Curtis sheet, the force of Pitkin as a reference would not have been avoided by the amendment inserting the limitation to "marginal." Here, again, we are not inclined to give an overstrict application to rather technical reasoning when the effect is to reach an unsatisfactory result.

The opinion said that claim 5 should also be construed to include the limitation to the diagonal support. This seems to have been an inadvertent reading of claim 6 instead of claim 5. Claim 6 contains this express limitation; claim 5 is the same, verbatim, excepting the limitation. It, therefore, most certainly cannot be read into claim 5; and claim 5 must be classed with 1, 8, and 10, and be considered invalid. Claim 6 was at first sued upon, but later plaintiff omitted it from the list of those upon which he intended to depend. This was done because he adopted a theory of the respective meanings of 5 and 6 which we have not been able to approve, and which seems to have been nothing more than that hypothesis which is not an election.[2] We do not now see that it is important, in any practical way, whether claim 6 is added to 3 and 9 to serve as the basis of the decree. If plaintiff thinks it is, application may be made to the court below to shape the decree so as to include claim 6, and the court below will grant or refuse the application, or grant it upon terms as to a further opportunity for defendant to be heard thereon—all as to that court may seem proper.

There is no occasion to open the case at this stage for further proof regarding defendant's new machine. Whether that infringes may be considered in the court below in any way in which such questions are commonly presented.

Upon what may be considered the main, meritorious question, reargued and presented most exhaustively, we are not convinced that we reached the wrong conclusion. We think the substance of Curtis' invention lay in the diagonal supporting edge over which the longitudinally moving slitted sheet was deflected and expanded at an angle to the plane of the sheet, and that defendant's device is rightly thus described. We also adhere to the view that the sheet is "drawn" over the edge in the fair sense which the whole record requires should be given to that word in the patent.

The application for rehearing and the motion to reopen are denied.

[2] Mr. Justice Holmes in Northern Co. v. Grandview Co., 203 U. S. 106, 108, 27 Sup. Ct. 27, 51 L. Ed. 109.

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THOMPSON v. NICHOLS.

(District Court, D. Maine. January 27, 1919.)

No. 786.

1. COURTS ⊂=281—FEDERAL COURT—DISTRICT COURT—JURISDICTION.
Under Judicial Code, § 24 (Comp. St. § 991), declaring that the District Court shall have jurisdiction of all suits of a civil nature, at common law or in equity, where the matter in controversy exceeds $3,000, and is between citizens of different states, the District Court is without jurisdiction of purely probate matters, and such court has no jurisdiction to establish or annul a will in any district where the state in which the district is located has intrusted jurisdiction of probate matters to a probate court and has not given such jurisdiction to courts of equity.

2. COURTS ⊂=200—MAINE—PROBATE COURTS.
Under Rev. St. Me. 1916, c. 67, §§ 2, 9, chapter 73, §§ 10, 11, and chapter 82, § 6, and in view of history of probate matters, the equity courts for Maine are without jurisdiction of the purely probate matters of approving or annulling a will.

3. COURTS ⊂=281—FEDERAL COURTS—JURISDICTION—"SUIT."
A proceeding in a probate court to probate or annul a will is not a "suit," within Judicial Code, § 24 (Comp. St. § 991), giving the District Courts original jurisdiction of all suits of a civil nature at common law or in equity, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suit.]

4. COURTS ⊂=255—FEDERAL COURTS—DISTRICT COURT.
If a federal District Court has jurisdiction over a proceeding to annul a will, admitted to probate in the probate court of a state, such jurisdiction must have been conferred by statute.

5. COURTS ⊂=281—JURISDICTION—PROBATE—ANNULMENT.
Where an heir at law, who would be entitled to share in the estate of a decedent, were there no will, sought to enjoin the executor from carrying out the terms of the will that had been probated, and to have the executor declared an administrator de son tort, on the ground that the decision of the probate court denied due process of law, the heir, regardless of whatever language he may use in stating his attack, is seeking a nullification of a decree of the probate court, and a federal court, although there be requisite diversity of citizenship and jurisdictional amount, has no jurisdiction over the proceeding.

6. CONSTITUTIONAL LAW ⊂=306—DUE PROCESS OF LAW—DENIAL.
Where a will was duly admitted to probate by the state probate court, and the proceedings were conducted according to the rules and principles established by law for the protection and enforcement of the rights of those interested in the estate, *held*, that an heir at law was not denied due process of law.

In Equity. Bill by Fred S. Thompson against Alexander H. Nichols. On defendant's motion to dismiss. Bill dismissed, and plaintiff's motion to strike from the records defendant's pending motion overruled.

Arthur S. Littlefield, of Rockland, Me., A. E. Hanson, of Malden, Mass., and Eugene C. Upton, of Boston, Mass., for complainant.

Wm. P. Whitehouse, of Augusta, Me., Robert T. Whitehouse, of Portland, Me., and Robert F. Dunton, of Belfast, Me., for defendant.

HALE, District Judge. This case is now before the court on defendant's motion to dismiss plaintiff's bill of complaint for want of

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jurisdiction. By the bill, the plaintiff, a citizen of Illinois, proceeds against the defendant, a citizen of Maine, and invokes the jurisdiction of the court, on the ground of such diversity of citizenship. The bill alleges that the petitioner has been deprived of his distributive share as heir at law of the intestate estate of his aunt, Henrietta T. Nickels, late of Searsport, in this district, namely, of a part of that estate exceeding in value $3,000, and that he has been so deprived by reason of a violation of the right to due process of law, secured to him by the Constitution of the United States, and by the Fifth and Fourteenth Amendments thereto; by the failure of evidence, that a certain instrument, alleged to be a copy of her will and executed by her in 1911, continued unrevoked as her will till death, notwithstanding the nonproduction of the original, and the consequent legal presumption of destruction; also by the failure of any evidence that she had destroyed the instrument in the belief that she had executed a later legal will, and in that, if there were such evidence, it would not be competent upon which to base a decree, there being no statutory authority for such procedure in Maine.

After the allegation of the diversity of citizenship, the plaintiff alleges that he is a nephew and heir at law of the intestate, who died in February, 1914, leaving the petitioner as one of the heirs at law, and entitled to one-sixth of the estate, which one-sixth amounts to more than $3,000; that the defendant is administering the estate under a decree of the probate court of Waldo county, Me., purporting to admit to probate an alleged will of the intestate, which was allowed in May, 1914, by the probate court of Waldo county, as the last will of Henrietta T. Nickels, without proof of the necessary jurisdictional facts, without process of law which would justify the decree, and without giving the plaintiff due process of law, as provided by the Constitution of the United States. The bill alleges that this decision of the probate court was sustained on petition brought in the probate court of Waldo county and appealed to the supreme court of probate and to the law court of Maine, and a third time sustained upon a second petition to annul, filed in the probate court of Waldo county, by a decree in that court dismissing the petition, the last decree being unappealed from.

The bill alleges that the original decree of the probate court of Waldo county, dated May 12, 1914, was made without due process of law, in that the decree was based upon the doctrine that, where a prior will is destroyed by the testator in the belief that he has legally made a later will, the revocation of the prior will by destruction is dependent upon, and related to, the valid execution of the later will, and, if no later will was in fact executed, then there is no revocation, and the former will may be admitted to probate by copy; that this doctrine is called the doctrine of dependent relative revocation, and that such doctrine has no recognition in the Law of Maine; and, even if it were so recognized by the law of Maine, there is no evidence that the instrument of November 9, 1911, the execution of which was approved by copy in the probate court, continued in the mind of the said Henrietta T. Nickels, unrevoked, as her will till death, or that she had

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destroyed the instrument in the belief that she had theretofore executed a legal will.

Among the prayers of the bill are: That this court will decree that the employment of the doctrine of dependent relative revocation in the courts of probate of Maine is beyond the statutory powers of the probate courts of Maine, and without due process of law; that the defendant has no legal right to the custody of the estate of Henrietta T. Nickels under a decree obtained without due process of law; that, under color of decree made without due process of law, the defendant has no right to withhold from the plaintiff his one-sixth of the property to which he is entitled as an heir at law; that the defendant, its servants and agents, be enjoined from enforcing or carrying out the decree of the probate court of Maine of May 12, 1914, said decree being made without due process of law; that the defendant be adjudged to be administrator de son tort; that the amount of the plaintiffs distributive share in the estate shall be established as a debt upon the estate, or a trust impressed upon it for the plaintiff's benefit; that the plaintiff be adjudged to be entitled to one-sixth of the estate after payment of debts and expense of administration; that, under an order of the court for the sale of assets of the estate, the administrator shall be obliged to sell listed stock first, and retain the Maine Belting Company stock and the unlisted stock for distribution in kind, or that the defendant shall be ordered by this court to go into the probate court of Maine and ask that court to declare the probated document of 1911, by alleged copy, to be null and void and revoked; and that the defendant be ordered to ask for a further appointment as administrator of the estate, by a decree made under due process of law.

The plaintiff's contention is that by this bill he is not seeking to vacate a decree of the probate court or of any state court, but that he is seeking to restrain the action of a void decree, made without due process of law; that the court has jurisdiction under its general equity powers, the controversy being inter partes, between citizens of different states; that the bill shows the unlawful taking of plaintiff's property without due process of law; that the authority of the state cannot be allowed to restrict the federal court of its authority conferred by the Constitution of the United States; and that the plaintiff should be allowed the decree of this court to protect his property, even though, in the protection of such property, a decree of the probate court is disregarded or set aside.

The defendant's motion to dismiss states ten different grounds of dismissal. The first ground of dismissal is that:

"The plaintiff's bill seeks to nullify and prevent the enforcement of a decree of the probate court admitting a will to probate, and to interfere with the custody and administration of the estate of a decedent thereunder, which are purely matters of probate, intrusted by the state, from which the authority to make and prove wills is derived, exclusively to the jurisdiction of the probate court, and as such are not within the jurisdiction of a court of the United States."

[1] If this court has jurisdiction over the matters stated in the bill, it obtains such jurisdiction from section 24 of the Judicial Code

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(Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. § 991]), the material and applicable part of which section is:

"The District Courts shall have original jurisdiction as follows: First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum * * * of $3,000, and * * * is between citizens of different states."

Is the matter before us a suit of a civil nature, at common law or in equity? Or does it present a pure matter of probate, in that it seeks to prevent the enforcement of a decree of the probate court of Maine, admitting a will to probate?

The solution of the question does not require original reasoning, but rather an examination of the leading cases upon a subject which has received much consideration. It is the clear doctrine of the federal courts that matters of pure probate are not within the jurisdiction of courts of the United States, for the reason that the authority to make wills is derived from the state; and the requirement of probate is a regulation to make a will effective. The leading case in this circuit, and one of the most important cases upon the subject in the federal courts, is In re Cilley (C. C.) 58 Fed. 977. In that case Judge Aldrich made a careful and exhaustive examination of the whole question. He began by inquiring what was meant by "suits of a civil nature in law and in equity." He considered whether those words, as understood when the Constitution was framed, embraced proceedings for the probating of wills. He pointed out clearly that, by decisions in England and America, these words in the Judiciary Act and in the Constitution were not used in any colloquial sense, but in the broad, common, well-determined sense by which equity and common law are understood in this country and in England. He cited leading decisions of the federal courts, among others Tarver v. Tarver, 9 Pet. 174, 9 L. Ed. 91, Broderick's Will, 21 Wall. 503, 22 L. Ed. 599 (1874), Fouvergne v. City of New Orleans, 18 How. 470, 15 L. Ed. 399, Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006 (1883), and other cases, holding that it was the settled law of England at the time of the adoption of our Constitution, as well as at the time of the enactment of various Judicial Codes under the Constitution, that the Court of Chancery will not entertain jurisdiction of questions in relation to probate upon the validity of a will, which the ecclesiastical court was competent to adjudicate; but it would act only in cases where the ecclesiastical court could furnish no adequate remedy;—that jurisdiction to probate wills was withdrawn from the spiritual courts and bestowed upon the probate courts late in the seventeenth century. He cited many decisions of the state courts to show that decisions to establish wills are not classed as suits at common law or in equity, and were not so classed in the early history of the country. He distinguished ordinary probate cases from cases like Gaines v. Fuentes, 92 U. S. 10, 23 L. Ed. 524, which was a suit in form to annul a will and to recall the decree by which it was probated, but was in reality a suit brought againt a devisee by strangers to the estate to annul the will as a muniment of title, and to restrain the enforcement of the decree by which its validity had been established so far as it affected property.

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He pointed out that this class of cases was not inconsistent with the repeated declarations of the Supreme Court that federal courts have no jurisdiction over the probate of wills, and that the apparent confusion arises from the fact that cases like Gaines v. Fuentes came either from the territorial courts or from states where, by statute, courts of equity have been clothed with jurisdiction to entertain bills to set aside wills on the ground of fraud. Jurisdiction may be vested in the state courts of equity by statute; and, when so vested, the federal courts sitting in states where such statutes exist will also entertain concurrent jurisdiction in a case between proper parties. No such jurisdiction exists over probate proceedings in a state where courts of equity are not clothed with such statutory power. Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006 (1883). Judge Aldrich further makes the pertinent suggestion that, from the foundation of the government, the federal courts have disclaimed jurisdiction over probate matters, leaving their exercise to the probate courts created for that purpose, and for kindred special purposes, just as the English courts left such matters to the ecclesiastical courts; and that, when Congress intends to make so radical a change as to confer jurisdiction in such a field upon the federal courts, it will not leave room for any doubtful construction, but will use definite and unmistakable language.

In Wahl v. Franz, 100 Fed. 680, 40 C. C. A. 638, 49 L. R. A. 62 (1900), the Circuit Court of Appeals of the Eighth Circuit reviews Judge Aldrich's opinion in the Cilley Case, and says of it that—

"The opinion * * * is both instructive and strong, and seems to us conclusive, so much so that little can be added thereto."

See, also, Cilley v. Patten (C. C.) 62 Fed. 498, showing that the same doctrine is also applicable to setting aside a will. It is not necessary to review the many cases that have followed the Cilley Cases.

In Farrell v. O'Brien, 199 U. S. 89, 109, 110, 25 Sup. Ct. 727, 732, 50 L. Ed. 101 (1904), the Supreme Court passes conclusively upon the question. In speaking for the court, Chief Justice White considers and quotes at length from the leading cases upon the subject. He analyzes Gaines v. Fuentes, 92 U. S. 10, 20, 21, 23 L. Ed. 524. In commenting upon it, he observes:

"Having decided that the suit was in all essential particulars one inter partes, for equitable relief to cancel an instrument alleged to be void and to restrain the enforcement of a decree alleged to have been obtained by false and insufficient testimony, the court was brought to consider whether the law of Louisiana allowed such equitable relief, and said [92 U. S. 20, 23 L. Ed. 524]:

" 'There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits of equity. But they are none the less essentially such suits; and if by the law obtaining in the state, customary or statutory, they can be maintained in a state court, whatever designation that court may bear, we think they may be maintained by original process in a federal court, where the parties are, on the one side, citizens of Louisiana, and, on the other, citizens of other states.' "

He then reviewed the Broderick Will Case, 21 Wall. 503, 22 L. Ed. 599, Goodrich v. Ferris, 214 U. S. 80, 29 Sup. Ct. 580, 53 L. Ed. 914, Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520, Byers

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v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006, Hook v. Payne, 14 Wall. 253, 20 L. Ed. 887, and other leading authorities upon the subject. He thus concludes his review of the cases:

"Let us, then, first deduce the principles established by the foregoing authorities as to the power of a court of the United States over the probate or revocation of the probate of a will. An analysis of the cases, in our opinion, clearly establishes the following:

"First. That, as the authority to make wills is derived from the state and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States.

"Second. That where a state law, statutory or customary, gives to the citizens of the state, in an action or suit inter partes, the right to question at law the probate of a will or to assail probate in a suit in equity the courts of the United States in administering the rights of citizens of other States or aliens will enforce such remedies."

The most recent federal decision is that of Smith v. Jennings, 238 Fed. 48, 151 C. C. A. 124. Here is found a review of all the old cases, and of the late cases of Garzot v. De Rubio, 209 U. S. 283, 28 Sup. Ct. 548, 52 L. Ed. 794, and Goodrich v. Ferris, 214 U. S. 71, 29 Sup. Ct. 580, 53 L. Ed. 914, supra.

From the above review of cases it is well settled that the federal courts have no jurisdiction in equity, either by virtue of statutes, or general chancery powers, over distinctly probate matters; that they have no jurisdiction to establish or annul a will in any district where the state in which that district is located and the suit is brought has intrusted jurisdiction of probate matters to a probate court, and has not, by statute, given jurisdiction to the courts of equity in such state.

[2] Has the state of Maine intrusted exclusive jurisdiction to establish or to annul a will to its probate courts? Or has it granted jurisdiction in such matters, concurrently or otherwise, to its equity courts?

The jurisdiction of the probate court of the state of Maine is found in chapter 67, § 9, of the Revised Statutes of Maine of 1916:

"Each judge may take the probate of wills, and grant letters testamentary or of administration on the estates of all deceased persons, who, at the time of their death, were inhabitants or residents of his county, or who, not being residents of the state, died leaving estate to be administered in his county, or whose estate is afterwards found therein, also on the estate of any person confined in the state prison under sentence of death or of imprisonment for life, and has jurisdiction of all matters relating to the settlement of such estates."

Chapter 73, §§ 10 and 11, provides as follows:

"Any judge of probate, having jurisdiction of the trust, and the Supreme Judicial Court in any county, on application of the trustee, or of any person interested in the trust estate, after notice to all interested, may authorize or require him to sell any real or personal estate held by him in trust, and to invest the proceeds thereof, with any other trust moneys in his hands, in real estate, or in any other manner most for the interest of all concerned therein, and may give such further directions as the case requires, for managing, investing and disposing of the trust fund, as will best effect the objects of the trust.

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"Either of said courts may hear and determine, in equity, all other matters relating to the trusts herein mentioned."

The last two of the above provisions have, in substance, been in effect ever since the separation of Maine from Massachusetts. In Given v. Simpson, 5 Greenl. 303, the jurisdiction of the Supreme Judicial Court of Maine, as a court of equity, in regard to testamentary trusts, was defined and limited by the court. It was held that:

"The language of St. 1821, c. 50, giving to this court equity jurisdiction 'to hear and determine all cases of trust arising under deeds, wills, or in the settlement of estates,' is applicable only to express trusts arising from written contracts of the deceased; that is, to trusts expressly and directly created, not to those implied by law, or growing out of the official character or situation of the executor or administrator."

As to the words "in settlement of estates," the court said:

"This vague language may be satisfied by applying it to contracts not under seal, respecting the settlement of estates, whereby trusts are created; and there is therefore no reason for extending its meaning any further, especially as a system, peculiar in itself, is by law established, for regulating and enforcing the settlement of the estates of persons deceased, by the judges of probate. The exercise of an original equity jurisdiction by this court in these cases would disturb and derange this system, unless expressly confined to those trusts which arise under the contracts in writing of the deceased; that is, to trusts expressly and directly created, not to those implied by law, or growing out of the official situation, or incidental to the official character of an executor or administrator."

Chapter 82 of the Revised Statutes of Maine of 1916, § 6, cl. 10, provides that a court of equity has jurisdiction:

"To determine the construction of wills and whether an executor, not expressly appointed a trustee, becomes such from the provisions of a will; and in cases of doubt, the mode of executing a trust, and the expedience of making changes and investments of property held in trust."

Chapter 67, § 2, provides that:

"The courts of probate shall have jurisdiction in equity, concurrent with the Supreme Judicial Court, of all cases and matters relating to the administration of the estates of deceased persons, to wills, and to trusts which are created by will or other written instrument. Such jurisdiction may be exercised upon bill or petition according to the usual course of proceedings in equity."

It must be observed that the above sections, as well as sections 10 and 11 of chapter 73, have no relation to the establishment or annulment of wills. Section 2 of chapter 67, just cited, is taken from an act passed in 1915, which gives the courts of probate such jurisdiction as the Supreme Judicial Court has in equity matters relating to the estates of deceased persons, to wills, and to kindred subjects. It is not an act giving jurisdiction of probate matters to the equity court; it enlarges in no way the jurisdiction of the equity court; it does enlarge the jurisdiction of the probate court, to the extent of the jurisdiction now possessed by equity courts concerning matters relating to wills and to the settlement of estates. By the Public Laws of 1874, now embodied in the Revision of 1916 as clause 14, the Supreme Judicial Court is given—

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"full equity jurisdiction, according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate and complete remedy at law."

In tracing the usage of equity courts, it will be found that, at the time of the adoption of the Constitution of the United States, the English High Court of Chancery did not exercise jurisdiction over matters of probate, such as the approving or annulling of wills. It did not entertain questions in relation to the probate or validity of a will. Broderick's Will, 21 Wall. 503, 22 L. Ed. 599 (1874); In re Cilley (C. C.) 58 Fed. 977, 982. From an early period of history, in all the states constituting the United States, special tribunals, unknown to the ancient judicial system of England, had been created under different names, such as "Probate Courts," "Surrogate Courts," "Orphans' Courts," with statutory jurisdiction over all matters of probate and the administration of estates. As a result of such legislation, in a few of the states, original chancery jurisdiction over all matters has been held to remain unimpaired in spite of the jurisdiction of probate courts, and is exercised concurrently with the latter; but in the great majority of the states the original chancery jurisdiction is denied, or its exercise is suspended, in all matters specified by statute to be within probate jurisdiction.

In secton 1154 (edition of 1905), Pomeroy has summarily grouped the states into three classes. In the states of the first class the original equitable jurisdiction over probate administrations remains unabridged by statute and is concurrent with that possessed by the probate courts. In the second class the jurisdiction of the probate courts over everything relating to the administration and settlement of a decedent's estate is substantially exclusive; the equitable jurisdiction over the subject is neither concurrent, nor auxiliary, nor corrective. In the third class the equitable jurisdiction is not concurrent; it is simply auxiliary. Pomeroy puts the states of Connecticut, Indiana, Maine, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, Oregon, and Pennsylvania into the second group, namely, into the class where the jurisdiction of the probate courts is exclusive in everything relating to the settlement of estates and the probate of wills.

In Whitehouse's Equity Practice, § 35, it is stated that Maine unquestionably belongs in Pomeroy's second class; that is, to the class where equity jurisdiction over probate matters is denied absolutely, or suspended in all matters specified by statute as within probate jurisdiction. It is further stated that in Maine courts of chancery will not exercise concurrent jurisdiction with courts of probate, but only supplementary or auxiliary jurisdiction in certain matters of administration involving special equitable features, which would constitute sufficient ground for equitable jurisdiction, as in Hawes v. Williams, 92 Me. 492, 43 Atl. 101, citing Graffam v. Ray, 91 Me. 234, 39 Atl. 569, in which case, in speaking for the court, Mr. Justice Strout said:

"The probate court has exclusive jurisdiction, subject to appeal to the supreme court of probate, of the estates of decedents, and their final settlement and distribution, including the settlement of the accounts of the personal

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representative. * * * All these questions would be determined by the probate court, and the executor charged for such amount as in equity and under the rules of law he was liable for. All these matters are within the exclusive jurisdiction of the probate court, and cannot be passed upon by a common-law tribunal. The probate court is invested with ample power in these respects."

In Cousens v. Advent Church, 93 Me. 292, 45 Atl. 43, it was held that the Supreme Court, sitting in equity, could not establish an unprobated will; that such will should be presented for probate to the probate court; that the prior probate of an earlier will did not preclude the probate of a later will; that the probate court, being authorized to admit wills to probate, has authority to revise or revoke its former decree, so as to give effect to the last will. In speaking for the court, Mr. Justice Strout said:

"Wills do not become operative until proved and established in some court having jurisdiction for that purpose—in this state, by allowance by the court of probate, or the appellate supreme court of probate. *No other tribunal can give effect to a will. Until established in that forum it has no life. This court, sitting in equity, cannot establish and execute an unprobated will.* * * * The power of the probate court to revoke a decree granting administration is recognized in R. S. c. 64, § 19, which requires an administrator to give a bond, with the condition, among others, 'to deliver the letters of administration into the probate court, in case any will of the deceased is thereafter proved and allowed.' * * * To grant the prayer of the bill would require this court, sitting in equity, to assume the jurisdiction of the probate court, and establish and execute a will, never presented to a court of probate. This is beyond the province of equity. Wolcott v. Wolcott, 140 Mass. 194 [3 N. E. 214]."

The court cites Bowen v. Johnson, 5 R. I. 119, 73 Am. Dec. 49, in which case the Supreme Court of Rhode Island held that the power to revoke a probate once granted, though nowhere expressly recognized in the statutes of that state, was a just and necessary power to be implied from the statute granting general authority to "take the probate of wills and grant administration on the estate of deceased persons."

Waters v. Stickney, 12 Allen (Mass.) 1, 90 Am. Dec. 122, contains an historical discussion of the powers of the probate court in such matters. Following these authorities, in Merrill Trust Co. v. Hartford, 104 Me. 566, 572, 72 Atl. 745, 129 Am. St. Rep. 415, a purely probate proceeding, and not a suit between parties, it was held that a probate court is the tribunal having the power, upon subsequent petition, to vacate or annul a prior decree of probate of a will, when such prior decree is clearly shown to be without foundation in law or fact. In Patten v. Tallman, 27 Me. 17, 24, 27, the Maine court had before it the construction of a will as a muniment of title. The will came before the court as a will already "proved and allowed in the probate court for the county of Lincoln." In speaking for the court, Mr. Justice Shepley said:

"The original jurisdiction for the probate of wills is by statute vested exclusively in the courts of probate. The courts of common law have no jurisdiction, or right to determine, whether a will has been legally executed or not. If a will be presented to them as a muniment of title, which has not been proved and allowed by a probate court, it cannot be received and proved, nor its validity be admitted. If it has been approved and allowed by a pro-

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bate court having jurisdiction, its validity cannot be called in question by the court of common law. The adjudication of the court of probate, not vacated by an appeal, is final and conclusive upon all persons. Whether the court of probate decided any questions necessarily arising and involved in its adjudication correctly or incorrectly can never be made a matter of inquiry and decision in a common-law court, to affect that adjudication. Such have been the settled doctrines for a long time in this and in several of the other United States. Dublin v. Chadbourn, 16 Mass. 433; Laughton v. Atkins, 1 Pick. [Mass.] 535."

From the whole current of judicial authority in Maine, it is clear that the power to revoke or annul a will, once admitted to probate, rests solely with the probate court decreeing its allowance. The Supreme Judicial Court, as the equity court of Maine, has no power to entertain a proceeding for the revocation of a will admitted to probate. It follows, then, from what has been said before, that the District Court of the United States, within the district of Maine, has no such power.

[3, 4] It is now necessary to inquire whether proceedings in the probate court to probate a will have the character of "suits," and have been treated as such.

Such proceedings are, as has been seen, distinctly statute proceedings. They do not arise between parties; they are entirely matters of statute; in fact, the whole subject of wills is a matter of statute. In United States v. Perkins, 163 U. S. 625, 627, 16 Sup. Ct. 1073, 41 L. Ed. 287, in passing upon the inheritance tax under a state law, the Supreme Court had occasion to discuss, historically, the right to dispose of property by will. The court cited 2 Blackstone, 492, where the learned commentator says that by the common law, as it stood in the reign of Henry II, a man's goods were to be divided into three equal parts; one part went to the heirs; another part to his wife; a third part was at his own disposal. Prior to the reign of Henry VIII, the right of a man to make his will was thus limited in matters of personal estate, and did not extend at all to real estate. Until special tribunals were founded by the statutes of the several states constituting this nation, in the manner to which reference has been made, there was no machinery for creating a representative to take care of the property of a person after he died. Nobody had the title to the property of a deceased person, except the heir of the real estate, in the absence of a will devising it; and even this was subject to the right of sale for the payments of debts. But when a representative had once been created by statute, under the machinery of such tribunals as probate courts, such representative became a party upon one side against whom any person having a claim could proceed to establish his claim; and when such claimant did proceed to establish his claim, he did so by a suit. The claimant was one party to such suit; the representative of the estate was the other party; and so the suit was inter partes. Such suit could be brought either in law or equity in the state courts when the parties were citizens of the state; they could also be entertained by the federal court when diversity of citizenship appeared, and when jurisdiction was thus given; but this became true only after the will had become probated, and thus had been given life. Until the machinery set up by the state for

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creating a custodian of the estate had done its work, such estate was not ripe either for distribution or attack.

In Hook v. Payne, 14 Wall. 253, 20 L. Ed. 887, discussed in Farrell v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101, an administrator had been duly appointed in a certain estate; a bill in equity was brought against him by a distributee. The bill did not question the validity of his appointment or his authority to represent the estate; it sought, on the ground of fraud, to annul a certain release which the distributee had given to the administrator relating to other shares; it sought to have a decree against such distributee for the correct amount of his distributive share. The court took jurisdiction as between the parties to the suit, and granted relief; but it refused to deal generally with the estate, and the rights of persons other than the complainant. It refused to interfere in any way with the administrative functions of the administrator, as distinguished from the rights of litigants in the suit inter partes which had been brought. It did not undertake to interfere with probate proceedings. The case is not in conflict with the doctrine of the United States courts that they have no jurisdiction in equity to allow or disallow a will. In Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, the court distinctly says that it had no original jurisdiction to administer an estate and, by entertaining jurisdiction of a suit against the administrator, could not draw to itself the full possession of the estate, or the power to determine all claims against it. See, also, Ball v. Tompkins (C. C.) 41 Fed. 486.

In Waterman v. Canal Louisiana Bank, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80, a bill was filed by an heir against the executor for the determination of the plaintiff's interest in an alleged lapsed legacy. The will was in no way attacked; the validity of the appointment of an executor was not attacked; no decree of the probate court was attacked. The court cited Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260, and other cases, holding that a debt may be established by the federal court in an estate as administered by the probate court. The case recognized that in proceedings purely of a probate character there was no jurisdiction of the federal courts. It reaffirms the doctrine of Farrell v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101, that a court of the United States could not entertain jurisdiction of a bill to set aside the probate of a will in the state of Washington because, by the statutes of that state, the proceeding was one purely in rem, and not a suit inter partes sustainable in a court of equity; that in proceedings of a purely probate character there was no jurisdiction in a federal court. In the Farrell Case, referred to, the bill was brought to annul the probate of a will for lack of lawful procedure, for application of a wrong legal principle, and on the ground that under the laws of the state real estate could not be disposed of by a nuncupative will; and the opinion of the court was distinct and conclusive that the law of the state authorized a proceeding for contest of a will only in the court which had admitted the will to probate; that the authority conferred concerning the contest over the probate of a will was an essential part of the probate procedure, cre-

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ated by the laws of the state, and was not an ordinary suit between parties; that the remedy afforded by the laws of the state to secure the probate, or the revocation of the probate, of a will, were proceedings of a probate character, and did not constitute an action, or a suit inter partes; that, although there was diversity of citizenship, the court was without jurisdiction, so far as the bill sought a declaration of the nonexistence of a will and the consequent nullity of the probate.

In Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006, the Supreme Court held that the original probate of wills is a matter of state legislation and depends upon local law, for it is that law which confers the power of making wills; that no instrument can be effective as a will until it is probated; that no rights and relations to it can be contested between parties until preliminary probate has first been made; that power has not been conferred upon the courts of the United States to probate a will; that, if the administration is incomplete and in fieri, application must be made to the courts of probate which have possession of the subject, and exclusive jurisdiction over it. After a will has once been proved and has obtained life in the world, the United States courts permit suits to be brought to construe it as an existing instrument, and even to charge the estate with the amount of a judgment recovered against it in another suit. Lawrence v. Nelson, 143 U. S. 215, 12 Sup. Ct. 440, 36 L. Ed. 130 (1891). In Christianson v. King County, 239 U. S. 356, 373, 36 Sup. Ct. 114, 121 (60 L. Ed. 327) Mr. Justice Hughes, for the Supreme Court, reviews the proceedings of the probate court of the territory of Washington. He says:

"Despite the informality of the petition, the appointment of the administrator was not void, and, not being void, it is not subject to collateral attack."

He cites many cases.

"It appears that subsequently the probate court, after opportunity had been afforded to discover heirs, entertained a petition of the administrator for final account and distribution. The statutory notice * * * was published, and on the return day the proceeding was duly continued, and, on hearing, the decree was entered settling the account, finding that there were no heirs, and directing distribution of the real property, as described, to the County of King. This proceeding was essentially in rem [citing cases]. It was competent for the court to inquire whether there were heirs, and, if there were such, to determine who were entitled to take according to the order prescribed by the statute; and also, if it was found that there were no heirs, to make the distribution to the county as the statute required. It is apparent that there was no deprivation of property without due process of law. The court, after appropriate notice, did determine that there were no heirs and its decree being the act of a court of competent jurisdiction under a valid statute bound all the world including the plaintiff in error. It cannot be regarded as open to attack in this action. Grignon's Lessee v. Astor [2 How. 319, 11 L. Ed. 283] supra; Florentine v. Barton [2 Wall. 210, 17 L. Ed. 783] supra; Caujolle v. Ferrie, 13 Wall. 465, 474 [20 L. Ed. 507]; Broderick's Will, 21 Wall. 503 [22 L. Ed. 599]; Simmons v. Saul [138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054] supra; Goodrich v. Ferris, 214 U. S. 71, 80, 81 [29 Sup. Ct. 580, 53 L. Ed. 914]."

It is urged in behalf of the plaintiff that, in some way, certain cases above cited—and particularly the Waterman Case—sustain the contention that this suit can be maintained under the equity power of the fed-

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eral courts in cases arising between citizens of different states; that under general equity grounds of jurisdiction, this controversy, being between citizens of different states, can be passed upon in the federal courts. I cannot sustain such contention. The cases just cited fully sustain the doctrine that the federal courts cannot control property in possession of the state courts under probate proceedings; that, as courts of chancery, they can have no jurisdiction of a purely probate matter; they cannot deal with a will until it has obtained life by going through probate machinery. I need spend no time considering the general chancery powers of the federal courts to assume jurisdiction over probate matters. Such jurisdiction, if it is to be found in the United States courts, must have been conferred upon them by an act of Congress. Loring v. Marsh, Fed. Cas. No. 8,515. If it has been conferred by any statute, it is by the section of the Judicial Code to which I have referred, and which provides that this court shall have original jurisdiction of all suits of a civil nature at common law or in equity, where the amount in controversy exceeds $3,000 and is between citizens of different states. From the decisions of the courts to which I have called attention, it is clear that a probate proceeding is not a suit of a civil nature at common law or in equity; it has never been regarded as such by the courts of this country.

[5, 6] In the case at bar the learned counsel for the plaintiff urges that the bill does not seek to set aside the probate of a will, but that it is a suit which obtains the jurisdiction of this court by diversity of citizenship, and seeks to give the plaintiff due process of law in reference to the custody of a certain estate, and to restrain action on a void decree; that this court has jurisdiction to give due process of law even though, in the course of enforcing its decree, it should be found that there is a decree of the probate court of Maine inconsistent with the decree of the federal court, and with the right of the plaintiff to have due process of law. But it is the duty of this court to put the accent of its decree upon the vitals of a controversy, and not upon the mere form. The bill does seek to enjoin the executor from carrying out the terms of a will that has been probated; it seeks to have the executor declared an administrator de son tort, and to have the plaintiff decreed to be entitled to one-sixth of the estate as next of kin and heir. It thus seeks to have this court decree that there has been no legal probate of a will, that the estate is intestate, and that, though the will has been through the machinery of probate, it is, in fact, void. It seeks the decree of this court that the defendant executor has no legal right to the custody of the estate; it seeks to interfere with the disposition of the property under the will by asking the court to decree what sort of stock shall be sold first. It further asks, as an alternative, that the court will order the executor, armed with a decree of this court, to go into the probate court of Maine, and ask that court to declare its decree, probating a will, to be null and void. The bill seeks to attack the probate of a will, and not merely to construe it after it has been through the probate machinery. It is clear that there can be no difference in law between asking the court to declare a will to be null and void, and asking the court to enjoin an executor, appointed under it, from enforcing its

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provisions. It seems clear that the court is prevented from making an illegal decree in reference to one-sixth of the estate, as much as it would be prevented from making an illegal decree upon the whole estate. Whatever language the plaintiff may use in which to state his attack upon the probate court, the fact remains that what he seeks from this court results in a nullification of a decree of the probate court of Maine.

Judge Hough has lately discussed the subject of "due process of law" in an illuminating way. 32 Harvard Law Review, 218. He shows the difficulty of defining law or its due process, observing that "Moses, Blackstone, and Mr. James Coolidge Carter have not permanently succeeded in such definition." Judge Hough's article is valuable, not only in its clear reasoning, but in its extended citations. Among many other references, he cites Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, in which case Mr. Justice Field defines the term "due process of law," when applied to judicial proceedings, as meaning a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. He observes that, to give such proceedings any validity, there must be a competent tribunal to pass upon their subject-matter.

In the case at bar, in my opinion, the plaintiff in his bill does not present a case where due process of law has been denied him. He has invoked the law of the land in the course of legal proceedings, which appear to have been conducted according to the rules and principles, established by our jurisprudence, for the protection and enforcement of the rights of citizens of Maine. He has obtained a decree in the probate court of Maine, and in the courts to which appeal was taken. Upon the authorities to which I have called attention, these courts must be held to be competent tribunals to pass upon the subject-matter thus brought before them. In Thompson, Appellant, 116 Me. 473, 102 Atl. 303, Mr. Chief Justice Cornish, in speaking for the Maine court, has said:

"The law of the land has been measured out to the petitioner, and [the Supreme Judicial Court of Maine] have searched in vain for any infringement of his constitutional rights."

Upon examination of the proceedings in the state court, recited in the bill in equity, I am of the opinion that the plaintiff had already received due process of law in the only courts competent to take jurisdiction in the probate of wills.

The bill must be dismissed, for the reason that this court has no power to nullify and prevent the enforcement of a decree of the probate court of Maine admitting a will to probate. Having come to this conclusion, it is unnecessary to consider the further questions raised by the motion.

A decree may be presented dismissing the bill, with costs.

On December 28th, the day of the hearing, a motion was filed by the plaintiff to strike from the records defendant's pending motion, with which motion the court is now dealing. The plaintiff's motion to strike defendant's pending motion from the record is overruled.

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MEMORANDUM DECISIONS.

BAILIS v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 11, 1918.) No. 114. In Error to the District Court of the United States for the Southern District of New York. Criminal prosecution by the United States against Jacob Bailis. Judgment of conviction, and defendant brings error. Affirmed. K. Henry Rosenberg, of New York City, for plaintiff in error. Francis G. Caffey, U. S. Atty., of New York City (Garrett W. Cotter, Asst. U. S. Atty., of Flushing, of counsel), for the United States. Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. This case is affirmed without opinion.

THE BRIS. (Circuit Court of Appeals, Second Circuit. November 20, 1918.) No. 141. Appeal from the District Court of the United States for the Southern District of New York. Libel by the Standard Varnish Works against the steamship Bris. From a decree for complainant (253 Fed. 259), libelant appeals. Question certified to the Supreme Court.

ROGERS and MANTON, Circuit Judges. This cause coming on to be heard upon the appeal taken herein by the libelant, and it appearing to the court that a writ of certiorari has been granted by the Supreme Court of the United States to review the decree entered by this court in the case of the International Paper Company against the schooner Gracie D. Chambers and others (253 Fed. 182, — C. C. A. —) and it also appearing to the court by an inspection of the transcript of the record upon the appeal in this cause that questions arise in this cause which were involved in the decision in the last-mentioned cause, and that the District Judge relied upon the authority of the decision of this court in said case of the Gracie D. Chambers in making the decision on which the decree appealed from was entered: Now, therefore, this court hereby certifies to the Supreme Court of the United States the following questions of law concerning which it desires the instructions of the Supreme Court for the proper decision of the appeal herein, under the following facts:

On August 17, 1917, varnish belonging to libelant was shipped by it in the port of New York for Gothenburg, Sweden, upon the steamship Bris, consigned to the Allmanna Svenska Elektriska A. B. Westeras, and the agents for said ship thereupon delivered to libelant a bill of lading, of which a copy is annexed hereto, which formed a contract between libelant and claimant in reference to said goods. Particular reference is made to clause 6, clause 7, and the next to last clause of the bill of lading. The libelant paid in advance the freight mentioned in said bill of lading. At the time of said shipment, shippers were required to obtain export licenses from the British government on cargo of this class, and were also required by United States statute to obtain export licenses from the United States government in connection with such articles as the President should, by proclamation, designate. At the time that said shipment was made the President had designated certain articles as to which licenses must be thus procured when destined for Gothenburg, Sweden, but varnish was not included among them. At the time of shipment, the libelant presented a license which it had procured from the British government. On August 27, 1917, the President made a further proclamation, effective August 30, 1917, whereby shippers of varnish and all other cargo destined for Gothenburg, Sweden, were required to procure licenses before the same could be exported. The libelant thereupon made application for such a license, and the claimant held its vessel in port until October 8th, to see if such licenses could be procured, before beginning the discharge of the cargo. Unless shipments were accompanied by the aforesaid licenses they were not allowed by the men-of-war belonging to the Allies to

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proceed to destination. On or about October 8th the United States, acting through the Exports Administrative Board, refused the application for a license to transport the goods mentioned in the libel, and other cargo destined for Gothenburg, and claimant thereupon began to unload the cargo of the Bris and concluded the discharge on October 22, 1917. The claimant continued ready and willing to carry said cargo forward, if a license therefor were obtained by libelant. The libelant took redelivery of the cargo at the port of shipment and made a demand upon the claimant that the claimant should return the freight paid, which demand was refused. The question aforesaid is as follows: (1) Did the bill of lading contract justify the carrier, under the facts stated, in refusing to refund the prepaid freight? Which question, arising from the facts aforesaid, is hereby submitted to the Supreme Court.

CONRAD v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. July 8, 1918.) No. 5108. In Error to the District Court of the United States for the District of Colorado. Boswell F. Reed and Robert W. Steele, Jr., both of Denver, Colo., for plaintiff in error. Harry B. Tedrow, U. S. Atty., of Boulder, Colo., for the United States.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, on motion of plaintiff in error.

FAUER et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. November 13, 1918.) No. 28. In Error to the District Court of the United States for the Southern District of New York. Proceeding by the United States against Philip Fauer and others. From the judgment, defendants bring error. Affirmed. Charles H. Griffiths, of New York City (Raymond H. Sarfaty, of New York City, of counsel), for plaintiffs in error. Francis G. Caffey, U. S. Atty., of New York City (Ben. A. Matthews, Asst. U. S. Atty., of New York City, of counsel), for the United States. Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Judgment affirmed.

FEDERAL TRADE COMMISSION v. NULOMOLINE CO. (Circuit Court of Appeals, Second Circuit. August 16, 1918.) Petition to vacate an interlocutory order of the Federal Trade Commission against the Nulomoline Company. Denied without prejudice. Leo Levy, of New York City (Louis Marshall, Sol. M. Stroock, and Edward F. Spitz, all of New York City, of counsel), for petitioner. Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. We regard this application as premature, and therefore it is denied without prejudice, as is also the motion for a stay for the same reason.

FUEL ECONOMY ENGINEERING CO. et al. v. BERRY. (Circuit Court of Appeals, Third Circuit. January 13, 1919.) No. 2372. Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge. Suit by William H. Berry against the Fuel Economy Engineering Company and others. From a decree for plaintiff (248 Fed. 736), defendants appeal. Affirmed. Robert M. Barr, of Philadelphia, Pa., for appellants. A. B. Stoughton, of Philadelphia, Pa., and John E. McDonough, of Chester, Pa., for appellee. Before WOOLLEY, Circuit Judge, and THOMPSON, District Judge.

PER CURIAM. By the decree of the District Court, claims 5, 10, 11, and 12 of letters patent No. 726,792, granted William H. Berry, for a feed water regulator, were held valid and infringed. We affirm the decree on the court's opinion. 248 Fed. 736. In order to allay the concern of the appellants that

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this court might decide the case on matters outside the issues—matters concerning unfair competition, charged in the bill but abandoned at the trial—which they conceive improperly remained in the case and influenced the decision below, we say that, from our reading of the opinion, the case appears to have been decided solely on the issues of validity and infringement. But, if litigants read the opinion differently, we add that, notwithstanding we adopt the opinion of the trial judge, our affirmance of the decree is based on the issues raised on the patent and on nothing else. The decree below is affirmed.

GEORGE v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. November 13, 1918.) No. 3. In Error to the District Court of the United States for the Southern District of New York. Proceedings by the United States against Anthony George. From the judgment, defendant brings error. Affirmed. Robert M. Moore, of New York City, for plaintiff in error. Francis G. Caffey, U. S. Atty., of New York City (Vincent H. Rothwell, Asst. U. S. Atty., of New York City, of counsel), for the United States. Before WARD, ROGERS and HOUGH, Circuit Judges.

PER CURIAM. Judgment affirmed in open court.

HALLOWELL v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. August 12, 1918.) No. 2489. In Error to the District Court of the United States for the District of Nebraska. Thomas L. Sloan, of Washington, D. C., for plaintiff in error. Charles A. Goss and Howard Saxton, Asst. U. S. Atty., both of Omaha, Neb., for the United States.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, etc., on motion of counsel for plaintiff in error.

HAYDEN v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. November 13, 1918.) No. 50. In Error to the District Court of the United States for the Southern District of New York. Joseph Hayden was convicted of crime, and he brings error. Affirmed. Wesselman & Kraus, of New York City, for plaintiff in error. Francis G. Caffey, U. S. Atty., and John E. Walker, Asst. U. S. Atty., both of New York City, for the United States. Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Judgment affirmed.

HELMER v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. November 14, 1918. Rehearing Denied February 1, 1919.) No. 3245. In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge. Ed. Helmer was convicted of selling whisky to soldiers, and brings error. Affirmed. Don A. Bliss, of San Antonio, Tex., (J. D. Robinson and C. J. Gray, both of San Antonio, Tex., on the brief), for plaintiff in error. Hugh R. Robertson, U. S. Atty., of San Antonio, Tex. (Claud J. Carter, Asst. U. S. Atty., of San Antonio, Tex., on the brief), for the United States. Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. Our examination of the record in this case in the light of the argument of counsel has led us to the conclusion that no reversible error was committed. The judgment is affirmed.

INTERNATIONAL RY. CO. v. CRAWFORD. (Circuit Court of Appeals, Second Circuit. November 13, 1918.) No. 38. In Error to the District Court of the United States for the Western District of New York. Action between the

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International Railway Company and Alice Crawford. There was a judgment for the latter, and the former brings error. Affirmed. Cohn, Chormann & Franchot, of Niagara Falls, N. Y. (Edward J. Franchot, of Niagara Falls, N. Y., of counsel), for plaintiff in error. Bartlett & Roberts, of Buffalo, N. Y. (Eugene M. Bartlett, of Buffalo, N. Y., of counsel), for defendant in error. Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. Judgment affirmed.

LEHIGH VALLEY RAILROAD CO. v. MONK. (Circuit Court of Appeals, Second Circuit. November 13, 1918.) No. 21. In Error to the District Court of the United States for the Southern District of New York. Action between the Lehigh Valley Railroad Company and Otto Monk. There was a judgment for the latter, and the former brings error. Affirmed. Alexander & Green and Allan McCulloh, all of New York City (William W. Green and Edward W. Walker, both of New York City, of counsel), for plaintiff in error. S. A. Machchinski and John C. Robinson, both of New York City, for defendant in error. Before WARD, ROGERS and MANTON, Circuit Judges.

PER CURIAM. Judgment affirmed.

LONGSON v. BELASCO et al. (Circuit Court of Appeals, Second Circuit. November 13, 1918.) No. 27. Appeal from the District Court of the United States for the Southern District of New York. Suit by Lila Longson against David Belasco and others. From a decree for defendants, complainant appeals. Affirmed. Thomas A. Hill, of New York City, for appellant. A. J. Dittenhoefer, I. M. Dittenhoefer, and Nathan Burkan, all of New York City, for appellees. Before WARD, ROGERS and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed.

LOWER LAFOURCHE PLANTING & MFG. CO. et al. v. BREAUX. THE APEX. THE LOUISIANA. (Nos. 3279, 3280.) (Circuit Court of Appeals, Fifth Circuit. January 7, 1919.) Appeals from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge. Suits in admiralty by A. P. Breaux against the barge Apex and the barge Louisiana; the Lower Lafourche Planting & Manufacturing Company, claimant. Decrees for libelant, and claimant appeals. Affirmed. L. P. Caillouet, of Thibodaux, La. (Caillouet & Caillouet, of Thibodaux, La., on the brief), for appellants. John D. Grace, of New Orleans, La. (M. A. Grace, of New Orleans, La., on the brief), for appellee. Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. Appellant had a right to appeal, and is not to be criticized for the exercise of the right. That the amount actually in dispute may be less than attorney's fees paid or costs incurred may evidence fidelity to right rather than litigious obstinacy. It may be that some of the amounts included in the judgment were erroneously allowed, and we might be compelled to further prolong a litigation that has had little excuse for being, but for the fact that the recovery against appellant is somewhat too small because of the exclusion of interest. The judgments are affirmed.

McIVER v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 7, 1918.) No. 5159. In Error to the District Court of the United States for the Western District of Oklahoma. Twyford & Smith, of Oklahoma City, Okl., for plaintiff in error. John A. Fain, U. S. Atty., of Lawton, Okl., for the United States.

PER CURIAM. Cause docketed, and writ of error dismissed, without costs to either party in this court, on motion of defendant in error.

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SAFETY CAR HEATING & LIGHTING CO. v. GOULD COUPLER CO. (Circuit Court of Appeals, Second Circuit. November 13, 1918.) No. 34. Appeal from the District Court of the United States for the Western District of New York. Suit by the Safety Car Heating & Lighting Company against the Gould Coupler Company. From a decree for defendant (245 Fed. 755), complainant appeals. Affirmed. Emery, Booth, Janney & Varney and Randolph Parmly, all of New York City (Livingston Gifford, Robert S. Blair, and Delos G. Haynes, all of New York City, of counsel), for appellant. Kenyon & Kenyon and Richard Eyre, all of New York City, for appellee. Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

SCHEIER v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. November 13, 1918.) No. 9. In Error to the District Court of the United States for the Southern District of New York. Abraham Scheier was convicted of crime, and he brings error. Affirmed. S. S. Breslin, of New York City (Budd S. Weisser, of New York City, on the brief), for plaintiff in error. Francis G. Caffey, U. S. Atty., of New York City (Laurence H. Axman, of New York City, of counsel), for the United States. Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Judgment affirmed.

SCIOTO OIL CO. v. UNITED STATES et al. (Circuit Court of Appeals, Eighth Circuit. September 3, 1918.) No. 5081. Appeal from the District Court of the United States for the Western District of Oklahoma. Walter A. Ledbetter, H. L. Stuart, and R. R. Bell, all of Oklahoma City, Okl., for appellant. John A. Fain, U. S. Atty., of Lawton, Okl., and S. P. Freeling, Atty. Gen., of Oklahoma, for the United States.

PER CURIAM. Appeal dismissed, with costs, on motion of appellant.

UNITED STATES v. LENOIR et al. (Circuit Court of Appeals, Eighth Circuit. July 8, 1918.) No. 5175. Appeal from the District Court of the United States for the District of New Mexico. S. Burkhart, U. S. Atty., of Albuquerque, N. M., for the United States. Vaught & Watson, of Deming, N. M., for appellees.

PER CURIAM. Appeal dismissed, without costs to either party in this court, on motion of appellant.

END OF CASES IN VOL. 254

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